

NORTH CAROLINA REGISTER

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April 1, 2014

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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

contact: Molly Masich, Codifier of Rules molly.masich@oah.nc.gov (919) 431-3071
Dana Vojtko, Publications Coordinator dana.vojtko@oah.nc.gov (919) 431-3075
Tammara Chalmers, Editorial Assistant tammara.chalmers@oah.nc.gov (919) 431-3083
Lindsay Woy, Editorial Assistant lindsay.woy@oah.nc.gov (919) 431-3078

Rule Review and Legal Issues

Rules Review Commission
1711 New Hope Church Road (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
Abigail Hammond, Commission Counsel abigail.hammond@oah.nc.gov (919) 431-3076
Amber Cronk, Commission Counsel amber.cronk@oah.nc.gov (919) 431-3074
Julie Brincefield, Administrative Assistant julie.brincefield@oah.nc.gov (919) 431-3073

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 2014 – December 2014

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
28:13	01/02/14	12/06/13	01/17/14	03/03/14	03/20/14	05/01/14	05/2014	09/29/14
28:14	01/15/14	12/19/13	01/30/14	03/17/14	03/20/14	05/01/14	05/2014	10/12/14
28:15	02/03/14	01/10/14	02/18/14	04/04/14	04/21/14	06/01/14	01/2015	10/31/14
28:16	02/17/14	01/27/14	03/04/14	04/21/14	05/20/14	07/01/14	01/2015	11/14/14
28:17	03/03/14	02/10/14	03/18/14	05/02/14	05/20/14	07/01/14	01/2015	11/28/14
28:18	03/17/14	02/24/14	04/01/14	05/16/14	05/20/14	07/01/14	01/2015	12/12/14
28:19	04/01/14	03/11/14	04/16/14	06/02/14	06/20/14	08/01/14	01/2015	12/27/14
28:20	04/15/14	03/25/14	04/30/14	06/16/14	06/20/14	08/01/14	01/2015	01/10/15
28:21	05/01/14	04/09/14	05/16/14	06/30/14	07/21/14	09/01/14	01/2015	01/26/15
28:22	05/15/14	04/24/14	05/30/14	07/14/14	07/21/14	09/01/14	01/2015	02/09/15
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29:01	07/01/14	06/10/14	07/16/14	09/02/14	09/22/14	11/01/14	01/2015	03/28/15
29:02	07/15/14	06/23/14	07/30/14	09/15/14	09/22/14	11/01/14	01/2015	04/11/15
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29:04	08/15/14	07/25/14	08/30/14	10/14/14	10/20/14	12/01/14	01/2015	05/12/15
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29:06	09/15/14	08/22/14	09/30/14	11/14/14	11/20/14	01/01/15	01/2015	06/12/15
29:07	10/01/14	09/10/14	10/16/14	12/01/14	12/22/14	02/01/15	05/2016	06/28/15
29:08	10/15/14	09/24/14	10/30/14	12/15/14	12/22/14	02/01/15	05/2016	07/12/15
29:09	11/03/14	10/13/14	11/18/14	01/02/15	01/20/15	03/01/15	05/2016	07/31/15
29:10	11/17/14	10/24/14	12/02/14	01/16/15	01/20/15	03/01/15	05/2016	08/14/15
29:11	12/01/14	11/05/14	12/16/14	01/30/15	02/20/15	04/01/15	05/2016	08/28/15
29:12	12/15/14	11/20/14	12/30/14	02/13/15	02/20/15	04/01/15	05/2016	09/11/15

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) text of proposed rules;
- (3) text of permanent rules approved by the Rules Review Commission;
- (4) emergency rules
- (5) Executive Orders of the Governor;
- (6) 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; and
- (7) 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 McCRORY
GOVERNOR

February 26, 2014

EXECUTIVE ORDER NO. 45

NOTICE OF TERMINATION OF EXECUTIVE ORDERS 43 AND 44

WHEREAS, Executive Order No. 43, issued on February 11, 2014, declared a state of emergency in the State of North Carolina due to a major winter storm; and

WHEREAS, Executive Order No. 44 issued on February 11, 2014, waived the maximum hours of service for drivers transporting supplies and equipment for utility restoration and essentials, and with the concurrence of the Council of State temporarily suspended size and weight restrictions on vehicles used for utility restoration and carrying essentials on the interstate and intrastate highways due to anticipated damage and impacts from the winter storm. In addition, the order also directed the Department of Public Safety to temporarily suspend weighing those vehicles used to transport livestock and poultry.

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

Pursuant to N.C.G.S § 166A-19.20(c) the State of Emergency that was declared by Executive Order 43 and Executive Order 44 are hereby terminated as of 11:59 p.m., February 28, 2014.

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 twenty-sixth day of February in the year of our Lord two thousand and fourteen, and of the Independence of the United States of America the two hundred and thirty-eight.


Pat McCrory
Governor

ATTEST:


Elaine F. Marshall
Secretary of State





State of North Carolina

PAT McCrory
GOVERNOR

March 4, 2014

EXECUTIVE ORDER NO. 46

REAUTHORIZING THE STATE HEALTH COORDINATING COUNCIL

WHEREAS, the State Health Coordinating Council is a public advisory body established by Executive Order No. 139 on March 3, 2008; and

WHEREAS, the State Health Coordinating Council plays an important role in working with the Department of Health and Human Services to prepare the State Medical Facilities Plan approved annually by the Governor; and

WHEREAS, the success of the State Health Coordinating Council depends on the membership of persons knowledgeable about healthcare services, facilities, and technology including physicians, representatives of business and industry, medical educators and members of professional associations; and

WHEREAS, the State Health Coordinating Council has only advisory authority and therefore is not a covered board under the State Ethics Act; and

WHEREAS, it is important that the State Health Coordinating Council exercise its advisory authority in a transparent manner so that the Governor and citizens have full knowledge of the professional and economic interests of members of the State Health Coordinating Council represent; and

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

Section 1. Establishment

The North Carolina State Health Coordinating Council (hereinafter "NCSHCC") is hereby reestablished.

Section 2. Membership

The NCSHCC shall have the following duties and functions:

- a) Serve as a forum for hearing regional concerns and recommendations related to health planning;
- b) Compile a list of state health needs and advise the Department of Health and Human Services;
- c) Advise the Department of Human Resources on issues related to state health needs, giving attention to local, regional, and statewide needs;

- d) Review and comment on contents of documents related to health planning and make recommendations concerning them to the Secretary of Human and Human Services and the Governor;
- e) Advise the Department of Health and Human Services on cost-effective mechanisms for achieving health needs;
- f) Prepare the Annual State Medical Facilities Plan and present the plan to the Governor.

Section 3. Membership

The NCSHCC shall consist of 25 members who shall be appointed by the Governor as follows:

- a) One member from an academic medical center;
- b) Two members from business and industry (at least one individual representing small business and one representing large business);
- c) One member from the health insurance industry;
- d) Two members from county government (one representing a rural county and one representing an urban county);
- e) One member representing nursing homes;
- f) One members representing hospitals;
- g) One member representing home care facilities;
- h) One member representing hospice;
- i) One local health director;
- j) One licensed physician;
- k) One member from the North Carolina House of Representatives;
- l) One member from the North Carolina Senate;
- m) Eleven at-large members to represent other health professionals, business, industry and to ensure regional representation.

Section 4. Terms of Membership

The terms of membership of the NCSHCC shall be staggered so that the terms of approximately one-third of the members shall expire in a single calendar year. All members shall be appointed for a term of three years. Terms shall expire on December 31, and new terms shall begin on January 1. Members of the NCSHCC shall serve at the pleasure of the Governor.

Members currently serving on February 28, 2014 shall continue to serve at the pleasure of the Governor until their successors are appointed or otherwise noticed by the Office of the Governor.

Section 5. Vacancies

A vacancy occurring during a term of appointment is filled in the same manner as the original appointment and for the balance of the unexpired terms.

Section 6. Travel Expenses

Members of the NCSHCC shall receive necessary travel and subsistence expenses in accordance with the provision of G.S. § 138-5.

Section 7. Chairman

The Chairman and Vice Chairman of the NCSHCC shall be appointed by the Governor. The Chairman and Vice Chairman shall serve at the pleasure of the Governor. The NCSHCC may elect other such officers as it deems necessary.

Section 8. Meetings

The NCSHCC shall meet quarterly and at other times at the call of the Chairman or upon written request of at least ten (10) of its members. All business meetings of the NCSHCC, its committees and subcommittees, or special task forces shall be open to the public.

Section 9. Staff Assistance

The Department of Health and Human Services shall provide clerical support and other services required by the NCSHCC.

Section 10. Ethical Standards

1. The members of the NCSHCC shall always act in the best interests of the public and shall bring their particular knowledge and experience to the NCSHCC to serve the public interest as identified in the Certificate of Needs Law, Chapter 131E, Article 9 of the General Statutes.
2. The following process shall be observed for all meetings of the NCSHCC and NCSHCC subcommittees at which the NCSHCC or NCSHCC subcommittee takes any action:
 - a. At the beginning of each meeting, the Chair shall remind all members of their duty to act always in the best interest of the public without regard for their own professional, institutional or financial interests and that members should recuse themselves from voting on any matter on which they cannot meet this standard.
 - b. Prior to conducting any business, each member shall disclose any professional or institutional interest he or she may have in any matter coming before the NCSHCC or NCSHCC subcommittee for action at that meeting. The Chair will determine if the member needs to recuse himself or herself from voting on the matter in order to ensure the integrity of the actions of the NCSHCC or NCSHCC subcommittee.
 - c. Prior to conducting any business, each member shall also disclose any financial benefit he or she may derive from any matter coming before the NCSHCC or NCSHCC subcommittee for action at that meeting. A member derives a financial benefit from a matter under consideration if the person or his/her spouse (i) has an ownership interest in an entity that is a party to the matter under consideration; (ii) will derive any income or commission as a direct result of action on the matter under consideration; or (iii) will acquire property as a direct result of action on the matter under consideration. When any member indicates that he or she will derive a financial benefit from a matter coming before the NCSHCC or any subcommittee, the member shall recuse himself or herself from voting on the matter.
 - d. A member who has recused himself or herself from voting is not prohibited from deliberating on the matter unless the Chair determines, after review, that participation by the member in deliberations would impair the integrity of the actions of the NCSHCC or NCSHCC subcommittee.
 - e. The minutes of the NCSHCC and its subcommittees will reflect all disclosures and recusals made pursuant to this section, and such minutes will be provided to the Governor for review with the SMFP.
 - f. A challenge to a member's participation in a vote on issues under this Executive Order may be raised only by a member of the NCSHCC or an employee of the

Division of Health Services Regulation of DHHS. In such case where a challenge is made, the Chair, in consultation with the DHHS legal counsel, shall determine whether the challenge is valid and the action that should be taken.

- g. For the purposes of this Executive Order, the term "Chair" means the Chair of the NCSHCC or the Chair of any NCSHCC subcommittee. In the absence of the Chair or if the professional, institutional, or financial interests of the Chair must be reviewed pursuant to this section, then the Vice-Chair of the NCSHCC or NCSHCC subcommittee shall make the determinations required by this section.
3. Members of the NCSHCC are expected to and should confer with DHHS on any matters that come before them in the development of the SMFP. No member of the NCSHCC, however, may confer with any DHHS employee regarding any proposed provision of the SMFP or any proposed or pending certificate of need application in which the member has a direct, conflicting professional, institutional or financial interest, except in public meetings conducted by DHHS or the NCSHCC.
4. This Executive Order is for the Governor's purposes in reviewing and approving or amending the proposed SMFP submitted by the NCSHCC and DHHS. This Order does not and shall not be construed to create any rights, nor create claims, under the Certificate of Need Law, State Government Ethics Act, or otherwise.

This Executive Order is retroactive to March 1, 2014 and shall remain in effect until December 31, 2016, pursuant to N.C. Gen. Stat. § 147-16.2(b), or until earlier rescinded. This order supersedes and replaces all other executive orders on this subject and specifically rescinds Executive Order No. 139 issued on March 3, 2008, Executive Order No. 10 issued on March 3, 2009, Executive Order No. 52 issued on March 2, 2010, and Executive Order No. 67 issued on October 4, 2010.

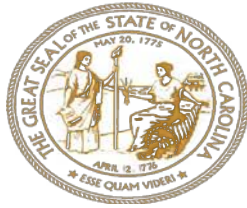
IN WITNESS WHEREOF, I have hereunto signed my name and affixed the Great Seal of the State of North Carolina at the Capitol in the City of Raleigh, this 4th day of March in the year of our Lord two thousand fourteen, and of the Independence of the United States of America the two hundred and thirty-eight.


Pat McCrory
Governor

ATTEST:


Elaine F. Marshall
Secretary of State





State of North Carolina

PAT McCrORY
GOVERNOR

March 7, 2014

EXECUTIVE ORDER NO. 47

TEMPORARY SUSPENSION OF MOTOR VEHICLE REGULATIONS TO ENSURE RESTORATION OF UTILITY SERVICES

WHEREAS, due to the impact of the March 6-7, 2014 winter storm, vehicles bearing equipment and supplies for utility restoration and debris removal, carrying essentials such as food and medicine, transporting livestock and poultry, and feed for livestock and poultry need to be moved on the highways of North Carolina; and

WHEREAS, pursuant to N.C.G.S. § 166A-19.20, I declare a limited state of emergency exists in North Carolina as defined in N.C.G.S. §§ 166A-19.3(6) and 166A-19.3(19) due to the power outages and other impacts across the State as a result of this recent winter storm. The emergency area as defined in N.C.G.S. §§ 166A-19.3(7) and N.C.G.S. 166A-19.20(b) is the State of North Carolina; and

WHEREAS, the uninterrupted supply of electricity, fuel oil, diesel oil, gasoline, kerosene, propane, liquid petroleum gas, food, water, livestock and poultry feed, and medical supplies to residential and commercial establishments is essential before, during and after the winter storm and any interruption in the delivery of those commodities threatens the public welfare; and

WHEREAS, the prompt restoration of utility services to citizens is essential to their safety and well-being; and

WHEREAS, under the provisions of N.C.G.S. § 166A-19.30(b)(3) the Governor, with the concurrence of the Council of State, may regulate and control the flow of vehicular traffic and the operation of transportation services; and

WHEREAS, with the concurrence of the Council of State, I have found that vehicles bearing equipment and supplies for utility restoration, carrying essentials **and** for debris removal must adhere to the registration requirements of N.C.G.S. § 20-86.1 and 20-382, fuel tax requirements of N.C.G.S. § 105-449.47, and the size and weight requirements of N.C.G.S. §§ 20-116 and 20-118. I have further found that citizens in this State may suffered losses and will likely suffer imminent further widespread damage within the meaning of N.C.G.S. § 166A-19.3(3) and N.C.G.S. § 166A-19.21(b); and

WHEREAS, pursuant to N.C.G.S. § 166A-19.70(g) on the recommendation of the Commissioner of Agriculture, upon a finding that there is an imminent threat of severe economic loss of livestock or poultry, the Governor shall direct the Department of Public Safety to temporarily suspend weighing those vehicles used to transport livestock and poultry; and

WHEREAS, 49 CFR § 390.23 allows the Governor of a state to suspend the rules and regulations under 49 CFR Part 395 for up to 30 days if the Governor determines that an emergency condition exists; and

WHEREAS, under N.C.G.S. § 166A-19.70, the Governor may declare that the health, safety, or economic well-being of persons or property requires that the maximum hours of service for drivers prescribed by N.C.G.S. § 20-381 should be waived for persons transporting essential fuels, food, water, medical supplies, feed for livestock and poultry, transporting livestock and poultry and for vehicles used in the restoration of utility services.

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

Section 1.

The Department of Public Safety in conjunction with the North Carolina Department of Transportation shall waive the maximum hours of service for drivers prescribed by the Department of Public Safety pursuant to N.C.G.S. § 20-381.

Section 2.

The Department of Public Safety in conjunction with the Department of Transportation shall waive certain size and weight restrictions and penalties arising under N.C.G.S. §§ 20-116 and 20-118, and certain registration requirements and penalties arising under N.C.G.S. §§ 20-86.1, 20-382, 105-449.47, and 105-449.49 for vehicles transporting equipment and supplies for the restoration of utility services, carrying essentials and for equipment used for any debris removal. The Department of Public Safety shall temporarily suspend weighing pursuant to N.C.G.S. § 20-118.1 vehicles used to transport livestock and poultry in the emergency area.

Section 3.

Notwithstanding the waivers set forth above, size and weight restrictions and penalties have not been waived under the following conditions:

- a. When the vehicle weight exceeds the maximum gross weight criteria established by the manufacturer (GVWR) or 90,000 pounds gross weight, whichever is less.
- b. When the tandem axle weight exceeds 42,000 pounds and the single axle weight exceeds 22,000 pounds.
- c. When a vehicle and vehicle combination exceeds 12 feet in width and a total overall vehicle combination length of 75 feet from bumper to bumper.
- d. Vehicles and vehicle combinations subject to exemptions or permits by authority of this Executive Order shall not be exempt from the requirement of having a yellow banner on the front and rear measuring a total length of 7 feet by 18 inches bearing the legend "Oversized Load" in 10 inch black letters 1.5 inches wide and red flags measuring 18 inches square to be displayed on all sides at the widest point of the load. In addition, when operating between sunset and sunrise, a certified escort shall be required for loads exceeding 8 feet 6 inches in width.

Section 4.

Vehicles referenced under Sections 2 and 3 shall be exempt from the following registration requirements:

- a. The \$50.00 fee listed in N.C.G.S. § 105-449.49 for a temporary trip permit is waived for the vehicles described above. No quarterly fuel tax is required because the exception in N.C.G.S. § 105-449.45(a)(1) applies.

b. The registration requirements under N.C.G.S. § 20-382.1 concerning intrastate and interstate for-hire authority is waived; however, vehicles shall maintain the required limits of insurance as required.

c. Non-participants in North Carolina's International Registration Plan will be permitted into North Carolina in accordance with the exemptions identified by this Executive Order.

Section 5.

The size and weight exemption for vehicles will be allowed on all routes designated by the North Carolina Department of Transportation, except those routes designated as light traffic roads under N.C.G.S. § 20-118. This order shall not be in effect on bridges posted pursuant to N.C.G.S. § 136-72.

Section 6.

The waiver of regulations under Title 49 of the Code of Federal Regulations (Federal Motor Carrier Safety Regulations) does not apply to the CDL and Insurance Requirements. This waiver shall be in effect for 15 days or the duration of the emergency, whichever is less.

Section 7.

The North Carolina State Highway Patrol shall enforce the conditions set forth in Sections 1 through 6 of this Executive Order in a manner which will implement these provisions without endangering motorists in North Carolina.

Section 8.

Upon request by law enforcement officers, exempted vehicles must produce documentation sufficient to establish their loads are being used for bearing equipment and supplies for utility restoration, debris removal, carrying essentials in commerce, carrying feed for livestock and poultry, or transporting livestock and poultry in the State of North Carolina.

Section 9.

This Executive Order does not prohibit or restrict lawfully possessed firearms or ammunition or impose any limitation on the consumption, transportation, sale or purchase of alcoholic beverages as provided in N.C.G.S. § 166A-19.30(c).

Section 10.

Pursuant to N.C.G.S. § 166A-19.23, this declaration triggers the prohibition against excessive pricing as provided in N.C.G.S. § 75-37 and 75-38 in the declared emergency area.


Section 11.

This Executive Order is effective immediately and shall remain in effect for fifteen (15) days or the duration of the emergency, whichever is less.

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 7th day of March in the year of our Lord two thousand and fourteen, and of the Independence of the United States of America the two hundred and thirty-eight.


Pat McCrory
Governor

ATTEST:


Elaine F. Marshall
Secretary of State



**MEDICAL CARE COMMISSION
EXTENSION OF COMMENT PERIOD**

Re: Extension of Public Comment Period for Nursing Home Licensure & Certification Rules 10A NCAC 13D .2111, .2402, .3101, .3103, .3104, .3201, .3202, .3301, .3302, .3401, .3402, .3403, and .3404.

The N.C. Medical Care Commission has extended the public comment period for rules 10A NCAC 13D .2111, .2402, .3101, .3103, .3104, .3201, .3202, .3301, .3302, .3401, .3402, .3403, and .3404. The comment period, as published in the December 16, 2013 edition of the N.C. Register, was scheduled to conclude on February 14, 2014, but has been extended and will end on May 10, 2014.

A public hearing will be held on April 19, 2014 at 10:00am at the Wright Building (Room 131) on the Dorothea Dix Campus, 1201 Umstead Drive, Raleigh, NC 27603.

<http://www.ncdhhs.gov/dhsr/ruleactions.html>

**REAL ESTATE COMMISSION
EXTENSION OF COMMENT PERIOD**

Notice is hereby given that the comment period in connection with the NC Real Estate Commission's proposed adoption of the rule cited as 21 NCAC 58C .0221; amendment of the rules cited as 21 NCAC 58A .0104, .0110, .0112, .0114, .0117, .0118, .0404, .0502-.0503, .1702, .1709, .1808; 58C .0105, .0209, .0218, .0309-.0310, .0608; 58E .0102, .0202-.0204, .0304; and repeal of the rules cited as 21 NCAC 58E .0601-.0604., as published in Volume 28, Issue 15, pages 1726 - 1750 of the North Carolina Register, has been extended as follows:

Comment period ends: *May 5, 2014*

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 10A – DEPARTMENT OF HEALTH AND HUMAN SERVICES

Notice is hereby given in accordance with G.S. 150B-21.2 that the NC Child Care Commission intends to adopt the rule cited as 10A NCAC 09 .0607; and amend the rules cited as 10A NCAC 09 .0102, .0302, .0604, .0707, .0804, .1003, .1701, .1705, .1720, .1721, .1723, .2318, .2404, and .2829.

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

- ☒ OSBM certified on: February 11, 2014
- ☐ RRC certified on:
- ☐ Not Required

Pursuant to G.S. 150B-19.1(c), the agency has posted on its website the following:

Text of proposed rule posted at:

http://ncchildcare.dhhs.state.nc.us/general/mb_ccrulespublic.asp

Explanation and reason for proposed rule posted at:

http://ncchildcare.dhhs.state.nc.us/general/mb_ccrulespublic.asp

Federal Certification posted at: N/A

Instructions for oral and written comments posted at:

http://ncchildcare.dhhs.state.nc.us/general/mb_ccrulespublic.asp

Fiscal Note if prepared posted at:

http://ncchildcare.dhhs.state.nc.us/general/mb_ccrulespublic.asp
and http://www.osbm.state.nc.us/files/pdf_files/DHHS02112014.pdf

Proposed Effective Date: October 1, 2014

Public Hearing:

Date: May 12, 2014

Time: 1:00 p.m.

Location: Division of Public Health Campus, 5605 Six Forks Rd, Cardinal Conference Room, Raleigh, NC

Reason for Proposed Action: The NC Child Care Commission proposes to adopt and amend the Child Care Requirements related to Emergency Preparedness and Response (EPR) to promote the safety of children while in child care and to strengthen the current requirements related to EPR in child care. These rules are written in response to findings reported in the Save the Children Study 2008 that many states including North Carolina do not have regulations that would adequately protect children in emergencies. These rules are 10A NCAC 09 .0102, .0302, .0307, .0604, .0607, .0707, .1701, .1705, .1720, .1721, .2318, and .2829. Proposed amendments to rules 10A NCAC 09 .0804 and .2404 will prohibit taking the temperatures of mildly ill children rectally. Temperatures should be taken under the arm or orally instead of rectally in child care programs due to specific health training that is needed and the potential for abuse. Amendments to rules 10A NCAC 09 .1003

and .1723 will prohibit staff from talking on the cell phone while driving children that are enrolled in child care. Staff should park in a safe location to use the cell phone in the case of an emergency.

Comments may be submitted to: Dedra Alston, 2201 Mail Service Center, Raleigh, NC 27699-2201, Phone 919-527-6502, Fax 919-662-4570, Email Dedra.Alston@dhhs.nc.gov

Comment period ends: June 2, 2014

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
- ☐ Substantial economic impact (≥\$1,000,000)
- ☐ No fiscal note required by G.S. 150B-21.4

CHAPTER 09 - CHILD CARE RULES

SECTION .0100 – DEFINITIONS

10A NCAC 09 .0102 DEFINITIONS

The terms and phrases used in this Chapter are defined as follows except when the context of the rule requires a different meaning. The definitions prescribed in G.S. 110-86 also apply to these Rules.

- (1) "Agency" as used in Section .2200 of this Chapter, means Division of Child Development and Early Education, Department of Health and Human Services located at ~~319 Chapanoke Road, Suite 120,~~

- 820 South Boylan Avenue, Raleigh, North Carolina 27603.
- (2) "Appellant" means the person or persons who request a contested case hearing.
 - (3) "Basic School-Age Care" training (BSAC training) means the training on the elements of quality afterschool care for school-age children, developed by the North Carolina State University Department of 4-H Youth Development and subsequently revised by the North Carolina School-age Quality Improvement Project. Other equivalent training shall be approved by the Division.
 - (4) "Child Care Program" means a single center or home, or a group of centers or homes or both, that are operated by one owner or supervised by a common entity.
 - (5) "Child care provider" as defined by G.S. 110-90.2(a)(2)a. and used in Section .2700 of this Chapter, includes the following employees who have contact with the children in a child care program:
 - (a) facility directors;
 - (b) administrative staff;
 - (c) teachers;
 - (d) teachers' aides;
 - (e) cooks;
 - (f) maintenance personnel; and
 - (g) drivers.
 - (6) "Child Development Associate Credential" means the national early childhood credential administered by the Council for Early Childhood Professional Recognition.
 - (7) "Curriculum" means a curriculum that has been approved as set forth in these Rules by the NC Child Care Commission as comprehensive, evidence-based and with a reading component.
 - (8) "Developmentally appropriate" means suitable to the chronological age range and developmental characteristics of a specific group of children.
 - (9) "Division" means the Division of Child Development and Early Education within the Department of Health and Human Services.
 - (10) "Drop-in care" means a child care arrangement where children attend on an intermittent, unscheduled basis.
 - (11) "Early Childhood Environment Rating Scale - Revised Edition" (Harms, Clifford, and Cryer, 2005, published by Teachers College Press, New York, NY) is the instrument used to evaluate the quality of care received by a group of children in a child care center, when the majority of children in the group are two and a half years old through five years old, to achieve three or more points for the program standards of a rated license. This instrument is incorporated by reference and includes subsequent editions. Individuals wishing to purchase a copy may call Teachers College Press at 1-800-575-6566. The cost of this scale in ~~June 2012 is twenty-one dollars and ninety-five cents (\$21.95).~~ February 2014 is twenty-two dollars and ninety-five cents (\$22.95). A copy of this instrument is on file at the Division at the address given in Item (1) of this Rule and is available for public inspection during regular business hours.
 - (12) "Experience working with school-aged children" means working with school-age children as an administrator, program coordinator, group leader, assistant group leader, lead teacher, teacher or aide.
 - (13) "Family Child Care Environment Rating Scale – Revised Edition" (Harms, Cryer and Clifford, 2007, published by Teachers College Press, New York, NY) is the instrument used to evaluate the quality of care received by children in family child care homes to achieve three or more points for the program standards of a rated license. This instrument is incorporated by reference and includes subsequent editions. Individuals wishing to purchase a copy may call Teachers College Press at 1-800-575-6566. The cost of this scale in ~~June 2012 is twenty-one dollars and ninety-five cents (\$21.95).~~ February 2014 is twenty-two dollars and ninety-five cents (\$22.95). A copy of this instrument is on file at the Division at the address given in Item (1) of this Rule and is available for public inspection during regular business hours.
 - (14) "First aid kit" is a collection of first aid supplies (such as bandages, tweezers, disposable nonporous gloves, micro shield or face mask, liquid soap, cold pack) for treatment of minor injuries or stabilization of major injuries.
 - (15) "Group" means the children assigned to a specific caregiver or caregivers, to meet the staff/child ratios set forth in G.S. 110-91(7) and this Chapter, using space which is identifiable for each group.
 - (16) "Health care professional" means:
 - (a) a physician licensed in North Carolina;
 - (b) a nurse practitioner approved to practice in North Carolina; or
 - (c) a licensed physician assistant.
 - (17) "Household member" means a person who resides in a family home as evidenced by factors including maintaining clothing and personal effects at the household address, receiving mail at the household address, using identification with the household address, or eating and sleeping at the household address on a regular basis.

- (18) "If weather conditions permit" means:
- (a) temperatures that fall within the guidelines developed by the Iowa Department of Public Health and specified on the Child Care Weather Watch chart. These guidelines shall be used when determining appropriate weather conditions for taking children outside for outdoor learning activities and playtime. This chart may be downloaded free of charge from <http://www.idph.state.ia.us/hcci/comm/pdf/weatherwatch.pdf>, and is incorporated by reference and includes subsequent editions and amendments;
 - (b) following the air quality standards as set out in 15A NCAC 18A .2832(d). The Air Quality Color Guide can be found on the Division's web site at <http://xapps.enr.state.nc.us/aq/ForecastCenter> or call 1-888-RU4NCAIR (1-888-784-6224); and
 - (c) no active precipitation. Caregivers may choose to go outdoors when there is active precipitation if children have appropriate clothing such as rain boots and rain coats, or if they are under a covered area.
- (19) "Infant/Toddler Environment Rating Scale - Revised Edition" (Harms, Cryer, and Clifford, 2003, published by Teachers College Press, New York, NY) is the instrument used to evaluate the quality of care received by a group of children in a child care center, when the majority of children in the group are younger than thirty months old, to achieve three or more points for the program standards of a rated license. This instrument is incorporated by reference and includes subsequent editions. Individuals wishing to purchase a copy may call Teachers College Press at 1-800-575-6566. The cost of this scale in June 2012 is twenty-one dollars and ninety-five cents (\$21.95). February 2014 is twenty-two dollars and ninety-five cents (\$22.95). A copy of this instrument is on file at the Division at the address given in Item (1) of this Rule and is available for public inspection during regular business hours.
- (20) "ITS-SIDS Training" means the Infant/Toddler Safe Sleep and SIDS Risk Reduction Training developed by the NC Healthy Start Foundation for the Division of Child Development and Early Education for caregivers of children ages 12 months and younger.
- (21) "Licensee" means the person or entity that is granted permission by the State of North Carolina to operate a child care facility. The owner of a facility is the licensee.
- ~~(22)~~ "Lockdown drill" means an emergency safety procedure in which people remain in a locked indoor space and is usually used when threats of a dangerous person near the vicinity occur.
- ~~(22)~~(23) "North Carolina Early Educator Certification (certification)" is an acknowledgement of an individual's verified level of educational achievement based on a standardized scale. The North Carolina Institute for Child Development Professionals certifies individuals and assigns a certification level on two scales:
- (a) the Early Care and Education Professional Scale (ECE Scale) in effect as of July 1, 2010; or
 - (b) the School Age Professional Scale (SA Scale) in effect as of May 19, 2010. Each scale reflects the amount of education earned in the content area pertinent to the ages of children served. The ECE Scale is designed for individuals working with or on behalf of children ages birth to five. The SA Scale is designed for individuals working with or on behalf of children ages 5 to 12 who are served in school age care settings.
- ~~(23)~~(24) "North Carolina Early Childhood Credential" means the state early childhood credential that is based on completion of required early childhood coursework taken at any NC Community College. Other post secondary curriculum coursework shall be approved as equivalent if the Division determines that the content of the other post secondary curriculum coursework offered is substantially equivalent to the NC Early Childhood Credential Coursework. A copy of the North Carolina Early Childhood Credential requirements is on file at the Division at the address given in Item (1) of this Rule and is available for public inspection or copying at no charge during regular business hours.
- ~~(24)~~(25) "Owner" means any person with a five percent or greater equity interest in a child care facility, however stockholders of corporations who own child care facilities are not subject to mandatory criminal history checks pursuant to G.S. 110-90.2 unless they are a child care provider.
- ~~(25)~~(26) "Parent" means a child's parent, legal guardian, or full-time custodian.
- ~~(26)~~(27) "Part-time care" means a child care arrangement where children attend on a regular schedule but less than a full-time basis.
- ~~(27)~~(28) "Passageway" means a hall or corridor.

- ~~(28)~~(29) "Person" means any individual, trust, estate, partnership, corporation, joint stock company, consortium, or any other group, entity, organization, or association.
- ~~(29)~~(30) "Preschooler" or "preschool-age child" means any child who does not fit the definition of school-age child in this Rule.
- ~~(30)~~(31) "School-Age Care Environment Rating Scale" (Harms, Jacobs, and White, 1996, published by Teachers College Press) is the instrument used to evaluate the quality of care received by a group of children in a child care center, when the majority of the children in the group are older than five years, to achieve three or more points for the program standards of a rated license. This instrument is incorporated by reference and includes subsequent editions. Individuals wishing to purchase a copy may call Teachers College Press at 1-800-575-6566. The cost of this scale in ~~June 2012 is twenty one dollars and ninety five cents (\$21.95).~~ February 2014 is twenty-two dollars and ninety-five cents (\$22.95). A copy of this instrument is on file at the Division at the address given in Item (1) of this Rule and is available for public inspection during regular business hours.
- ~~(31)~~(32) "School-age child" means any child who is attending or who has attended, a public or private grade school or kindergarten and meets age requirements as specified in G.S. 115C-364.
- ~~(32)~~(33) "Seasonal Program" means a recreational program as set forth in G.S. 110-86(2)(b).
- ~~(33)~~(34) "Section" means Division of Child Development and Early Education.
- (35) "Shelter-in-Place drill" means staying where you are to take shelter rather than trying to evacuate. It usually involves selecting a small interior room, with no or few windows, to take refuge when threat of tornado or where hazardous materials have been released in the atmosphere.
- ~~(34)~~(36) "Substitute" means any person who assumes the duties of a staff person for a time period not to exceed two consecutive months.
- ~~(35)~~(37) "Track-Out Program" means any child care provided to school-age children when they are out of school on a year-round school calendar.
- ~~(36)~~(38) "Volunteer" means a person who works in a child care facility and is not monetarily compensated by the facility.

Authority G.S. 110-85; 110-88; 143B-168.3.

SECTION .0300 – PROCEDURES FOR OBTAINING A LICENSE

- ### **10A NCAC 09 .0302 APPLICATION FOR A LICENSE FOR A CHILD CARE CENTER**
- (a) An individual that is legally responsible for the operation of ~~the a child care~~ center, including assuring compliance with the licensing law and standards, shall apply for a license for a child care center using the form provided by the Division. The form can be found on the Division's website at http://ncchildcare.dhhs.state.nc.us/general/mb_customerservice.asp. If the operator will be a group, organization, or other entity, an officer of the entity who is legally empowered to bind the operator shall complete and sign the application.
- (b) The applicant shall arrange for inspections of the center by the local health, building and fire inspectors. The applicant shall provide to the Division copies of inspection reports pursuant to G.S. 110-91(1), (4), and (5). When a center does not conform with a building, fire, or sanitation standard, the inspector may submit a written explanation of how equivalent, alternative protection is provided. The Division shall accept the inspector's documentation in lieu of compliance with the standard. Nothing in this Rule precludes or interferes with issuance of a provisional license pursuant to Section .0400 of this Chapter.
- (c) The applicant, or the person responsible for the day-to-day operation of the center, shall be able to describe the plans for the daily program, including room arrangement, staffing patterns, equipment, and supplies, in sufficient detail to show that the center shall comply with applicable requirements for activities, equipment, and staff-child ratios for the capacity of the center and type of license requested. The applicant shall make the following written information available to the Division for review to verify compliance with provisions of this Chapter and G.S. 110, Article 7:
- (1) daily schedules;
 - (2) activity plans;
 - (3) emergency medical care plan;
 - (4) discipline policy;
 - (5) incident reports; and
 - (6) incident logs.
- (d) The applicant shall demonstrate to the Division representative that the following is available for review in the center's files:
- (1) staff records which include an application for employment and date of birth; documentation of education, training, and experience; medical and health records; documentation of participation in training and staff development activities; and required criminal history records check documentation;
 - (2) children's records which include an application for enrollment; medical and immunization records; and permission to seek emergency medical care;
 - (3) daily attendance records;
 - (4) daily records of arrival and departure times at the center for each child;
 - (5) records of monthly fire drills documenting the date and time of each drill, the length of time taken to evacuate the building, and the signature of the person who conducted the drill;

- (6) records of monthly playground inspections documented on a checklist provided by the Division; ~~and~~
- (7) records of medication ~~administered~~ administered; and
- (8) records of lockdown or shelter-in-place drills as defined in 10A NCAC 09 .0102 giving the date each drill was held, the time of day, the length of time taken to get into designated locations and the signature of the person who conducted the drill.

(e) The Division representative shall measure all rooms to be used for child care and shall assure that an accurate sketch of the center's floor plan is part of the application packet. The Division representative shall enter the dimensions of each room to be used for child care, including ceiling height, and shall show the location of the bathrooms, doors, and required exits on the floor plan.

(f) The Division representative shall make one or more inspections of the center and premises to assess compliance with all applicable requirements as follows:

- (1) if all applicable requirements of G.S. 110, Article 7 and this Section are met, the Division shall issue the license; or
- (2) if all applicable requirements of G.S. 110, Article 7 and this Section are not met, the Division representative may recommend issuance of a provisional license in accordance with Section .0400 of this Chapter or the representative may recommend denial of the application. Final disposition of the recommendation to deny is the decision of the Secretary.

(g) The Secretary may deny an application for a license under the following circumstances:

- (1) if any child care facility license previously held by the applicant has been denied, revoked, or summarily suspended by the Division;
- (2) if the Division initiated denial, revocation, or summary suspension proceedings against any child care facility license previously held by the applicant and the applicant voluntarily relinquished the license;
- (3) during the pendency of an appeal of a denial, revocation, or summary suspension of any other child care facility license held by the applicant;
- (4) if the Division determines that the applicant has a relationship with an operator or former operator who held a license under an administrative action described in Subparagraphs (1), (2), or (3) of this Paragraph. As used in this Rule, an applicant has a relationship with a former operator if the former operator would be involved with the applicant's child care facility in one or more of the following ways:

- (A) would participate in the administration or operation of the facility;
- (B) has a financial interest in the operation of the facility;
- (C) provides care to children at the facility;
- (D) resides in the facility; or
- (E) would be on the facility's board of directors, be a partner of the corporation, or otherwise have responsibility for the administration of the business;

- (5) based on the applicant's previous non-compliance as an operator with the requirements of G.S. 110, Article 7 or this Chapter;
- (6) if abuse or neglect has been substantiated against the applicant; or
- (7) if the applicant is a disqualified child care provider or has a disqualified household member residing in the center.

(h) In determining whether denial of the application for a license is warranted pursuant to Paragraph (g) of this Rule, the Division shall consider:

- (1) any documentation provided by the applicant that describes the steps the applicant will take to prevent reoccurrence of noncompliance issues that led to any prior administrative action taken against a license previously held by the applicant;
- (2) training certificates or original transcripts for any coursework from a nationally recognized regionally accredited institution of higher learning related to providing quality child care, and that was taken subsequent to any prior administrative action against a license previously held by the applicant. "Nationally recognized" means that every state in this nation acknowledges the validity of the coursework taken at higher education institutions that meet the requirements of one of the accrediting bodies;
- (3) proof of employment in a licensed child care facility and references from the administrator or licensee of the child care facility regarding work performance;
- (4) documentation of collaboration or mentorship with a licensed child care provider to obtain additional knowledge and experience related to operation of a child care facility; and
- (5) documentation explaining relationships with persons meeting the criteria listed in Subparagraph (g)(4) of this Rule.

Authority G.S. 110-85; 110-86; 110-88(2); 110-88(5); 110-91; 110-91(1), (4) and (5); 110-92; 110-93; 110-99; 143B-168.3.

**SECTION .0600 – SAFETY REQUIREMENTS FOR
CHILD CARE CENTERS**

**10A NCAC 09 .0604 GENERAL SAFETY
REQUIREMENTS**

- (a) In child care centers, potentially hazardous items, such as archery equipment, hand and power tools, nails, chemicals, propane stoves, lawn mowers, and gasoline or kerosene, whether or not intended for use by children, shall be stored in locked areas or with other safeguards, or shall be removed from the premises.
- (b) Firearms and ammunition are prohibited in a licensed child care program unless carried by a law enforcement officer.
- (c) Electrical outlets not in use which are located in space used by the children shall be covered with safety plugs unless located behind furniture or equipment that cannot be moved by a child.
- (d) Electric fans shall be mounted out of the reach of children or shall be fitted with a mesh guard to prevent access by children.
- (e) All electrical appliances shall be used only in accordance with the manufacturer's instructions. For appliances with heating elements, such as bottle warmers, crock pots, irons, coffee pots, or curling irons, neither the appliance nor the cord, if applicable, shall be accessible to preschool-age children.
- (f) Electrical cords shall not be accessible to infants and toddlers. Extension cords, except as approved by the local fire inspector, shall not be used. Frayed or cracked electrical cords shall be replaced.
- (g) All materials used for starting fires, such as matches and lighters, shall be kept in locked storage or shall be stored out of the reach of children.
- (h) Smoking is not permitted in space used by children when children are present. All smoking materials shall be kept in locked storage or out of the reach of children.
- (i) Fuel burning heaters, fireplaces and floor furnaces shall be provided with a protective screen attached securely to supports to prevent access by children and to prevent objects from being thrown into them.
- (j) Plants that are toxic shall not be in indoor or outdoor space that is used by or is accessible to children.
- (k) Air conditioning units shall be located so that they are not accessible to children or shall be fitted with a mesh guard to prevent objects from being thrown into them.
- (l) Gas tanks shall be located so they are not accessible to the children or shall be in a protective enclosure or surrounded by a protective guard.
- (m) Cribs and playpens shall be placed so that the children occupying them shall not have access to cords or ropes, such as venetian blind cords.
- (n) Once a day, prior to initial use, the indoor and outdoor premises shall be checked for debris, vandalism, and broken equipment. Debris shall be removed and disposed.
- (o) Plastic bags, toys, and toy parts small enough to be swallowed, and materials that can be easily torn apart such as foam rubber and styrofoam, shall not be accessible to children under three years of age, except that styrofoam plates and larger pieces of foam rubber may be used for supervised art activities and styrofoam plates may be used for food service. Latex and rubber balloons shall not be accessible to children under five years of age.

- (p) When non-ambulatory children are in care, a crib or other device shall be available for evacuation in case of fire or other emergency. The crib or other device shall be fitted with wheels in order to be easily moveable, have a reinforced bottom, and shall be able to fit through the designated fire exit. For centers that do not meet institutional building code, and the exit is more than eight inches above grade, the center shall develop a plan to ensure a safe and timely evacuation of the crib or other device. This plan shall be demonstrated to a Division representative for review and approval. During the monthly fire drills required by Rule 10A NCAC 09 .0302(d)(4), the required fire, lockdown, or shelter-in-place drills, an evacuation crib or other device shall be used in the manner described in the evacuation plan. Emergency Preparedness and Response Plan as defined in Rule .0607(b) of this Section.
- (q) A first aid kit must always be available on site.
- (r) Fire drills shall be practiced monthly.
- (s) A "shelter in place drill" or "lockdown drill" as defined in Rule .0102 of this Chapter, shall be conducted at least every three months.

Authority G.S. 110-85; 110-91(3),(6); 143B-168.3.

**10A NCAC 09 .0607 EMERGENCY PREPAREDNESS
AND RESPONSE**

- (a) A new administrator or designated staff person shall complete the Emergency Preparedness and Response in Child Care training approved by the Division within the first six months of employment. A current administrator or designated staff person has two years as of the effective date of this Rule to complete the Emergency Preparedness and Response in Child Care training. Verification of completion of the training shall be maintained at the center.
- (b) Upon completion of the Emergency Preparedness and Response in Child Care training, the administrator or designated staff person shall develop and annually review the Emergency Preparedness and Response Plan to ensure all information is current. Emergency Preparedness and Response Plan means a written plan that addresses how a program will respond to both natural and man-made disasters, such as fire, tornado, flood, power failures, chemical spills, bomb threats, earthquakes, blizzards, nuclear disaster, or a dangerous person in the vicinity, to ensure the safety and protection of the children and staff. This Plan must be on a form provided by the Division and available for review.
- (c) The Emergency Preparedness and Response Plan shall include:
 - (1) written procedures for accounting for all children;
 - (2) a description for how and when children shall be transported;
 - (3) methods for communicating with parents and appropriate emergency response teams;
 - (4) a description of how children's nutritional and health needs will be met;
 - (5) the relocation and reunification process;
 - (6) emergency telephone numbers;

- (7) evacuation diagrams showing how the staff and children will evacuate during an emergency;
- (8) the date of the last revision of the plan;
- (9) specific considerations for non-mobile children and children with special needs; and
- (10) the location of a *Ready to Go File*. A *Ready to Go File* means a collection of information on children, staff and the program, to utilize, if an evacuation occurs. The file shall include, but is not limited to, a list of children, staff and volunteers in attendance, contact information for individuals to pick-up children, each child's Application for Child Care, medication authorizations and instructions, any action plans for children with special health care needs, a list of any known food allergies of children and staff, staff contact information, Incident Report forms, an area map, and emergency telephone numbers.

(d) All staff must receive training on the center's Emergency Preparedness and Response Plan during orientation and on an annual basis. Verification of completion of the training shall be maintained at the center.

(e) All substitutes who are present at the center shall receive orientation on the center's Emergency Preparedness and Response Plan. Verification of completion of the orientation shall be maintained in the provider's personnel file.

Authority G.S. 110-85.

SECTION .0700 – HEALTH AND OTHER STANDARDS FOR CENTER STAFF

10A NCAC 09 .0707 IN-SERVICE TRAINING REQUIREMENTS

(a) Each center shall assure that each new employee who is expected to have contact with children receives a minimum of 16 clock hours of on-site training and orientation within the first six weeks of employment. This training and orientation shall include:

- (1) training in the recognition of the signs and symptoms of child abuse or neglect and in the employee's duty to report suspected abuse and neglect;
- (2) review of the center's operational policies, including the center's safe sleep policy for ~~infants~~; infants, the Emergency Preparedness and Response Plan and the emergency medical care plan;
- (3) adequate supervision of children, taking into account their age, emotional, physical, and cognitive development;
- (4) first-hand observation of the center's daily operations;
- (5) instruction in the employee's assigned duties;
- (6) instruction in the maintenance of a safe and healthy environment;
- (7) review of the center's purposes and goals;

- (8) review of the center's personnel policies;
- (9) review of the child care licensing law and rules;
- (10) an explanation of the role of State and local government agencies in the regulation of child care, their impact on the operation of the center, and their availability as a resource; and
- (11) an explanation of the employee's obligation to cooperate with representatives of State and local government agencies during visits and investigations.

(b) As part of the training required in Paragraph (a) of this Rule, each new employee shall complete, within the first two weeks of employment, six clock hours of the training referenced in Subparagraphs (a)(1), (a)(2), and (a)(3) of this Rule.

(c) The child care administrator and any staff who have responsibility for planning and supervising a child care program, as well as staff who work directly with children, shall participate in in-service training activities annually, according to the individual's needs as assessed by the child care administrator. Staff shall choose one of the following options for meeting the in-service requirement:

- (1) persons with a four year degree or higher advanced degree in a child care related field of study from a regionally accredited college or university may complete five clock hours of training annually.
- (2) persons with a two year degree in a child care related field of study from a regionally accredited college or university, or persons with a North Carolina Early Childhood Administration Credential or its equivalent may complete eight clock hours of training annually.
- (3) persons with a certificate or diploma in a child care related field of study from a regionally accredited college or university, or persons with a North Carolina Early Childhood Credential or its equivalent may complete 10 clock hours of training annually.
- (4) persons with at least 10 years documented, professional experience as a teacher, director, or caregiver in a licensed child care arrangement may complete 15 clock hours of training annually.
- (5) complete 20 clock hours of training annually.

(d) For staff listed in Subparagraphs (c)(1), (c)(2), (c)(3) and (c)(4) of this Rule, basic cardiopulmonary resuscitation (CPR) training required in Rule .0705 of this Section shall not be counted toward meeting annual in-service training. First aid training may be counted once every three years.

(e) If a child care administrator or lead teacher is currently enrolled in coursework to meet the staff qualification requirements in G.S. 110-91(8), the coursework may be counted toward meeting the annual in-service training requirement.

(f) For staff working less than 40 hours per week on a regular basis and choosing the option for 20 hours of in-service training, the training requirement may be prorated as follows:

**WORKING HOURS PER CLOCK HOURS REQUIRED
WEEK**

0-10	5
11-20	10
21-30	15
31-40	20

Authority G.S. 110-91(11); 143B-168.3.

**SECTION .0800 – HEALTH STANDARDS FOR
CHILDREN**

**10A NCAC 09 .0804 INFECTIOUS AND
CONTAGIOUS DISEASES**

(a) Centers may provide care for a mildly ill child who has a Fahrenheit temperature of less than 100 degrees axillary, or 101 degrees orally, ~~or 102 degrees rectally~~ and who remains capable of participating in routine group activities; provided the child does not:

- (1) have the sudden onset of diarrhea characterized by an increased number of bowel movements compared to the child's normal pattern and with increased stool water; or
- (2) have two or more episodes of vomiting within a 12 hour period; or
- (3) have a red eye with white or yellow eye discharge until 24 hours after treatment; or
- (4) have scabies or lice; or
- (5) have known chicken pox or a rash suggestive of chicken pox; or
- (6) have tuberculosis, until a health professional states that the child is not infectious; or
- (7) have strep throat, until 24 hours after treatment has started; or
- (8) have pertussis, until five days after appropriate antibiotic treatment; or
- (9) have hepatitis A virus infection, until one week after onset of illness or jaundice; or
- (10) have impetigo, until 24 hours after treatment; or
- (11) have a physician's or other health professional's written order that the child be separated from other children.

(b) Centers which choose to provide care for mildly ill children shall:

- (1) follow all procedures to prevent the spread of communicable diseases described in 15A NCAC 18A .2800, "Sanitation of Child Day Care Facilities", as adopted by the Commission for Public Health;
- (2) separate from the other children any child who becomes ill while in care or who is suspected of having a communicable disease or condition other than as described in Paragraph (a) of this Rule until the child leaves the center;
- (3) notify all parents at enrollment that the center will be providing care for mildly ill children;

- (4) immediately notify the parent of any child who becomes ill while in care or who is suspected of being ill with a communicable condition other than as described in Paragraph (a) of this Rule that the child is ill and may not remain in care;
- (5) immediately notify the parent of any sick child in care if the child's condition worsens while the child is in care.

Authority G.S. 110-91(1),(2); 143B-168.3.

SECTION .1000 – TRANSPORTATION STANDARDS

10A NCAC 09 .1003 SAFE PROCEDURES

(a) The driver or other adult in the vehicle shall assure that all children are transferred to a responsible person who is indicated on the child's application as specified in Rule .0801(a)(4) of this Chapter or as authorized by the parent.

(b) Each center shall establish safe procedures for pick-up and delivery of children. These procedures shall be communicated to parents, and a copy shall be posted in the center where they can easily be seen. Centers licensed for three to 12 children located in a residence are not required to post these procedures.

(c) A first-aid kit shall be located in each vehicle used on a regular basis to transport children. The first-aid kit shall be firmly mounted or otherwise secured if kept in the passenger compartment.

(d) For each child being transported emergency and identifying information shall be in the vehicle.

(e) The driver shall:

- (1) be 21 years old or a licensed bus driver;
- (2) have a valid driver's license of the type required under North Carolina Motor Vehicle Law for the vehicle being driven or comparable license from the state in which the driver resides; and
- (3) have no convictions of Driving While Impaired (DWI) or any other impaired driving offense within the previous three years.

(f) Each person in the vehicle must be seated in the manufacturer's designated areas. No child shall ride in the load carrying area or floor of a vehicle.

(g) Children shall not be left in a vehicle unattended by an adult.

(h) Children shall be loaded and unloaded from curbside or in a safe, off-street area, out of the flow of traffic, so that they are protected from all traffic hazards.

(i) Before children are transported, written permission from a parent shall be obtained which shall include when and where the child is to be transported, expected time of departure and arrival, and the transportation provider.

(j) Parents may give standing permission, valid for up to 12 months, for routine transport of children to and from the center.

(k) When children are transported, staff in each vehicle shall have a functioning cellular telephone or other functioning two-way voice communication device with them for use in an emergency. Staff shall not use cellular telephones or other functioning two-way voice communication devices except in the

case of an emergency and only when the vehicle is parked in a safe location.

(l) For routine transport of children to and from the center, staff shall have a list of the children being transported. Staff members shall use this list to check attendance as children board the vehicle and as they depart the vehicle. A list of all children being transported shall also be available at the center.

Authority G.S. 110-85; 110-91; 110-91(13); 143B-168.3.

SECTION .1700 – FAMILY CHILD CARE HOME REQUIREMENTS

10A NCAC 09 .1701 GENERAL PROVISIONS RELATED TO LICENSURE OF HOMES

(a) All family child care homes shall comply with the standards for licensure set forth in this Section. A one- star rated license shall be issued to a family child care home operator who complies with the minimum standards for a license contained in this Section and G.S. 110-91.

(b) An individual who provides care for five hours or more in a week, during planned absences of the operator, shall be at least 21 years old, have a high school diploma or GED, have completed a first aid and cardiopulmonary resuscitation (CPR) course as described in Rule .1705, Subparagraphs (a)(3), (a)(4), (b)(2), and (b)(3) of this Section, have completed a health questionnaire, have proof of negative results of a tuberculosis test completed within 12 months prior to the first day of providing care, submit criminal records check forms as required in 10A NCAC 09 .2702, and annual in-service training as described in Rule .1705(b)(5) of this Section. Copies of required information shall be on file in the home available for review and shall be transferable to other family child care homes where the individual is providing care.

(c) An individual who provides care for less than five hours in a week, during planned absences of the operator shall meet all requirements listed in Paragraph (b) of this Rule, except the requirements for annual in-service training and a high school diploma or GED. The individual shall be literate.

(d) The operator shall review the appropriate requirements found in this ~~Chapter~~ Chapter, including the Emergency Preparedness and Response Plan, and in G.S. Chapter ~~110~~ 110, Article 7 with any individuals who are providing care prior to the individual's assuming responsibility for the children. The operator and individual providing care shall sign and date a statement which attests that this review was completed. This statement shall be kept on file in the home available for review.

(e) An individual who provides care during unplanned absences of the operator, such as medical emergencies, shall be at least 18 years old and submit criminal records check forms as required in 10A NCAC 09 .2702, Paragraph (j). The children of an emergency caregiver shall not be counted in the licensed capacity for the first day of the emergency caregiver's service.

(f) The provisions of G.S. 110-90.2 which exclude persons with certain criminal records or personal habits or behavior which may be harmful to children from operating or being employed in a family child care home are hereby incorporated by reference and shall also apply to any person on the premises with the operator's permission when the children are present. This

exclusion shall not apply to parents or other persons who enter the home only for the purpose of performing parental responsibilities; nor does it include persons who enter the home for brief periods for the purpose of conducting business with the operator and who are not left alone with the children.

(g) The parent of a child enrolled in any family child care home subject to regulation under G.S. 110, Article 7 shall be allowed unlimited access to the home during its operating hours for the purposes of contacting the child or evaluating the home and the care provided by the operator. The parent shall notify the operator of his or her presence immediately upon entering the premises.

(h) An operator licensed to care for children overnight may sleep during the nighttime hours when all the children are asleep, provided:

- (1) The operator and the children in care, excluding the operator's own children, are on ground level; and
- (2) The operator can hear and respond quickly to the children if needed; and
- (3) A battery operated smoke detector or an electrically operated (with a battery backup) smoke detector is located in each room where children are sleeping.

(i) Each operator shall develop and adopt a written plan of care for completing routine tasks (including running errands, meeting family and personal demands, and attending classes) to ensure that routine tasks shall not interfere with the care of children during hours of operation. The plan shall:

- (1) Specify typical times for completing routine tasks and include those times on the written schedule, or specify that routine tasks will not occur during hours of operation;
- (2) Specify the names of any individuals, such as additional caregivers or substitutes, who will be responsible for the care of children when the operator is attending to routine tasks;
- (3) Specify how the operator shall maintain compliance with transportation requirements specified in 10A NCAC 09 .1723 if children are transported;
- (4) Specify how parents will be notified when children accompany the operator off premises for routine tasks not specified on the written schedule;
- (5) Specify any other steps the operator shall take to ensure routine tasks will not interfere with the care of children;
- (6) Be given and explained to parents of children in care on or before the first day the child attends the home. Parents shall sign a statement acknowledging the receipt and explanation of the plan. Parents shall also give written permission for their child to be transported by the operator for specific routine tasks that are included on the written schedule. The acknowledgment and written parental permission shall be retained in the child's record as long as the child is enrolled at

the home and a copy of each document shall be maintained on file for review by Division representatives.

(j) If the operator amends the written plan, the operator shall give written notice of the amendment to parents of all enrolled children at least 30 days before the amended plan is implemented. Each parent shall sign a statement acknowledging the receipt and explanation of the amendment. The operator shall retain the acknowledgement in the child's records as long as the child is enrolled in the home and a copy shall be maintained on file for review by Division representatives.

Authority G.S. 110-85; 110-86(3); 110-88(1); 110-91; 110-99; 110-105; 143B-168.3.

**10A NCAC 09 .1705 HEALTH AND TRAINING
REQUIREMENTS FOR FAMILY CHILD CARE HOME
OPERATORS**

(a) Prior to receiving a license, each family child care home operator shall:

- (1) Complete and keep on file a health questionnaire which attests to the operator's physical and emotional ability to care for children. The Division may require a written statement or medical examination report signed by a licensed physician or other authorized health professional if there is reason to believe that the operator's health may adversely affect the care of the children.
- (2) Obtain written proof that he or she is free of active tuberculosis. The results indicating the individual is free of active tuberculosis shall be obtained within 12 months prior to applying for a license.
- (3) Complete within 12 months prior to applying for a license a basic first aid course that shall address principles for responding to emergencies, and techniques for handling common childhood injuries, accidents and illnesses such as choking, burns, fractures, bites and stings, wounds, scrapes, bruises, cuts and lacerations, poisoning, seizures, bleeding, allergic reactions, eye and nose injuries and sudden changes in body temperature.
- (4) Successfully complete within 12 months prior to applying for a license a course by the American Heart Association or the American Red Cross or other organizations approved by the Division in cardiopulmonary resuscitation (CPR) appropriate for the ages of children in care. Other organizations shall be approved if the Division determines that the courses offered are substantially equivalent to those offered by the American Red Cross. Successfully completed is defined as demonstrating competency, as evaluated by the instructor, in performing CPR. Documentation of successful completion of the course from the American Heart

Association, the American Red Cross, or other organization approved by the Division shall be on file in the home.

(b) After receiving a license, an operator shall:

- (1) Update the health questionnaire referenced in Paragraph (a) of this Rule annually. The Division may require the operator to obtain written proof that he or she is free of active tuberculosis.
- (2) Complete a first aid course as referenced in Paragraph (a) of this Rule. First aid training shall be renewed on or before expiration of the certification or every three years, whichever is less.
- (3) Successfully complete a CPR course as referenced in Paragraph (a) of this Rule. CPR training shall be renewed on or before the expiration of the certification, or every two years, whichever is less.
- (4) If licensed to care for infants ages 12 months and younger, complete ITS-SIDS training within four months of receiving the license, and complete it again every three years from the completion of previous ITS-SIDS training. Completion of ITS-SIDS training may be included once every three years in the number of hours needed to meet the annual in-service training requirement in Paragraph (b)(5) of this Rule.
- (5) Complete 12 clock hours of annual in-service training in the topic areas required by G.S. 110-91(11), except that persons with at least 10 years work experience as a caregiver in a child care arrangement regulated by the Division of Child Development and Early Education shall complete eight clock hours of annual in-service training. Only training which has been approved by the Division as referenced in Rule .0708 of this Chapter shall count toward the required hours of annual in-service training. The operator shall maintain a record of annual in-service training activities in which he or she has participated. The record shall include the subject matter, the topic area in G.S. 110-91(11) covered, the name of the training provider or organization, the date training was provided and the number of hours of training completed. First aid training may be counted no more than once every three years.
- (6) Within six months complete the Emergency Preparedness and Response in Child Care training approved by the Division. Current operators have two years as of the effective date of this Rule to complete the Emergency Preparedness and Response in Child Care training. Verification of completion of the training shall be maintained in the operator's personnel file.

(7) Develop and annually review the Emergency Preparedness and Response Plan upon completion of the Emergency Preparedness and Response in Child Care training to ensure all information is current.

(A) Emergency Preparedness and Response Plans shall include procedures for accounting for all children; a written description for how and when children shall be transported; methods for communicating with parents and appropriate emergency response teams; a description for how children's nutritional and health needs will be met; the relocation and reunification process; emergency telephone numbers; evacuation diagrams showing how the operator, family members, children and any other individuals who may be present will evacuate during an emergency; the date of the last revision of the plan; specific considerations for non-mobile children and children with special needs; and the location of the Ready to Go File as defined in Rule .0607(c)(10) of this Chapter.

(B) The Emergency Preparedness and Response Plan shall be available for review during operating hours.

(C) The Emergency Preparedness and Response Plan must be reviewed at least annually with any additional individual who will be caring for the children for more than six hours a week.

Authority G.S. 110-85; 110-88; 110-91; 143B-168.3.

10A NCAC 09 .1720 SAFETY, MEDICATION, AND SANITATION REQUIREMENTS

(a) To assure the safety of children in care, the operator shall:

- (1) empty firearms of ammunition and keep both in separate, locked storage;
- (2) keep items used for starting fires, such as matches and lighters, out of the children's reach;
- (3) keep all medicines in locked storage;
- (4) keep hazardous cleaning supplies and other items that might be poisonous, e.g., toxic plants, out of reach or in locked storage when children are in care;
- (5) keep first aid supplies in a place accessible to the operator;
- (6) keep tobacco products out of reach or in locked storage when children are in care;

(7) ensure the equipment and toys are in good repair and are developmentally appropriate for the children in care;

(8) have a working telephone within the family child care home. Telephone numbers for the fire department, law enforcement office, emergency medical service, and poison control center shall be posted near the telephone;

(9) have access to a means of transportation that is always available for emergency situations; ~~and~~

(10) be able to recognize common symptoms of ~~illnesses~~ illnesses;

(11) conduct a monthly fire drill; and

(12) conduct "shelter in place drill" or "lockdown drill" every - three months.

(b) The operator may provide care for a mildly ill child who has a Fahrenheit temperature of less than 100 degrees axillary or 101 degrees orally and who remains capable of participating in routine group activities; provided the child does not:

- (1) have the sudden onset of diarrhea characterized by an increased number of bowel movements compared to the child's normal pattern and with increased stool water; or
- (2) have two or more episodes of vomiting within a 12 hour period; or
- (3) have a red eye with white or yellow eye discharge until 24 hours after treatment; or
- (4) have scabies or lice; or
- (5) have known chicken pox or a rash suggestive of chicken pox; or
- (6) have tuberculosis, until a health professional states that the child is not infectious; or
- (7) have strep throat, until 24 hours after treatment has started; or
- (8) have pertussis, until five days after appropriate antibiotic treatment; or
- (9) have hepatitis A virus infection, until one week after onset of illness or jaundice; or
- (10) have impetigo, until 24 hours after treatment; or
- (11) have a physician's or other health professional's written order that the child be separated from other children.

(c) The following provisions apply to the administration of medication in family child care homes:

- (1) No prescription or over-the-counter medication and no topical, non-medical ointment, repellent, lotion, cream or powder shall be administered to any child:
 - (A) without written authorization from the child's parent;
 - (B) without written instructions from the child's parent, physician or other health professional;
 - (C) in any manner not authorized by the child's parent, physician or other health professional;
 - (D) after its expiration date; or

- (E) for non-medical reasons, such as to induce sleep.
 - (2) Prescribed medications:
 - (A) shall be stored in the original containers in which they were dispensed with the pharmacy labels specifying:
 - (i) the child's name;
 - (ii) the name of the medication or the prescription number;
 - (iii) the amount and frequency of dosage;
 - (iv) the name of the prescribing physician or other health professional; and
 - (v) the date the prescription was filled; or
 - (B) if pharmaceutical samples, shall be stored in the manufacturer's original packaging, shall be labeled with the child's name, and shall be accompanied by written instructions specifying:
 - (i) the child's name;
 - (ii) the names of the medication;
 - (iii) the amount and frequency of dosage;
 - (iv) the signature of the prescribing physician or other health professional; and
 - (v) the date the instructions were signed by the physician or other health professional; and
 - (C) shall be administered only to the child for whom they were prescribed.
 - (3) A parent's written authorization for the administration of a prescription medication described in Paragraph (c)(2) of this Rule shall be valid for the length of time the medication is prescribed to be taken.
 - (4) Over-the-counter medications, such as cough syrup, decongestant, acetaminophen, ibuprofen, topical antibiotic cream for abrasions, or medication for intestinal disorders shall be stored in the manufacturer's original packaging on which the child's name is written or labeled and shall be accompanied by written instructions specifying:
 - (A) the child's name;
 - (B) the names of the authorized over-the-counter medication;
 - (C) the amount and frequency of the dosages;
 - (D) the signature of the parent, physician or other health professional; and
 - (E) the date the instructions were signed by the parent, physician or other health professional.
- The permission to administer over-the-counter medications is valid for up to 30 days at a time, except as allowed in Subparagraphs (c)(6), (7), (8), and (9) of this Rule. Over-the-counter medications shall not be administered on an "as needed" basis, other than as allowed in Subparagraphs (c)(6), (7), (8), and (9) of this Rule.
- (5) When questions arise concerning whether any medication should be administered to a child, the caregiver may decline to administer the medication without signed, written dosage instructions from a licensed physician or authorized health professional.
 - (6) A parent may give a caregiver standing authorization for up to six months to administer prescription or over-the-counter medication to a child, when needed, for chronic medical conditions and for allergic reactions. The authorization shall be in writing and shall contain:
 - (A) the child's name;
 - (B) the subject medical conditions or allergic reactions;
 - (C) the names of the authorized over-the-counter medications;
 - (D) the criteria for the administration of the medication;
 - (E) the amount and frequency of the dosages;
 - (F) the manner in which the medication shall be administered;
 - (G) the signature of the parent;
 - (H) the date the authorization was signed by the parent; and
 - (I) the length of time the authorization is valid, if less than six months.
 - (7) A parent may give a caregiver standing authorization for up to 12 months to apply over-the-counter, topical ointments, topical teething ointment or gel, insect repellents, lotions, creams, and powders --- such as sunscreen, diapering creams, baby lotion, and baby powder --- to a child, when needed. The authorization shall be in writing and shall contain:
 - (A) the child's name;
 - (B) the names of the authorized ointments, repellents, lotions, creams, and powders;
 - (C) the criteria for the administration of the ointments, repellents, lotions, creams, and powders;
 - (D) the manner in which the ointments, repellents, lotions, creams, and powders shall be applied;

- (E) the signature of the parent;
 - (F) the date the authorization was signed by the parent; and
 - (G) the length of time the authorization is valid, if less than 12 months.
- (8) A parent may give a caregiver standing authorization to administer a single weight-appropriate dose of acetaminophen to a child in the event the child has a fever and a parent cannot be reached. The authorization shall be in writing and shall contain:
- (A) the child's name;
 - (B) the signature of the parent;
 - (C) the date the authorization was signed by the parent;
 - (D) the date that the authorization ends or a statement that the authorization is valid until withdrawn by the parent in writing.
- (9) A parent may give a caregiver standing authorization to administer an over-the-counter medication as directed by the North Carolina State Health Director or designee, when there is a public health emergency as identified by the North Carolina State Health Director or designee. The authorization shall be in writing, may be valid for as long as the child is enrolled, and shall contain:
- (A) the child's name;
 - (B) the signature of the parent;
 - (C) the date the authorization was signed by the parent; and
 - (D) the date that the authorization ends or a statement that the authorization is valid until withdrawn by the parent in writing.
- (10) Pursuant to G.S. 110-102.1A, a caregiver may administer medication to a child without parental authorization in the event of an emergency medical condition when the child's parent is unavailable, providing the medication is administered with the authorization and in accordance with instructions from a bona fide medical care provider.
- (11) A parent may withdraw his or her written authorization for the administration of medications at any time in writing.
- (12) Any medication remaining after the course of treatment is completed or after authorization is withdrawn shall be returned to the child's parents. Any medication the parent fails to retrieve within 72 hours of completion of treatment, or withdrawal of authorization, shall be discarded.
- (13) Any time prescription or over-the-counter medication is administered by a caregiver to children receiving care, including any time medication is administered in the event of an emergency medical condition without parental authorization as permitted by G.S. 110-102.1A, the child's name, the date, time, amount and type of medication given, and the name and signature of the person administering the medication shall be recorded. This information shall be noted on a medication permission slip, or on a separate form developed by the provider which includes the required information. This information shall be available for review by a representative of the Division during the time period the medication is being administered and for at least six months after the medication is administered. No documentation shall be required when items listed in Subparagraph (c)(7) of this Rule are applied to children.
- (d) To assure the health of children through proper sanitation, the operator shall:
- (1) collect and submit samples of water from each well used for the children's water supply for bacteriological analysis to the local health department or a laboratory certified to analyze drinking water for public water supplies by the North Carolina Division of Laboratory Services every two years. Results of the analysis shall be on file in the home;
 - (2) have sanitary toilet, diaper changing and hand washing facilities. Diaper changing areas shall be separate from food preparation areas;
 - (3) use sanitary diapering procedures. Diapers shall be changed whenever they become soiled or wet. The operator shall:
 - (A) wash his or her hands before, as well as after, diapering each child;
 - (B) ensure the child's hands are washed after diapering the child; and
 - (C) place soiled diapers in a covered, leak proof container which is emptied and cleaned daily;
 - (4) use sanitary procedures when preparing and serving food. The operator shall:
 - (A) wash his or her hands before and after handling food and feeding the children; and
 - (B) ensure the child's hands are washed before and after the child is fed;
 - (5) wash his or her hands, and ensure the child's hands are washed, after toileting or handling bodily fluids.
 - (6) refrigerate all perishable food and beverages. The refrigerator shall be in good repair and maintain a temperature of 45 degrees Fahrenheit or below. A refrigerator thermometer is required to monitor the temperature;
 - (7) date and label all bottles for each individual child, except when there is only one bottle fed child in care;
 - (8) have a house that is free of rodents;

- (9) screen all windows and doors used for ventilation;
- (10) have all household pets vaccinated with up-to-date vaccinations as required by North Carolina law and local ordinances. Rabies vaccinations are required for cats and dogs; and
- (11) store garbage in waterproof containers with tight fitting covers.

(e) The operator shall not force children to use the toilet and the operator shall consider the developmental readiness of each individual child during toilet training.

(f) The operator shall not use tobacco products at any time while children are in care. Smoking or use of tobacco products shall not be permitted indoors while children are in care, or in a vehicle when children are transported.

Authority G.S. 110-88; 110-91(6).

10A NCAC 09 .1721 REQUIREMENTS FOR RECORDS

(a) The operator shall maintain the following health records for each child who attends on a regular basis, including his or her own preschool child(ren):

- (1) a copy of the child's health assessment as required by G.S. 110-91(1);
- (2) a copy of the child's immunization record;
- (3) a health and emergency information form provided by the Division that is completed and signed by a child's parent. The completed form shall be on file the first day the child attends. An operator may use another form other than the one provided by the Division, as long as the form includes the following information:
 - (A) the child's name, address, and date of birth;
 - (B) the names of individuals to whom the child may be released;
 - (C) the general status of the child's health;
 - (D) any allergies or restrictions on the child's participation in activities with instructions from the child's parent or physician;
 - (E) the names and phone numbers of persons to be contacted in an emergency situation;
 - (F) the name and phone number of the child's physician and preferred hospital;
 - (G) authorization for the operator to seek emergency medical care in the parent's absence; and
- (4) when medication is administered, authorization for the operator to administer the specific medication according to the parent's or physician's instructions.

(b) The operator shall complete and maintain other records which include:

- (1) documentation of the operator's Emergency Preparedness and Response Plan procedures in emergency situations, on a form which is provided by the Division;
- (2) documentation that monthly fire drills are practiced. The documentation shall include the date each drill is held, the time of day, the length of time taken to evacuate the home, and the operator's signature;
- (3) incident reports that are completed each time a child receives medical treatment by a physician, nurse, physician's assistant, nurse practitioner, community clinic, or local health department, as a result of an incident occurring while the child is in the family child care home. Each incident shall be reported on a form provided by the Division, signed by the operator and the parent, and maintained in the child's file. A copy shall be mailed to a representative of the Division within seven calendar days after the incident occurs;
- (4) an incident log which is filled out any time an incident report is completed. This log shall be cumulative and maintained in a separate file and shall be available for review by a representative of the Division. This log shall be completed on a form supplied by the Division;
- (5) documentation that a monthly check for hazards on the outdoor play area is completed. This form shall be supplied by the Division and shall be maintained in the family child care home for review by a representative of the Division; ~~and~~
- (6) ~~Accurate~~ accurate daily attendance records for all children in care, including the operator's own preschool children. The attendance record shall indicate the date and time of arrival and departure for each ~~child~~ child; and
- (7) documentation of lockdown or shelter-in-place drills giving the date each drill is held, the time of day, the length of time taken to get into designated locations and the signature of the person who conducted the drill.

(c) Written records shall be maintained as follows:

- (1) All children's records as required in this Chapter, except medication permission slips as required in Rule .1720(c)(13) of this Section, must be kept on file one year from the date the child is no longer enrolled.
- (2) Additional caregiver records as required in this Chapter shall be maintained on file one year from the employee's last date of employment.
- (3) Current program records as required in this Chapter shall be maintained on file for as long as the license remains valid. Prior versions shall be maintained based on the time frame in the following charts:

- (A) A minimum of 30 days from the revision or replacement date:

Record	Rule
Daily Schedule	.1718(13) <u>.1718(7)</u>
Infant Feeding Schedule	.1718(6) <u>.1706(f)</u>
SIDS Sleep Chart/Visual Check	.1724(8)

- (B) A minimum of one year from the revision or replacement date:

Record	Rule
Attendance	.1721 (b)(6)
Emergency Numbers	.1720(a)(8)
Emergency Preparedness and Response Plan Procedures Form	.1721(b)(1)
Field Trip/Transportation Permission	.1723(1)
Fire Drill Log	.1721(b)(2)
<u>Lockdown or Shelter-in-Place Drill Log</u>	<u>.1721(b)(7)</u>
Incident Log	.1721(b)(4)
Playground Inspection	.1721(b)(5)
Pet Vaccinations	.1720(d)(10)

- (4) Well-water analysis, pool inspection and inspections for local ordinances as referenced in Rules .1720(d)(1), .1719(7), and .1702(d) of this Section shall remain on file at the family child care home for as long as the license remains valid.
- (5) Records may be maintained in a paper format or electronically, except that records that require a signature of a staff person or parent shall be maintained in a paper format.
- (6) All records required in this Chapter shall be available for review by a representative of the Division.

Authority G.S. 110-85; 110-88; 110-91(1),(9).

10A NCAC 09 .1723 TRANSPORTATION REQUIREMENTS

To assure the safety of children whenever they are transported, the operator, or any other transportation provider, shall:

- (1) have written permission from a parent to transport his or her child and notify the parent when and where the child is to be transported, and who the transportation provider will be.

- (2) ensure that all children regardless of age or location in the vehicle shall be restrained by individual seat belts or child restraint devices. Only one person shall occupy each seat belt or child restraint device.
- (3) be at least 18 years old, and have a valid driver's license of the type required under the North Carolina Motor Vehicle Law for the vehicle being driven, or comparable license from the state in which the driver resides, and no convictions of Driving While Impaired (DWI), or any other impaired driving offense, within the last three years.
- (4) ensure that each child is seated in a manufacturer's designated area.
- (5) ensure that a child shall not occupy the front seat if the vehicle has an operational passenger side airbag.
- (6) never leave children in a vehicle unattended by an adult.
- (7) have emergency and identification information about each child in the vehicle whenever children are being transported.
- (8) not use a cellular telephone or other functioning two-way voice communication device except in the case of an emergency and only when the vehicle is parked in a safe location.

Authority G.S. 110-91; 110-91(13).

SECTION .2300 - FORMS

10A NCAC 09 .2318 RETENTION OF FORMS AND REPORTS BY A CHILD CARE OPERATOR

Each child care center operator must retain records as follows:

- (1) All children's records as required in this Chapter, except the Medication Permission Slip as referenced in Rule .0803(13) of this Chapter, shall be maintained on file for at least one year from the date the child is no longer enrolled in the center.
- (2) All personnel records as required in this Chapter shall be maintained on file at least one year from the date the employee is no longer employed.
- (3) Current program records shall be maintained on file for as long as the license remains valid. Prior versions shall be maintained based on the time frame in the following charts:
- (a) A minimum of 30 days from the revision or replacement date:

Record	Rule
Activity Plan	.0508 (a) <u>.0508(d)</u>
Allergy Postings	.0901(f)
Feeding Schedule	.0902 <u>.0902(a)</u>
Menu	.0901(b)

SIDS Sleep Chart/Visual Check	.0606(a)(7)
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- (b) A minimum of one year from the revision or replacement date:

Record	Rule
Attendance	.0302(d)(3)
Daily Schedule	.0508(a)
Emergency Medical Care Plan	<u>.0302(c)(3) and</u> .0802(a)
<u>Lockdown or Shelter-in-Place Drill Log</u>	<u>.0302(d)(8)</u>
<u>Emergency Preparedness and Response Plan</u>	<u>.0607(b);</u>
Field Trip/Transportation Permission	.2507(a) and .0512(b)(3)
Fire Drill Log	.0302(d)(4) <u>.0302(d)(5)</u>
Fire Evacuation plan <u>Procedures for non -mobile children in Centers not meeting institutional building code</u>	.0604(e) <u>.0604(p)</u>
Incident Log Playground Inspection	.0802(e) .0604(q)
Playground Inspection	.0604(q) <u>.0605(n)</u>
Safe Arrival and Departure Procedures	.1003(b)

- (4) All building, fire, sanitation and pool inspections as referenced in G.S. 110-91, and Rules .0302 and .1403 of this Chapter shall remain on file at the center for as long as the license remains valid.
- (5) Records may be maintained in a paper format or electronically, except that records that require a signature of a staff person or parent shall be maintained in a paper format.
- (6) All records required in this Chapter shall be available for review by a representative of the Division.

Authority G.S. 110-85; 110-91(9); 143B-168.3.

SECTION .2400 - CHILD CARE FOR MILDLY ILL CHILDREN

10A NCAC 09 .2404 INCLUSION/EXCLUSION REQUIREMENTS

(a) Centers may enroll mildly ill children over three months of age who meet the following inclusion criteria:

- (1) Centers that enroll children with Level One symptoms may admit children as follows:
- (A) children who meet the guidelines for attendance in 10A NCAC 09 .0804, except that they are unable to participate fully in routine group

activities and are in need of increased rest time or less vigorous activities; or children with fever controlled with medication of 102° or less orally, or 101° or less axillary;

- (2) Centers that enroll children with Level Two symptoms may admit children with the following:
- (A) ~~Inability~~ inability to participate in much group activity while requiring extra sleep, clear liquids, light meals and passive activities such as stories, videos or music as determined by a health care professional; or
- (B) ~~Fever~~ fever controlled with medication of 103° maximum orally, or 102° maximum axillary, ~~or 104° maximum rectally~~; with a health care professional's written screening; or
- (C) ~~Vomiting~~ vomiting fewer than three times in any eight hour period, without signs of dehydration; or
- (D) ~~Diarrhea~~ diarrhea without signs of dehydration and without blood or mucus in the stool, fewer than five times in any eight hour period; or
- (E) ~~With~~ with written approval from a child's physician and preadmission screening by an on-site health care professional prior to the current day's attendance unless excluded by Subparagraphs (b)(1), (2), (3), (4), (6), or (7) of this Rule.

(b) Any child exhibiting the following symptoms shall be excluded from any care:

- (1) ~~Temperature~~ temperature unresponsive to control measures; or
- (2) ~~Undiagnosed~~ undiagnosed or unidentified rash; or
- (3) ~~Respiratory~~ respiratory distress as evidenced by an increased respiratory rate and unresponsiveness to treatment, flaring nostrils, labored breathing or intercostal retractions; or
- (4) ~~Major~~ major change in condition requiring further care or evaluation; or
- (5) ~~Contagious~~ contagious diseases required to be reported to the health department, except as provided in Part (a)(2)(E) of this Rule; ~~or~~
- (6) ~~Other~~ other conditions as determined by a health care professional or onsite administrator; or
- (7) ~~Sluggish~~ sluggish mental status.

(c) Children less than three months of age shall not be in care.
~~(d)(c)~~ Once admitted, children shall be assessed and evaluated at least every four hours or more frequently if warranted based on medication administration or medical treatment to determine if symptoms continue to meet inclusion criteria.

Authority G.S. 110-88(11); 143B-168.3.

SECTION .2800 – VOLUNTARY RATED LICENSES

10A NCAC 09 .2829 QUALITY POINT OPTIONS

Operators may earn one additional quality point as follows:

- (1) Education options:
 - (a) Completing additional education coursework as follows:
 - (i) An Infant and Toddler Certificate, by 75 percent of infant and toddler teachers,
 - (ii) An A.A.S. or higher in early childhood education or child development by 75 percent of teachers,
 - (iii) A BA or BS or higher in early childhood education or child development by 75 percent of lead teachers,
 - (iv) An A.A.S. or higher in early childhood education or child development by all lead teachers,
 - (v) A North Carolina School Age Care Credential or have completed six semester hours in school-age coursework by 75 percent of group leaders, or
 - (vi) An Infant and Toddler Certificate or has a BA or BS or higher in early childhood education or child development by a family child care home provider;
 - (b) Completing 20 additional annual in-service training hours for full-time lead teachers and teachers, and staff working part-time completing additional hours based on the chart in Rule .0707(c) of this Chapter;
 - (c) Completing 20 additional annual in-service training hours for family child care home providers;
 - (d) 75 percent of lead teachers and teachers having at least 10 years verifiable early childhood work experience;
 - (e) All lead teachers and teachers having at least five years verifiable early childhood work experience employed by no more than two different employers;
 - (f) Having a combined turnover rate of 20 percent or less for the administrator, program coordinator, lead teachers, teachers and group leader positions over the last 12 months if the program has earned at least four points in education;
 - (g) In a stand alone school age program, 75 percent of group leaders having at least five years verifiable school-age work experience employed in no more than two different school-age settings; or
- (2) Programmatic options:
 - (a) Using age or developmentally appropriate curriculum that addresses five domains of development. This programmatic option is not available to facilities that are required to use an approved curriculum in accordance with Rule .2802(d) of this Section;
 - (b) Having group sizes decreased by at least one child per age group from the seven point level as described in Rule .2818(c) of this Section;
 - (c) Having staff/child ratios decreased by at least one child per age group from the seven point level as described in Rule .2818(c) of this Section;
 - (d) Meeting at least two of the following three programs standards:
 - (i) Having enhanced policies which include the following topics: ~~emergency evacuation plan,~~ field trip policy, staff development plan, medication administration, enhanced discipline policy, and health rules for attendance;
 - (ii) Having a staff benefits package that offers at least four of the following six benefits: paid leave for professional development, paid planning time, vacation, sick time, retirement or health insurance; or
 - (iii) Having evidence of an infrastructure of parent involvement that includes at least two of the following: parent newsletters offered at least quarterly, parent advisory board, periodic conferences for all children, or parent information meetings offered at least quarterly;
 - (e) Completing a 30 hour or longer business training course by a family child care home provider;
 - (f) Completing a business training course and a wage and hour training by the center administrator that is at least 30 hours total;

- (g) Restricting enrollment to four preschool children in a family child care home; or
- (h) Reducing infant capacity by at least one child from the seven point level for a family child care home as described in Rule ~~2821(g)(3)~~ 2828(g)(3) of this Section.

Authority G.S. 110-85; 110-88(7); 110-90(4); 143B-168.3; S.L. 2011-145, s. 10.7(b).

TITLE 21 – OCCUPATIONAL LICENSING BOARDS AND COMMISSIONS

CHAPTER 36 – BOARD OF NURSING

Notice is hereby given in accordance with G.S. 150B-21.2 that the Board of Nursing intends to amend the rule cited as 21 NCAC 36. 0228.

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):
<http://www.ncbon.com>

Proposed Effective Date: August 1, 2014

Public Hearing:

Date: May 30, 2014

Time: 1:00 p.m.

Location: NC Board of Nursing, 4516 Lake Boone Trail, Raleigh, NC 27607

Reason for Proposed Action: *The CNS has not been regulated in North Carolina except for voluntary recognition. The Consensus Model for Advanced Practice Registered Nurse (APRN) Regulation: Licensure, Accreditation, Certification and Education published in 2008 defined four roles of APRN practice, including the practice of Clinical Nurse Specialists (CNS). The National Council of State Boards of Nursing (NCSBN) added an APRN section in its Model Act and Rules consistent with information in the Consensus Model. Proposed amendments to 21 NCAC 36. 0228 Clinical Nurse Specialist Practice will clarify the qualifications and scope of the CNS.*

Comments may be submitted to: Angela H. Ellis, APA Coordinator, NC Board of Nursing, PO Box 2129, Raleigh, NC 27602-2129, Phone (919) 782-3211 X259, Fax (919) 781-9461, Email angela@ncbon.com

Comment period ends: June 2, 2014

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
- ☐ Substantial economic impact (≥\$1,000,000)
- ☒ No fiscal note required by G.S. 150B-21.4

SECTION .0200 – LICENSURE

21 NCAC 36 .0228 CLINICAL NURSE SPECIALIST PRACTICE

(a) ~~A~~ Effective March 1, 2015, only a registered nurse who meets the qualifications as outlined in Paragraph (b) of this Rule ~~may shall~~ be recognized by the Board as a clinical nurse specialist, ~~and to perform advanced practice registered nursing activities at an advanced skill level as outlined in Paragraph (c)(f) of this Rule.~~

(b) ~~In order to be recognized as a Clinical Nurse Specialist, the~~ The Board of Nursing shall require recognize an applicant to meet the following qualifications: who:

- (1) has an unrestricted license to practice as a registered nurse in North Carolina or a party state;
- (2) has an unrestricted previous approval, registration or license as a clinical nurse specialist if previously approved, registered, or licensed as a clinical nurse specialist in another state, territory, or possession of the United States;
- ~~(2)(3)~~ has successfully completed a master's or higher degree program consisting of a minimum of 500 hours of clinical experience in the clinical nursing specialty as defined in 21 NCAC 36 .0120(41) and consistent with G.S. 90-171.21(d)(4). For a dual track graduate program, if less than 500 hours per track, a requirement that there must be documentation of any crossover which would justify less than an additional 500 hours for the second track; and accredited by a nursing accrediting body approved by the U.S. Secretary of Education or the Council for Higher Education Accreditation; and

- (4) either:
~~(3)(A)~~ has current certification in the as a clinical nursing specialty nurse specialist from a national credentialing body approved by the Board of Nursing, as defined in Paragraph (e)(g) of this Rule and 21 NCAC 36.0120(26); 36.0120(26); or
 (B) if no clinical nurse specialist certification is available in the specialty, meets requirements determined by the Board to be equivalent to national certification. The Board shall determine equivalence based on consideration of an official transcript and course descriptions validating Subparagraph (b)(3) of this Rule, current curriculum vitae, work history and professional recommendations indicating evidence of at least 1,000 hours of clinical nurse specialist practice, and documentation of certificates indicating 75 contact hours of continuing education applicable to clinical nurse specialist practice during the previous five years.

(c) An applicant certified as a clinical nurse specialist by a national credentialing body prior to January 1, 2007 and who has maintained that certification and active clinical nurse specialist practice, and holds a master's or higher degree in nursing or a related field shall be recognized by the Board as a clinical nurse specialist.

(d) New graduates seeking first-time clinical nurse specialist recognition in North Carolina shall hold a Master's, post-master's or higher degree from a clinical nurse specialist program accredited by a nursing accrediting body approved by the U.S. Secretary of Education or the Council for Higher Education Accreditation as acceptable by the Board, and meets all requirements in Subparagraphs (b)(1),(2),(3) and Part (b)(4)(A) of this Rule.

(e) A clinical nurse specialist seeking Board of Nursing recognition who has not practiced as a clinical nurse specialist in more than five years shall complete a clinical nurse specialist refresher course approved by the Board of Nursing in accordance with 21 NCAC 36.0220(o) and (p) and consisting of common conditions and their management directly related to the clinical nurse specialist's area of education and certification. A clinical nurse specialist refresher course participant shall be granted clinical nurse specialist recognition that is limited to clinical activities required by the refresher course.

(e)(f) The scope of practice of a Clinical-clinical nurse specialist scope of practice incorporates the basic components of nursing practice as defined in Rule .0224 of this Section as well as the understanding and application of nursing principles at an advanced practice registered nurse level in his/her the area of clinical nursing specialization in which the clinical nurse specialist is educationally prepared and for which competency has been maintained which includes:

- (1) assessing clients' health status, synthesizing and analyzing multiple sources of data, and identifying alternative possibilities as to the nature of a healthcare problem;
 - (2) diagnosing and managing clients' acute and chronic health problems within a an advanced practice nursing framework;
 - (3) assessing for and monitoring the usage and effect of pharmacologic agents within an advanced practice nursing framework;
 - ~~(3)(4)~~ formulating strategies to promote wellness and prevent illness;
 - ~~(4)(5)~~ prescribing and implementing therapeutic and corrective nursing measures; non-pharmacologic nursing interventions;
 - ~~(5)(6)~~ planning for situations beyond the clinical nurse specialist's expertise, and consulting with or referring clients to other health care providers as appropriate;
 - ~~(6)(7)~~ promoting and practicing in collegial and collaborative relationships with clients, families, other health care professionals and individuals whose decisions influence the health of individual clients, families and communities;
 - ~~(7)(8)~~ initiating, establishing and utilizing measures to evaluate health care outcomes and modify nursing practice decisions;
 - ~~(8)(9)~~ assuming leadership for the application of research findings for the improvement of health care outcomes; and
 - ~~(9)(10)~~ integrating education, consultation, management, leadership and research into the advanced clinical nursing nurse specialist role.
- ~~(d)(g)~~ The A registered nurse who seeks seeking recognition by the Board as a clinical nurse specialist shall:
- (1) complete the appropriate application, which shall include:
 - (A) evidence of the appropriate masters, post-master's certificate or doctoral degree as set out in Subparagraph (b)(3) of this Rule; and and, either
 - (B) evidence of current certification in a clinical nursing specialty from a national credentialing body as set out in Part (b)(3) (b)(4)(A) of this Rule; or
 - (C) meet requirements as set out in Part (b)(4)(B) of this Rule.
 - (2) submit any additional information necessary to evaluate the application as requested by the Board.
 - ~~(2)(3)~~ submit a processing fee of twenty-five dollars (\$25.00) to cover the costs of duplicating and distributing the application materials; and
 - (4) renew the recognition every two years at the time of registered nurse renewal; and
 - (5) either:

~~(3)~~(A) submit evidence of initial certification and re-certification by a national credentialing body at the time such occurs in order to maintain Board of Nursing recognition consistent with Paragraphs (b) and ~~(e)~~ (h) of this ~~Rule. Rule; or~~

(B) if subject to Part (b)(4)(B) of this Rule, submit evidence of at least 1,000 hours of practice and 75 contact hours of continuing education every five years.

~~(e)~~(h) The Board of Nursing ~~may~~ shall approve those national credentialing bodies offering certification and recertification in a clinical nursing specialty which have established the following minimum requirements:

- (1) an unencumbered registered nurse license; and
- (2) certification as a clinical nurse specialist is limited to masters, post-master's certificate or ~~doctoral~~ doctorally prepared ~~applicant~~ applicant. effective January 1, 2010.

Authority G.S. 90-171.20(4); 90-171.20(7); 90-171.21(d)(4); 90-171.23(b); 90-171.27(b); 90-171.42(b).

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 February 20, 2014.

**REGISTER CITATION TO THE
NOTICE OF TEXT****NC RURAL ELECTRIFICATION AUTHORITY**

<u>Address of the NCREA</u>	04	NCAC	08	.0102*	28:04 NCR
<u>Meetings</u>	04	NCAC	08	.0107*	28:04 NCR
<u>Notification of Meetings</u>	04	NCAC	08	.0108	28:04 NCR
<u>Correspondence and Communications</u>	04	NCAC	08	.0110	28:04 NCR
<u>Board Proceedings</u>	04	NCAC	08	.0111	28:04 NCR
<u>Member Visitation</u>	04	NCAC	08	.0112	28:04 NCR
<u>Definitions</u>	04	NCAC	08	.0201*	28:04 NCR
<u>Loan Applications and Categories</u>	04	NCAC	08	.0202*	28:04 NCR
<u>Loan Categories</u>	04	NCAC	08	.0203	28:04 NCR
<u>Documents Required for Loan</u>	04	NCAC	08	.0204*	28:04 NCR
<u>Presentation of Documents</u>	04	NCAC	08	.0205	28:04 NCR
<u>Operating Rules and Regulations</u>	04	NCAC	08	.0206*	28:04 NCR
<u>Operating Rules and Regulations</u>	04	NCAC	08	.0207	28:04 NCR
<u>Bylaws</u>	04	NCAC	08	.0208	28:04 NCR
<u>Rate Schedules</u>	04	NCAC	08	.0209	28:04 NCR
<u>Complaints</u>	04	NCAC	08	.0210*	28:04 NCR
<u>Data Sheets for Progress Reports</u>	04	NCAC	08	.0211	28:04 NCR
<u>Operating Budget</u>	04	NCAC	08	.0212	28:04 NCR
<u>Definitions</u>	04	NCAC	08	.0301*	28:04 NCR
<u>Loan Applications</u>	04	NCAC	08	.0302*	28:04 NCR
<u>Loan Categories</u>	04	NCAC	08	.0303	28:04 NCR
<u>Presentation of Documents</u>	04	NCAC	08	.0305	28:04 NCR
<u>Operating Rules and Regulations</u>	04	NCAC	08	.0306*	28:04 NCR
<u>Operating Rules and Regulations</u>	04	NCAC	08	.0307	28:04 NCR
<u>Bylaws</u>	04	NCAC	08	.0308	28:04 NCR
<u>Tariffs</u>	04	NCAC	08	.0309	28:04 NCR
<u>Complaints</u>	04	NCAC	08	.0310	28:04 NCR
<u>Data Sheets for Progress Reports</u>	04	NCAC	08	.0311	28:04 NCR
<u>Operating Budget</u>	04	NCAC	08	.0312	28:04 NCR
<u>Petitions for Rule-Making Hearings</u>	04	NCAC	08	.0401*	28:04 NCR
<u>Declaratory Rulings</u>	04	NCAC	08	.0404*	28:04 NCR

CHILD CARE COMMISSION

<u>Application for a License for a Child Care Center</u>	10A	NCAC	09	.0302*	27:23 NCR
<u>Application for a License for a Family Child Care Home</u>	10A	NCAC	09	.1702*	27:23 NCR

APPROVED RULES

<u>General Safety Requirements</u>	10A	NCAC	09	.2506*	27:23 NCR
<u>Scope</u>	10A	NCAC	09	.2701*	27:23 NCR
<u>Definitions</u>	10A	NCAC	09	.2702*	27:23 NCR
<u>Criminal Record Check Requirements for Child Care Providers</u>	10A	NCAC	09	.2703*	27:23 NCR
<u>Criminal Record Check Requirements for Nonlicensed Home P...</u>	10A	NCAC	09	.2704*	27:23 NCR
<u>Staff Qualifications</u>	10A	NCAC	09	.2903*	27:23 NCR

SHERIFFS EDUCATION AND TRAINING STANDARDS COMMISSION

<u>Military and Military Spouse Transferees</u>	12	NCAC	10B	.1901*	28:07 NCR
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PHARMACY, BOARD OF

<u>Reports from the Controlled Substances Reporting System</u>	21	NCAC	46	.3501*	28:10 NCR
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PLUMBING, HEATING AND FIRE SPRINKLER CONTRACTORS, EXAMINERS OF BOARD OF

<u>Applications: Issuance of License</u>	21	NCAC	50	.0306*	28:10 NCR
<u>Limited Plumbing Contractor License</u>	21	NCAC	50	.0518*	28:10 NCR
<u>License Fees</u>	21	NCAC	50	.1102*	28:10 NCR

SPEECH AND LANGUAGE PATHOLOGISTS AND AUDIOLOGISTS, BOARD OF EXAMINERS FOR

<u>Supervision of Professional Experience</u>	21	NCAC	64	.0206*	28:08 NCR
<u>Remote Location Telepractice</u>	21	NCAC	64	.0219*	28:08 NCR
<u>Good Moral Conduct</u>	21	NCAC	64	.0307*	28:08 NCR

TITLE 04 – DEPARTMENT OF COMMERCE**04 NCAC 08 .0102 ADDRESS OF THE AUTHORITY**

(a) The office of the Authority is located in Raleigh, North Carolina at 120 Penmarc Drive, Suite 104 and the mailing address is 4321 Mail Service Center, Raleigh, North Carolina 27699-4321.

(b) The website address for the Authority is www.ncrea.net.

(c) All correspondence shall be addressed to the attention of the Administrator or to the Chairman of the Authority. The office is open to the public Monday through Friday during the normal business hours of 8:00 a.m. to 5:00 p.m. and is closed on all state holidays.

*History Note: Authority G.S. 117-1;
Eff. February 1, 1976;
Amended Eff. March 1, 2014.*

04 NCAC 08 .0107 MEETINGS

(a) The Authority shall not meet more than 12 times per year. The meetings will be held at the office, offsite, or via conference call.

(b) The Administrator shall send a notice of the date and location of the meeting to all Authority Board members, cooperatives and interested parties, which include the telephone coalition, the North Carolina Electric Membership Corporation, and members of the USDA, four weeks prior to the meeting.

(c) Anyone with a matter to present to the Board shall ensure the Authority receives all pertinent documents three weeks prior to the meeting where the matter will be presented to the Board.

(d) A copy of public documents maintained by this office is available to the general public at actual cost.

*History Note: Authority G.S. 117-4; 117-5; 150B-19(5)b;
Eff. February 1, 1976;
Amended Eff. March 1, 2014.*

04 NCAC 08 .0108 NOTIFICATION OF MEETINGS

*History Note: Authority G.S. 117-5;
Eff. February 1, 1976;
Repealed Eff. March 1, 2014.*

**04 NCAC 08 .0110 CORRESPONDENCE AND
COMMUNICATION**
04 NCAC 08 .0111 BOARD PROCEEDINGS
04 NCAC 08 .0112 MEMBER VISITATION

History Note: Authority G.S. 117-2(12);
Eff. February 1, 1976;
Repealed Eff. March 1, 2014.

04 NCAC 08 .0201 DEFINITIONS

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

- (1) "Domestic corporation" means an electric membership corporation granted privilege by the State of North Carolina under Chapter 117 of the General Statutes to render its service to its members only in the territory assigned to it by the Authority.
- (2) "Domesticated corporation" means a foreign electric membership corporation created under G.S. 117 in the State of North Carolina to serve members within a defined area whose main charter is in another state.

History Note: Authority G.S. 117-2; 117-9; 117-28;
Eff. February 1, 1976;
Amended Eff. March 1, 2014.

**04 NCAC 08 .0202 LOAN APPLICATIONS AND
CATEGORIES**

(a) All EMCs, both domestic and domesticated, shall petition the Authority to apply for any funds in the form of grants or loans issued from any agency of the United States Government for use in the State. The EMC shall send all loan documents to the Administrator three weeks prior to the Board meeting in accordance with Rule .0107 of this Chapter.

(b) Domesticated corporations shall include only the funds for use in this State in its petition for the loan or grant.

(c) A checklist for Rural Utility Service (RUS) loans and Rural Economic Development Loans and Grants (REDLG) may be found on the Authority's website.

History Note: Authority G.S. 117-26; 117-28;
Eff. February 1, 1976;
Amended Eff. March 1, 2014.

04 NCAC 08 .0203 LOAN CATEGORIES
**04 NCAC 08 .0204 DOCUMENTS REQUIRED FOR
LOAN APPLICATIONS**
**04 NCAC 08 .0205 PRESENTATION OF
DOCUMENTS**

History Note: Authority G.S. 117-2(10); 117-2(11); 117-26;
Eff. February 1, 1976;
Repealed Eff. March 1, 2014.

**04 NCAC 08 .0206 OPERATING RULES AND
REGULATIONS**

The EMCs shall provide the following information to the Authority:

- (1) A copy of the Financial and Statistical Report (RUS Form 7) and Annual Supplement to Financial and Statistical Report (RUS Form 7a) for periods ending December 31 and June 30 of each year. These forms can be found on the USDA's website at http://www.rurdev.usda.gov/UEP_Support_DCS.html and can be accessed free of charge.
- (2) A copy of the EMC's current operating rules and regulations. EMCs shall file copies of revised rules and regulations within 30 days of revision.
- (3) A copy of the current EMC bylaws. Changes to the bylaws must be filed within 30 days of the revision.
- (4) A copy of the current EMC rate schedules. Changes to the rate schedules must be filed within 30 days of the revision.
- (5) An annual data sheet showing growth trends in miles of line, facilities and consumers served.
- (6) Each EMC is required to provide a current operating budget report to the Authority at the time of a loan application.

History Note: Authority G.S. 117-2(12); 117-26;
Eff. February 1, 1976;
Amended Eff. March 1, 2014.

**04 NCAC 08 .0207 OPERATING RULES AND
REGULATIONS**
04 NCAC 08 .0208 BYLAWS
04 NCAC 08 .0209 RATE SCHEDULES
04 NCAC 08 .0210 COMPLAINTS
**04 NCAC 08 .0211 DATA SHEETS FOR PROGRESS
REPORTS**
04 NCAC 08 .0212 OPERATING BUDGET

History Note: Authority G.S. 117-2(11); 117-2(12);
Eff. February 1, 1976;
Repealed Eff. March 1, 2014.

04 NCAC 08 .0301 DEFINITIONS

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

- (1) "Commercial Mobile Radio Service Provider (CMRS)" means a carrier whose wireless network is connected to the public switched telephone network.
- (2) "Competing Local Provider (CLP)" means a telephone company that competes with the already established local telephone company by providing its own network and switching.
- (3) "Domestic corporation" means a telephone membership corporation (TMC) established in the State by G.S. 117 to render its services to its members only in the territory assigned to it by the Authority.
- (4) "Domesticated corporation" means a foreign TMC created under G.S. 117 to serve

- members within a defined area in the State whose main charter is in another state.
- (5) "Interconnection Agreement" means the negotiation of agreements and subsequent amendments between requesting telecommunications carriers (such as CLPs or CMRS providers) and TMCs for interconnection services or network elements pursuant to Section 251 of the Act.
- (6) "Tariff" means a schedule of charges imposed on members of the TMC by the TMCs.

History Note: Authority G.S. 117-2(12); 117-28;
47 CFR 20.3; 47 U.S.C. 251; 47 U.S.C. 252;
Eff. February 1, 1976;
Amended Eff. March 1, 2014.

04 NCAC 08 .0302 LOAN APPLICATIONS

- (a) All TMCs shall petition the Authority to apply for any funds in the form of grants or loans issued from any agency of the United States government for use in the State.
- (b) The TMC shall send all loan documents to the Administrator three weeks prior to the Board meeting in accordance with Rule .0107 of this Chapter.

History Note: Authority G.S. 117-2(11);
Eff. February 1, 1976;
Amended Eff. March 1, 2014.

04 NCAC 08 .0303 LOAN CATEGORIES

History Note: Authority G.S. 117-2(11);
Eff. February 1, 1976;
Repealed Eff. March 1, 2014.

04 NCAC 08 .0305 PRESENTATION OF DOCUMENTS

History Note: Authority G.S. 117-2(11);
Eff. February 1, 1976;
Repealed Eff. March 1, 2014.

04 NCAC 08 .0306 REQUIRED DISCLOSURES

The TMCs shall provide the following information to the Authority:

- (1) A copy of the Financial and Statistical Report for Telephone Borrowers (RUS Form 479), the Annual Supplement to the December 31 Financial and Statistical Report (RUS Form 479a) and Employment Data (RUS Form 15). These forms can be found on the USDA's website at http://www.rurdev.usda.gov/UEP_Support_DCS.html and can be accessed at no charge. This information shall be provided to the Authority by December 31st and June 30th of each year and is used when reviewing loan and grant requests.

- (2) A copy of the current TMC bylaws. Changes to the bylaws must be filed within 30 days of the revision.
- (3) A copy of the current TMC tariffs. Changes to the tariffs must be filed within 30 days of the revision.
- (4) Each TMC shall provide all negotiated interconnection agreements and their amendments to the Authority for review and approval in accordance with 47 U.S.C. 252.

History Note: Authority G.S. 117-2(11); 117-31;
47 U.S.C. 252;
Eff. February 1, 1976;
Amended Eff. March 1, 2014.

04 NCAC 08 .0307 REGULATIONS

04 NCAC 08 .0308

04 NCAC 08 .0309

04 NCAC 08 .0310

04 NCAC 08 .0311

REPORTS

04 NCAC 08 .0312

OPERATING RULES AND

BYLAWS

TARIFFS

COMPLAINTS

DATA SHEETS FOR PROGRESS

OPERATING BUDGET

History Note: Authority G.S. 117-2(11); 117-2(12);
Eff. February 1, 1976;
Repealed Eff. March 1, 2014.

04 NCAC 08 .0401 PETITIONS FOR RULE-MAKING HEARINGS

(a) Any person wishing to submit a petition requesting the adoption, amendment, or repeal of a rule by the Authority shall address the petition to: Administrator, North Carolina Rural Electrification Authority, 4321 Mail Service Center, Raleigh, North Carolina 27699-4321.

(b) The petition shall contain the following information:

- (1) a draft of the proposed rule;
- (2) effect on the existing rules and practices;
- (3) the name(s) and address(es) of petitioner(s); and
- (4) the date.

(c) The Authority shall determine within 120 days of submission whether the public interest will be served by granting the request. The Authority will consider all the contents of the submitted petition, plus any additional information it deems relevant.

(d) If the decision is to deny the petition, the Administrator shall notify the petitioner in writing, stating the reasons therefor. If the decision is to grant the petition, the Authority shall initiate a rule-making proceeding as required by G.S. 150B.

(e) Upon a determination to hold a rule-making proceeding, either in response to a petition or otherwise, the Authority shall follow the procedures in G.S. 150B.

History Note: Authority G.S. 117-2(12); 150B-20;
Eff. February 1, 1976;
Amended Eff. March 1, 2014.

04 NCAC 08 .0404 DECLARATORY RULINGS

(a) Any person aggrieved by a statute administered by a rule of the Authority may request a declaratory ruling for the following reasons:

- (1) to determine the validity of a rule;
- (2) to determine the applicability to a given set of facts of a statute, rule or order administered by the agency; or
- (3) to resolve a conflict or inconsistency within the agency regarding interpretation of a law of rule adopted by the agency.

(b) All requests for declaratory rulings shall be written and mailed to: Administrator, North Carolina Rural Electrification Authority, 4321 Mail Service Center, Raleigh, North Carolina 27699-4321.

(c) All requests for a declaratory ruling must include the following information:

- (1) the name and address of petitioner;
- (2) the statute, rule or order to which the petition relates;
- (3) the concise statement of the manner in which petitioner is aggrieved by the statute, rule or order or its potential application to him or her;
- (4) a statement of whether an oral hearing is desired, and if so the reasons for such an oral hearing; and
- (5) the date.

(d) The Authority shall respond to a request for a declaratory ruling as follows:

- (1) within 30 days of receipt of the request for a declaratory ruling, the Authority shall make a written decision to grant or deny the request. If the Authority fails to make a written decision to grant or deny the request within 30 days, the failure shall be deemed a decision to deny the request.
- (2) If the Authority denies the request, the decision is immediately subject to judicial review in accordance with Article 4 of this Chapter.
- (3) If the Authority grants the request, the Authority shall issue a written ruling on the merits within 45 days of the decision to grant the request. A declaratory ruling is subject to judicial review in accordance with Article 4 of G.S. 150B.
- (4) If the Authority fails to issue a declaratory ruling within 45 days, the failure shall be deemed a denial on the merits and the person aggrieved may seek judicial review pursuant to Article 4 of G.S. 150B. Upon review of the Authority's failure to issue a declaratory ruling, the court shall not consider any basis for the denial that was not presented in writing to the person aggrieved.

(e) The Board shall refuse to issue a declaratory ruling under the following circumstances:

- (1) when the Board has already made a controlling decision on substantially similar facts in a contested case;
- (2) when the facts underlying the request for a ruling were specifically considered at the time of the adoption of the rule in question; or
- (3) when the subject matter of the request is involved in pending litigation in North Carolina.

History Note: Authority G.S. 117-2(12); 150B-4;

Eff. February 1, 1976;

Amended Eff. March 1, 2014.

TITLE 10A – DEPARTMENT OF HEALTH AND HUMAN SERVICES

10A NCAC 09 .0302 APPLICATION FOR A LICENSE FOR A CHILD CARE CENTER

(a) An individual that is legally responsible for the operation of the center, including assuring compliance with the licensing law and standards, shall apply for a license for a child care center using the form provided by the Division. The form can be found on the Division's website at http://ncchildcare.dhhs.state.nc.us/general/mb_customerservice.asp. If the operator will be a group, organization, or other entity, an officer of the entity who is legally empowered to bind the operator shall complete and sign the application.

(b) The applicant shall arrange for inspections of the center by the local health, building and fire inspectors. The applicant shall provide to the Division copies of inspection reports pursuant to G.S. 110-91(1), (4), and (5). When a center does not conform with a building, fire, or sanitation standard, the inspector may submit a written explanation of how equivalent, alternative protection is provided. The Division shall accept the inspector's documentation in lieu of compliance with the standard. Nothing in this Rule precludes or interferes with issuance of a provisional license pursuant to Section .0400 of this Chapter.

(c) The applicant, or the person responsible for the day-to-day operation of the center, shall be able to describe the plans for the daily program, including room arrangement, staffing patterns, equipment, and supplies, in sufficient detail to show that the center shall comply with applicable requirements for activities, equipment, and staff-child ratios for the capacity of the center and type of license requested. The applicant shall make the following written information available to the Division for review to verify compliance with provisions of this Chapter and G.S. 110, Article 7:

- (1) daily schedules;
- (2) activity plans;
- (3) emergency care plan;
- (4) discipline policy;
- (5) incident reports; and
- (6) incident logs.

(d) The applicant shall demonstrate to the Division representative that the following information is available for review in the center's files:

- (1) staff records which include an application for employment and date of birth; documentation of education, training, and experience; medical and health records; documentation of participation in training and staff development activities; and required criminal history records check documentation;
 - (2) children's records which include an application for enrollment; medical and immunization records; and permission to seek emergency medical care;
 - (3) daily attendance records;
 - (4) daily records of arrival and departure times at the center for each child;
 - (5) records of monthly fire drills documenting the date and time of each drill, the length of time taken to evacuate the building, and the signature of the person who conducted the drill;
 - (6) records of monthly playground inspections documented on a checklist provided by the Division; and
 - (7) records of medication administered.
- (e) The Division representative shall measure all rooms to be used for child care and shall assure that an accurate sketch of the center's floor plan is part of the application packet. The Division representative shall enter the dimensions of each room to be used for child care, including ceiling height, and shall show the location of the bathrooms, doors, and required exits on the floor plan.
- (f) The Division representative shall make one or more inspections of the center and premises to assess compliance with all applicable requirements as follows:
- (1) if all applicable requirements of G.S. 110, Article 7 and this Section are met, the Division shall issue the license; or
 - (2) if all applicable requirements of G.S. 110, Article 7 and this Section are not met, the Division representative may recommend issuance of a provisional license in accordance with Section .0400 of this Chapter or the representative may recommend denial of the application. Final disposition of the recommendation to deny is the decision of the Secretary.
- (g) The Secretary may deny an application for a license under the following circumstances:
- (1) if any child care facility license previously held by the applicant has been denied, revoked, or summarily suspended by the Division;
 - (2) if the Division initiated denial, revocation, or summary suspension proceedings against any child care facility license previously held by the applicant and the applicant voluntarily relinquished the license;
 - (3) during the pendency of an appeal of a denial, revocation, or summary suspension of any other child care facility license held by the applicant;
 - (4) if the Division determines that the applicant has a relationship with an operator or former operator who held a license under an administrative action described in Subparagraphs (1), (2), or (3) of this Paragraph. As used in this Rule, an applicant has a relationship with a former operator if the former operator would be involved with the applicant's child care facility in one or more of the following ways:
 - (A) would participate in the administration or operation of the facility;
 - (B) has a financial interest in the operation of the facility;
 - (C) provides care to children at the facility;
 - (D) resides in the facility; or
 - (E) would be on the facility's board of directors, be a partner of the corporation, or otherwise have responsibility for the administration of the business;
 - (5) based on the applicant's previous non-compliance as an operator with the requirements of G.S. 110, Article 7 or this Chapter;
 - (6) if abuse or neglect has been substantiated against the applicant; or
 - (7) if the applicant is a disqualified child care provider or has a disqualified household member residing in the center.
- (h) In determining whether denial of the application for a license is warranted pursuant to Paragraph (g) of this Rule, the Division shall consider:
- (1) any documentation provided by the applicant that describes the steps the applicant will take to prevent reoccurrence of noncompliance issues that led to any prior administrative action taken against a license previously held by the applicant;
 - (2) training certificates or original transcripts for any coursework from a nationally recognized regionally accredited institution of higher learning related to providing quality child care, and that was taken subsequent to any prior administrative action against a license previously held by the applicant. "Nationally recognized" means that every state in this nation acknowledges the validity of the coursework taken at higher education institutions that meet the requirements of one of the accrediting bodies;
 - (3) proof of employment in a licensed child care facility and references from the administrator or licensee of the child care facility regarding work performance;

- (4) documentation of collaboration or mentorship with a licensed child care provider to obtain additional knowledge and experience related to operation of a child care facility; and
- (5) documentation explaining relationships with persons meeting the criteria listed in Subparagraph (g)(4) of this Rule.

History Note: Authority G.S. 110-85; 110-86; 110-88(2); 110-88(5); 110-91; 110-91(1),(4) and (5); 110-92; 110-93; 110-99; 143B-168.3; Eff. January 1, 1986; Amended Eff. March 1, 2014; August 1, 2011; July 1, 2010; April 1, 2003; April 1, 2001; July 1, 1998; January 1, 1996; November 1, 1989; July 1, 1988; January 1, 1987.

10A NCAC 09 .1702 APPLICATION FOR A LICENSE FOR A FAMILY CHILD CARE HOME

(a) Any person who plans to operate a family child care home (FCCH) shall apply for a license using a form provided by the Division. The form can be found on the Division's website at http://ncchildcare.dhhs.state.nc.us/general/mb_customerservice.asp. The applicant shall submit the completed application, to the Division that complies with the following:

- (1) only one licensed family child care home shall operate at the location address of any home; and
- (2) the applicant shall list each location address where a licensed family child care home will operate.

(b) If a family child care home operates at more than one location address by cooperative arrangement among two or more families, the following procedures apply:

- (1) one parent whose home is used as a location address shall be designated the coordinating parent and shall co-sign the application with the applicant; and
- (2) the coordinating parent shall know the current location address at all times and shall provide the information to the Division upon request.

(c) The applicant shall ensure that the family child care home complies with the following requirements:

- (1) single wide manufactured homes are limited to a maximum of three preschool-age children (not more than two may be two years of age or less) and two school-age children;
- (2) all children are kept on the ground level with an exit at grade;
- (3) all homes are equipped with an electrically operated (with a battery backup) smoke detector, or one electrically operated and one battery operated smoke detector located next to each other;
- (4) all homes are provided with at least one five pound 2-A: 10-B: C type extinguisher for every 2,500 square feet of floor area;
- (5) heating appliances shall be installed and maintained according to NC Building Code Chapter 603.5.3;

- (6) all indoor areas used by children are heated when the temperature is below 65 degrees and ventilated when the temperature is above 85 degrees; and
- (7) pipes or radiators that are hot enough to be capable of burning children and are accessible to the children are covered or insulated.

(d) The applicant shall also submit supporting documentation with the application for a license to the Division. The supporting documentation shall include:

- (1) a copy of a non-expired qualification letter in accordance with 10A NCAC 09 .2702;
- (2) a copy of documentation of completion of a first aid and cardiopulmonary resuscitation (CPR) course;
- (3) proof of negative results of the applicant's tuberculosis test completed within the past 12 months;
- (4) a completed health questionnaire;
- (5) a copy of current pet vaccinations for any pet in the home;
- (6) a negative well water bacteriological analysis if the home has a private well;
- (7) copies of any inspections required by local ordinances; and
- (8) any other documentation required by the Division according to the rules in this Section to support the issuance of a license.

(e) Upon receipt of a complete application and supporting documentation, a Division representative shall make an announced visit to each home. An announced visit is not required by a Division representative if the applicant is subject to the circumstances in Paragraph (g) of this Rule. The issuance of a license applies as follows:

- (1) if all applicable requirements of G.S. 110, Article 7 and this Section are met, a license shall be issued;
- (2) if the applicable requirements of G.S. 110, Article 7 and this Section are not met, but the applicant has the potential to comply, the Division representative shall establish with the applicant a time period for the home to achieve compliance. If the Division representative determines that all applicable requirements of G.S. 110, Article 7 and this Section are met within the established time period, a license shall be issued; or
- (3) if all applicable requirements of G.S. 110, Article 7 and this Section are not met or cannot be met within the established time, the Division shall deny the application.

(f) The Division shall allow the applicant to operate prior to the Division representative's visit described in Paragraph (e) of this Rule when the applicant is currently licensed as a family child care home operator, needs to relocate and notifies the Division of the relocation, and the Division representative is unable to visit before the relocation occurs. An applicant shall not operate until he or she has received from the Division either temporary permission to operate or a license.

(g) The Secretary may deny the application for the license under the following circumstances:

- (1) if any child care facility license previously held by the applicant has been denied, revoked, or summarily suspended by the Division;
- (2) if the Division initiated denial, revocation, or summary suspension proceedings against any child care facility license previously held by the applicant and the applicant voluntarily relinquished the license;
- (3) during the pendency of an appeal of a denial, revocation, or summary suspension of any other child care facility license held by the applicant;
- (4) if the Division determines that the applicant has a relationship with an operator or former operator who previously held a license under an administrative action described in Subparagraphs (g)(1), (2), or (3) of this Rule. As used in this Rule, an applicant has a relationship with a former operator if the former operator would be involved with the applicant's child care facility in one or more of the following ways:
 - (A) would participate in the administration or operation of the facility;
 - (B) has a financial interest in the operation of the facility;
 - (C) provides care to the children at the facility;
 - (D) resides in the facility; or
 - (E) would be on the facility's board of directors, be a partner of the corporation, or otherwise have responsibility for the administration of the business;
- (5) based on the applicant's previous non-compliance as an operator with the requirements of G.S. 110, Article 7 or this Chapter;
- (6) if abuse or neglect has been substantiated against the applicant or a household member; or
- (7) if the applicant is a disqualified child care provider or has a disqualified household member residing in the FCCH.

(h) In determining whether denial of the application for a license is warranted pursuant to Paragraph (g) of this Rule, the Division shall consider:

- (1) any documentation provided by the applicant which describes the steps the applicant will take to prevent reoccurrence of noncompliance issues that led to any prior administrative action taken against a license previously held by the applicant;
- (2) training certificates or original transcripts for any coursework from a nationally recognized

regionally accredited institution of higher learning related to providing quality child care, and that was taken subsequent to any prior administrative action against a license previously held by the applicant. "Nationally recognized" means that every state in this nation acknowledges the validity of the coursework taken at higher education institutions that meet the requirements of one of the accrediting bodies;

- (3) proof of employment in a licensed child care facility and references from the administrator or licensee of the child care facility regarding work performance;
- (4) documentation of collaboration or mentorship with a licensed child care provider to obtain additional knowledge and experience related to operation of a child care facility; and
- (5) documentation explaining relationships with persons meeting the criteria listed in Subparagraph (g)(4) of this Rule.

(i) The license shall not be bought, sold, or transferred from one individual to another.

(j) The license is valid only for the location address listed on it.

(k) The license must be returned to the Division in the event of termination, revocation, suspension, or summary suspension.

(l) A licensee shall notify the Division if a change occurs that affects the information shown on the license.

History Note: Authority G.S. 110-85; 110-88(5); 110-86; 110-91; 110-91(4); 110-93; 110-99; 143B-168.3;

Eff. January 1, 1986;

Amended Eff. March 1, 2014; December 1, 2012; August 1, 2011; July 1, 2010; April 1, 2003; April 1, 2001; July 1, 1998; January 1, 1991; November 1, 1989; January 1, 1987.

10A NCAC 09 .2506 GENERAL SAFETY REQUIREMENTS

(a) First aid equipment shall be available regardless of where activities are provided.

(b) All regulations in Rule .1403 of this Chapter regarding swimming pools apply.

(c) Potentially hazardous items, such as archery equipment, hand and power tools, nails, chemicals, or propane stoves, shall be used by children only when adult supervision is provided. Such potentially hazardous items, whether or not intended for use by the children, shall be stored in locked areas or with other safeguards, or shall be removed from the premises.

(d) All children shall be adequately supervised. Adequate supervision means staff shall be with the group of children and able to hear or see each child in his or her care, except:

- (1) Children who are developmentally able may be permitted to go to the restroom independently, provided that:

- (A) staff members' proximity to children assures immediate intervention to safeguard a child from harm;

- (B) individuals who are not staff members may not enter the restroom area while in use by any child; and
- (C) children up to nine years of age are supervised by staff members who are able to hear the child. Children nine years of age and older are not required to be directly supervised, however, staff members shall know the whereabouts of children who have left their group to use the restroom;
- (2) Adequate supervision for children nine years of age and older means that staff are with the group of children and able to hear or see each child in his or her care. A staff member shall accompany any children who leave the group to go indoors or outdoors; and
- (3) When emergencies necessitate that direct supervision is impossible for brief periods of time.
- (e) Children riding bicycles must wear safety helmets.

History Note: Authority G.S. 110-85; 110-91; 143B-168.3; Eff. July 1, 1988;
Amended Eff. March 1, 2014; July 1, 2010; July 1, 1998; September 1, 1990.

10A NCAC 09 .2701 SCOPE

The rules in this Section apply to all child care providers as defined in G.S.110-90.2. The Division, in accordance with G.S.110-90.2, shall determine if an individual is a qualified child care provider. An individual may work or be present in any child care facility during the time the individual holds a valid qualification letter after the Division's determination that the individual is a qualified child care provider.

History Note: Authority G.S. 110-85; 110-90.2; Eff. March 1, 2014.

10A NCAC 09 .2702 DEFINITIONS

For purposes of this Section:

- (1) a "qualified child care provider" means an individual who the Division has determined is fit to have responsibility for the safety and well-being of children based on the criminal history as set forth in G.S. 110-90.2.
- (2) a "disqualified child care provider" means an individual who:
 - (a) the Division has determined is not fit to have responsibility for the safety and well-being of children based on the criminal history in accordance with G.S. 110-90.2(a)(3);
 - (b) is classified within the prohibited list provided in G.S. 110-90.2(a1);
 - (c) the Division determines to be an habitually excessive user of alcohol, who illegally uses narcotic or other impairing drugs, or who is mentally

- or emotionally impaired to an extent that may be injurious to children;
- (d) refuses to consent to a criminal history record check; or
- (e) intentionally falsifies any information required to conduct a criminal history record check.
- (3) a "qualification letter" or "qualifying letter" means the letter issued by the Division notifying an individual that he or she is a qualified child care provider;
- (4) a "conviction" includes when a plea of guilty or no contest is accepted by the trial court, or entry of an order granting a prayer for judgment continued; and
- (5) a "pending criminal charge" includes, but is not limited to, a charge that has been deferred pursuant to G.S. 15A-1341(a1).

History Note: Authority G.S. 110-85; 110-90.2; 110-90.2(a)(3); 114-19.5; 143B-168.3; S.L. 1995, c. 507, s. 23.25; Temporary Adoption Eff. January 1, 1996; Eff. April 1, 1997;
Amended Eff. March 1, 2014; November 1, 2007; April 1, 2003.

10A NCAC 09 .2703 CRIMINAL HISTORY RECORD CHECK REQUIREMENTS FOR CHILD CARE PROVIDERS

(a) In addition to the requirements in Rules .0302 and .1702 of this Chapter, a child care provider shall submit the following to the Division prior to the issuance of a license or prior to beginning employment:

- (1) a signed and completed Authority for Release of Information form;
- (2) fingerprint impressions submitted on the form(s) required by the Division and State Bureau of Investigation; and
- (3) if a child care provider is an out-of-state resident, he or she shall also submit a certified local history from the Clerk of Superior Court in his or her county of residence.

All required forms can be found on the Division's website at http://ncchildcare.dhhs.state.nc.us/general/dhhsrsrc_childcare.asp

(b) If the child care provider has a criminal history of convictions, pending indictment of a crime, or pending criminal charges, he or she may submit to the Division additional information concerning the conviction or charges that the Division shall use in making the determination of the child care provider's qualification. The Division shall also consider the following in making its decision:

- (1) length of time since conviction;
- (2) whether the child care provider is currently on probation;
- (3) nature of the offense;
- (4) circumstances surrounding the commission of the offense or offenses;
- (5) evidence of rehabilitation;
- (6) number and type of prior offenses; and

(7) age of the child care provider at the time of occurrence.

(c) If the child care provider is a firm, partnership, association, or corporation, the chief executive officer or other person serving in like capacity or a person designated by the chief executive officer as responsible for the operation of the facility, shall complete the criminal history record check as specified in Paragraph (a) of this Rule.

(d) If a Letter of Intent to Operate pursuant to G.S. 110-106 is submitted to the Division, the person signing the Letter of Intent shall submit all forms as required in Paragraph (a) of this Rule.

(e) Child care providers must have a valid qualification letter prior to employment or living in the family child care home and the qualification letter must be kept on file at the facility for review by representatives of the Division.

(f) Child care providers found to be disqualified are not eligible for employment in child care until a qualification letter has been issued by the Division.

(g) Child care providers determined by the Division to be disqualified shall be terminated by the center or family child care home immediately upon receipt of the disqualification notice.

(h) Disqualification of a child care provider living in a family child care home shall be grounds for issuance of a summary suspension of the family child care home license in accordance with 10A NCAC 09 .2207.

(i) Refusal on the part of the employer to dismiss a child care provider who has been found to be disqualified shall be grounds for suspension, denial, or revocation of the license or any other administrative action or civil penalty permitted by law or rule. If an applicant appeals the disqualification, the child care provider shall not be employed during the appeal process.

(j) Operators, as defined by G.S. 110-86(7), shall include the criminal history mandatory reporting requirement in all new employee orientation information. Mandatory reporting requires all child care providers and household members who have incurred any pending charges, indictments or convictions (other than minor traffic offenses) since the last qualification letter was issued by the Division to notify the operator of such charges within five business days or before returning to work, whichever comes first. The operator shall notify the Division of any such pending charges, indictments or convictions within one business day of being notified.

(k) The qualification letter is valid for a maximum of three years from the date of issuance.

(l) Prior to the expiration date of the qualification letter, the child care provider shall complete and submit the forms listed in Paragraph (a) of this Rule.

(m) After a child care provider has been qualified, the Division may complete a new criminal history record check at any time when the Department of Social Services or the Division of Child Development and Early Education conducts an investigation that references the child care provider.

(n) Any individuals who live in the household who have had their 16th birthday after the initial licensing of a family child care home, shall complete and submit the forms listed in Paragraph (a) of this Rule to the Division within five business days.

(o) Child care operators must notify the Division of any new child care providers who are hired or moved into the home

within five business days by submitting the form provided by the Division.

History Note: Authority G.S. 110-85; 110-86(7); 110-90.2; 110-90.2(a); 110-106; 114-19.5; 143B-168.3; S.L. 2012-160, s.1;

Temporary Adoption Eff. January 1, 1996;

Eff. April 1, 1997;

Amended Eff. March 1, 2014; November 1, 2007.

10A NCAC 09 .2704 CRIMINAL HISTORY RECORD CHECK REQUIREMENTS FOR NONLICENSED CHILD CARE PROVIDERS

(a) A nonlicensed child care provider shall submit the following to the local purchasing agency prior to caring for children and receiving subsidy payments:

- (1) a signed Authority for Release of Information using the form provided by the Division;
- (2) fingerprint impressions submitted on the form(s) required by the Division and State Bureau of Investigation; and
- (3) if a prospective child care provider is an out-of-state resident, he or she shall also submit a certified local history from the Clerk of Superior Court in his or her county of residence.

This Rule applies to any individuals over 15 years old who move into the household, or any individuals who live in the household who have had his or her 16th birthday after the initial approval, including family members and non-family members who use the home either on a permanent or temporary basis as their primary residence. The individual shall submit the items in this Paragraph to the local purchasing agency within five business days of moving into the home or their 16th birthday.

(b) New nonlicensed child care providers shall submit the complete and accurate packet no later than five business days after applying for enrollment as a nonlicensed child care provider of subsidized child care. If more than three years have elapsed since the criminal history record check has been completed and subsidy funds were not received, then a new criminal history record check must be submitted by the nonlicensed child care provider and any household member over 15 years old.

(c) Any individual over 15 years old, including family members and non-family members who use the home either on a permanent or temporary basis as their primary residence, shall submit all criminal history record check forms as required in Subparagraphs (a)(1) and (a)(2) of this Rule, within five business days of joining the household.

(d) If a nonlicensed child care provider has a criminal history of convictions, pending indictment of a crime, or pending criminal charges, he or she may submit to the Division additional information concerning the conviction or charges that could be used by the Division in making the determination of the child care provider's qualification. The Division shall consider the following in making a decision:

- (1) length of time since conviction;
- (2) whether the nonlicensed child care provider is currently on probation;

- (3) nature of the offense;
- (4) circumstances surrounding the commission of the offense or offenses;
- (5) evidence of rehabilitation;
- (6) number and type of prior offenses; and
- (7) age of the nonlicensed child care provider at the time of occurrence.

(e) The local purchasing agency shall mail the Authority for Release of Information using the form provided by the Division, and fingerprint impressions to the Division no later than five business days after receipt. A copy of the submitted information shall be maintained in the nonlicensed child care provider's file until the notice of qualification is received by the nonlicensed child care provider. The notice of qualification shall be maintained in the nonlicensed child care provider's file. The local purchasing agency shall keep the child care provider's file.

(f) A nonlicensed child care provider shall not receive payment during the period in which the state and federal criminal history record check is being completed.

(g) Disqualification of a nonlicensed child care provider by the Division shall be reasonable cause for the local purchasing agency to deny payment.

(h) If a nonlicensed child care provider disagrees with the decision of disqualification and files a civil action in district court, the provider may continue to operate as a nonlicensed child care provider, but shall not receive payment during the proceedings. If the determination in the civil action is that the nonlicensed child care provider is qualified, the nonlicensed provider shall receive retroactive payment for the uncompensated care provided during the proceedings.

(i) After a nonlicensed child care provider is qualified, the Division may complete a new criminal history record check at any time when the Department of Social Services or the Division of Child Development and Early Education conducts an investigation that references the child care provider. If the Division requests a new criminal history record check, the child care provider shall complete and submit the forms listed in Paragraph (a) of this Rule to the Division within five business days of the Division's request.

(j) The qualification letter is valid for a maximum of three years from the date of issuance.

(k) Prior to the expiration date of the qualification letter, the nonlicensed child care provider shall complete and submit the forms described in Paragraph (a) of this Rule.

(l) Nonlicensed child care providers and household members must have a valid qualification letter prior to receiving subsidy payments.

History Note: Authority G.S. 110-90.2; 114-19.5; 143B-168.3; S.L. 2012-160, s. 1;
Temporary Adoption Eff. January 1, 1996;
Eff. April 1, 1997;
Amended Eff. March 1, 2014; December 1, 2007; April 1, 2003.

10A NCAC 09 .2903 STAFF QUALIFICATIONS

(a) Each center serving children ages birth to three years shall have a minimum of one staff who holds an Infant Toddler Family Specialist certification issued from the North Carolina Division of Public Health; Birth-through-Kindergarten (B-K)

Standard Professional I licensure; or provisional licensure in B-K issued from the Department of Public Instruction. This staff shall provide program oversight and supervision for any caregivers in classrooms with children ages birth to three years.

(b) In accordance with G.S. 115C-84.2(a)(1), during the 185 day school year (as defined by the State Board of Education), each child aged three years old and older on or before the initial school entry date specified in G.S. 115C-364 (school entry date) shall be served in a classroom with at least one lead teacher who holds a B-K Standard Professional I licensure or provisional licensure in B-K, or Preschool Add-on licensure issued from the Department of Public Instruction.

(c) Children who turn three years old after the school entry date who are identified as a child with a disability as evidenced by an Individualized Education Program (IEP), shall be served in a classroom with a B-K licensed teacher.

(d) During the time when school is not in session, each group of preschool children shall have at least one lead teacher with a minimum of an A.A.S. degree in early childhood education or child development, or an A.A.S. degree in any major with 12 semester hours in early childhood education or child development.

(e) During the 10 month school year, (as defined by the State Board of Education), each group of school-age children shall have at least one teacher who holds State certification as a Special Education Teacher. During the time when school is not in session, each group of school-age children shall have at least one teacher who has completed at least two semester hours of school-age care related coursework and has completed or is enrolled in at least two additional semester hours of school-age related coursework.

(f) Center administrators shall have a Level III North Carolina Early Childhood Administration Credential and two years of verifiable work experience with children with developmental delays or disabilities.

History Note: Authority G.S. 110-85; 110-88(14);
Eff. July 1, 2010;
Amended Eff. March 1, 2014.

TITLE 12 – DEPARTMENT OF JUSTICE

12 NCAC 10B .1901 MILITARY AND MILITARY SPOUSE TRANSFEREES

(a) An individual seeking certification as a military trained applicant pursuant to G.S. 93B-15.1 who applies to the Division for a certification issued by the Commission must meet the following requirements:

- (1) Been awarded a military occupational specialty that is substantially equivalent to or exceeds the training requirements required for certification and performed in the occupational specialty;
- (2) Completed a military program of training, completed testing or equivalent training and experience as determined by Paragraph (c) of this Rule;

- (3) Engaged in the active practice of that occupation for at least two of the five years prior to the date of appointment; and
- (4) Not committed any act in any jurisdiction that would have constituted grounds for refusal, suspension or revocation of a license to practice that occupation in this State at the time the act was committed. The military trained applicant shall submit documentation to the Division verifying his or her compliance with the above listed criteria.

(b) An individual seeking certification as a military spouse pursuant to G.S. 93B-15.1 who applies to the Division for a certification issued by the Commission must meet the following requirements:

- (1) Hold a current license, certification or registration from another jurisdiction which is substantially equivalent to or exceeds the training requirements required for certification;
- (2) Be in good standing with the issuing agency and not been disciplined by the agency that has the jurisdiction to issue the license, certification or permit; and
- (3) Demonstrate competency in the occupation by:
 - (A) Having completed continuing education comparable to the education and training required for the type of certification for which application is being made, as determined by Paragraph (c) of this Rule; or
 - (B) Having engaged in the active practice of that occupational specialty for at least two of the five years prior to the date of appointment.

The military spouse shall submit documentation to the Division verifying his or her compliance with the above listed criteria.

(c) The Division shall review the documents received to determine if any additional training is required to satisfy the certification requirements of this Subchapter. Where training provided by the military or in other states require approval of prior training, such approval by the appropriate entity must also be documented.

(d) In the event the applicant's prior training is not equivalent to the Commission's standards, the Commission shall prescribe as a condition of certification, supplementary or remedial training deemed necessary to equate previous training with current standards.

(e) Where certifications issued by the Commission require satisfactory performance on a written examination as part of the training, the Commission shall require such examinations for the certification.

History Note: Authority G.S. 17E-4; 17E-7; 93B-15.1; Eff. March 1, 2014.

TITLE 21 – OCCUPATIONAL LICENSING BOARDS AND COMMISSIONS

CHAPTER 46 – BOARD OF PHARMACY

21 NCAC 46 .3501 REPORTS FROM THE CONTROLLED SUBSTANCES REPORTING SYSTEM

The Department of Health and Human Services may submit a report to the Board of Pharmacy if it receives information that the Department of Health and Human Services believes provides a basis to investigate whether a pharmacy, pharmacist or technician has dispensed prescriptions for controlled substances in a manner that may violate laws governing the dispensing of controlled substances or the practice of pharmacy.

History Note: Authority G.S. 90-85.6; 90-85.12; 90-113.74; Eff. March 1, 2014.

CHAPTER 50 – BOARD OF EXAMINERS OF PLUMBING, HEATING AND FIRE SPRINKLER CONTRACTORS

21 NCAC 50 .0306 APPLICATIONS: ISSUANCE OF LICENSE

(a) All applicants for licensure or examination shall file an application in the Board office on a form available on the Board website or by contacting the Board office.

(b) Applicants for a plumbing or heating examination shall present evidence at the time of application to establish two years of full-time experience in the installation, maintenance, service or repair of plumbing or heating systems related to the category for which a license is sought, whether or not a license was required for the work performed. Applicants for a fuel piping examination shall present evidence at the time of application to establish one year of experience in the installation, maintenance, service or repair of fuel piping, whether or not a license was required for the work performed. Up to one-half of the experience may be in academic or technical training related to the field of endeavor for which examination is requested. The Board shall prorate part-time work of less than 40 hours per week or part-time academic work of less than 15 semester or quarter hours.

(c) The Board shall issue a license certificate bearing the license number assigned to the qualifying individual.

(d) Fire Sprinkler Installation Contractors shall meet experience requirements in accordance with NICET examination criteria.

(e) Applicants for examination or licensure in the Fire Sprinkler Inspection Technician classification shall submit evidence adequate to establish that the applicant has either:

- (1) 4000 hours of experience involved in inspection and testing of previously installed fire sprinkler systems, consistent with NFPA-25, Standard for the Inspection Testing as Maintenance of Water-Based Fire Protection Systems of the National Fire Protection Association, adopted by the North Carolina Building Code, which is hereby incorporated by reference including all subsequent editions

and amendments to the document as a full-time employee of a Fire Sprinkler Inspection Contractor or fire insurance underwriting organization;

- (2) 4000 hours of experience involved in inspection and testing of previously installed fire sprinkler systems, consistent with NFPA 25: Standard for the Inspection, Testing, and Maintenance of Water-Based Fire Protection Systems, which is hereby incorporated by reference including all subsequent editions and amendments. The document can be accessed free of charge at <http://www.nfpa.org/codes-and-standards/>;
- (3) 4000 hours of experience involved in installation of fire sprinkler systems as a full-time employee of a Fire Sprinkler Installation Contractor; or
- (4) a combination of 4000 hours of experience in any of the categories listed in this Paragraph.

(f) Applicants for licensure in the Fire Sprinkler Inspection Contractor classification shall meet experience requirements in accordance with NICET certification criteria.

(g) Applicants for initial licensure in the Limited Fire Sprinkler Maintenance Technician classification must submit evidence of 2000 hours experience at the place for which license is sought as a full-time maintenance employee in facility maintenance with exposure to periodic maintenance of fire protection systems as described in Rule .0515 of this Chapter. Applicants who have held Limited Fire Sprinkler Maintenance Technician license previously are not required to demonstrate experience in addition to the experience at the time of initial licensure, but shall submit a new application if relocating to a new location.

(h) Applicants for licensure in the Residential Fire Sprinkler Installation Contractor classification must hold an active Plumbing Class I or Class II Contractor license issued by this Board for a minimum of two years and must document attendance at a 16 hour course approved by the Board pursuant to the Rules in this Chapter covering NFPA 13D: Standard for the Installation of Sprinkler Systems in One-and Two-Family Dwellings and Manufactured Homes, which is hereby incorporated by reference including all subsequent editions and amendments. The document can be accessed free of charge at <http://www.nfpa.org/codes-and-standards/>. Residential Fire Sprinkler Installation Contractors must maintain a Plumbing Contractor license as a condition of renewal of the Residential Fire sprinkler Installation Contractor license.

(i) Applicants for a license as a plumbing or heating technician shall present evidence adequate to establish 3000 hours of full-time experience in the installation, maintenance, service or repair of plumbing or heating systems related to the category for which a technician license is sought, whether or not a license was required for the work performed. Applicants for a license as a fuel piping technician shall present evidence adequate to establish 1500 hours of experience in the installation, maintenance, service or repair of fuel piping, whether or not a license was required for the work performed. Up to one-half of the experience may be in academic or technical training related to the field of endeavor for which the examination is requested.

(j) Applicants for a Restricted Limited Plumbing Contractor license shall present evidence at the time of application to establish 1500 hours of full-time experience in the installation, maintenance, service or repair of plumbing systems, whether or not a license was required for the work performed. Up to one-half of the experience may be in academic or technical training related to the field of endeavor for which examination is requested. The Board shall prorate part-time work of fewer than 40 hours per week or part-time academic work of less than 15 semester or quarter hours.

(k) In lieu of the requirements of Paragraph (j) of this Rule, applicants for a Restricted Limited Plumbing Contractor License who present a current active License from the North Carolina Irrigation Contractor Licensing Board may take the examination, provided the applicant demonstrates that he or she holds certification as a Backflow Inspector from one of the municipalities in North Carolina, or demonstrates 500 hours of experience in the maintenance, service or repair of components of plumbing systems.

History Note: Authority G.S. 87-18; 87-21(b);

Eff. February 1, 1976;

Readopted Eff. September 29, 1977;

Amended Eff. January 1, 2004; July 1, 2003; August 1, 2002; July 1, 1998; September 1, 1994;

November 1, 1993; April 1, 1991; May 1, 1990;

Temporary Amendment Eff. August 31, 2004;

Amended Eff. April 1, 2014; July 3, 2012; January 1, 2010; June 1, 2006; March 1, 2005.

21 NCAC 50 .0518 RESTRICTED LIMITED PLUMBING CONTRACTOR LICENSE

Licensure in the Restricted Limited Plumbing Contractor classification is required of persons who do not possess a license as a plumbing contractor, but contract install, repair or replace:

- (1) exterior building sewer piping, as defined in the North Carolina Plumbing Code, which is hereby incorporated by reference including all subsequent editions and amendments. The document can be accessed at <http://www.NCDOI.com/OSFM/engineering>.
- (2) exterior water service piping two inch diameter or less, as defined in the North Carolina Plumbing Code;
- (3) exterior backflow preventers connected to water service piping two inches in diameter or less; or
- (4) water filtration systems or components of water filtration systems that filter, treat, condition or remove impurities from potable water by means of a fine physical barrier or membrane, a chemical process or a biological process, and which are installed on a water distribution line or water service piping, as defined in North Carolina State Plumbing Code.

History Note: Authority G.S. 87-18; 87-21;

Eff. April 1, 2014.

21 NCAC 50 .1102 LICENSE FEES

- (a) Except as set out in this Rule, the annual license fee for plumbing, heating and fuel piping contractor licenses by the Board is one hundred thirty dollars (\$130.00).
- (b) The annual license fee for a licensed individual who holds qualifications from the Code Officials Qualification Board and is employed full-time as a local government plumbing, heating or mechanical inspector is twenty-five dollars (\$25.00).
- (c) The initial application fee for a license without examination conducted by the Board is thirty dollars (\$30.00).
- (d) The annual license fee for a contractor or fire sprinkler inspection technician whose qualifications are listed as the second or subsequent individual on the license of a corporation, partnership, or business with a trade name under Paragraphs (a) or (c) of this Rule is thirty dollars (\$30.00).
- (e) The annual license fee for a Fire Sprinkler Installation Contractor and a Fire Sprinkler Inspection Contractor license by this Board is one hundred thirty dollars (\$130.00).
- (f) The annual license fee for a Limited Fire Sprinkler Maintenance Technician is one hundred thirty dollars (\$130.00).
- (g) The annual license fee for a Residential Fire Sprinkler Installation Contractor is one hundred thirty dollars (\$130.00).
- (h) The annual license fee for a Fire Sprinkler Inspection Technician is one hundred thirty dollars (\$130.00).
- (i) The annual license fee for all Fuel Piping Technician licenses listed with a Class A Gas Dealer is one hundred thirty dollars (\$130.00).
- (j) The annual license fee for Plumbing, Heating or Fuel Piping Technician licensees listed under a licensed Plumbing, Heating or Fuel Piping Contractor is sixty-five dollars (\$65.00).
- (k) The annual license fee for a Restricted Limited Plumbing Contractor is one hundred thirty dollars (\$130.00).

History Note: Authority G.S. 87-18; 87-21; 87-22;

Eff. May 1, 1989;

Temporary Amendment Eff. November 17, 1989 for a period of 77 days to expire on February 1, 1990;

Amended Eff. November 1, 1994; July 1, 1991; March 1, 1990;

Temporary Amendment Eff. August 31, 2001; September 15, 1997;

Amended Eff. April 1, 2014; July 3, 2012; July 1, 2010; March 1, 2005; December 1, 2003; December 4, 2002.

**CHAPTER 64 – BOARD OF EXAMINERS FOR SPEECH
AND LANGUAGE PATHOLOGISTS
AND AUDIOLOGIST**

**21 NCAC 64 .0206 SUPERVISION OF
PROFESSIONAL EXPERIENCE**

- (a) The Board interprets G.S. 90-298(c) to mean that supervision satisfactory to the Board requires four hours each month of direct, on-site observation of the applicant's work with patients, in addition to other methods of supervision such as review of tape recordings, review of records, and review of staff meetings.

- (b) A temporary license issued pursuant to G.S. 90-298 shall be suspended upon the termination of approved supervision, and any period of practice without approved supervision shall not be deemed to comply with the practical experience requirements of G.S. 90-295(4).

History Note: Authority G.S. 90-295; 90-298; 90-304(a)(3);

Eff. November 1, 1989;

Amended Eff. March 1, 2014.

21 NCAC 64 .0219 TELEPRACTICE

- (a) For purposes of this Rule the following words shall have the following meanings:

- (1) "Patient site" means the patient's physical location at the time of the receipt of the telepractice services.
- (2) "Provider" means a licensed speech and language pathologist or audiologist who provides telepractice services.
- (3) "Provider site" means the licensee's physical location at the time of the provision of the telepractice services.
- (4) "Telepractice" means the use of telecommunications and information technologies for the exchange of encrypted patient data, obtained through real-time interaction, from patient site to provider site for the provision of speech and language pathology and audiology services to patients through hardware or internet connection. Telepractice also includes the interpretation of patient information provided to the licensee via store and forward techniques.

- (b) Telepractice shall be obtained in real time and in a manner sufficient to ensure patient confidentiality.

- (c) Telepractice is subject to the same standard of practice stated in Rules .0205 and .0216 of this Chapter as if the person being treated were physically present with the licensee. Telepractice is the responsibility of the licensee and shall not be delegated.

- (d) Providers must hold a license in the state of the provider site and shall be in compliance with the statutory and regulatory requirements of the patient site.

- (e) Licensees and staff involved in telepractice must be trained in the use of telepractice equipment.

- (f) Notification of telepractice services shall be provided to the patient and guardian if the patient is a minor. The notification shall include the right to refuse telepractice services and options for alternate service delivery.

- (g) Telepractice constitutes the practice of Speech and Language Pathology and Audiology in both the patient site and provider site.

History note: Authority G.S. 90-304(a)(3);

Eff. July 1, 2010;

Amended Eff. March 1, 2014.

21 NCAC 64 .0307 GOOD MORAL CONDUCT

- In addition to the Proscriptions in this Section, licensees shall engage in good moral conduct under all conditions of

professional activity. "Good moral conduct" shall be defined as conduct in keeping with the Code of Ethics of American Speech-Language-Hearing Association in effect as of January 1, 2013, specifically: Principle of Ethics I, Rules of Ethics Q and Principles of Ethics IV, Rules of Ethics D and E. These materials are incorporated by reference as of the above date and do not include any subsequent amendments or editions. A copy

of these materials may be obtained on the Board's website: www.ncboeslpa.org.

History note: Authority G.S. 90-295(a)(6); 90-295(b)(6); 90-301(3); 90-304(a)(3); Eff. March 1, 2014.

This Section contains information for the meeting of the Rules Review Commission on April 17, 2014 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**

Margaret Currin (Chair)
Jeff Hyde
Jay Hemphill
Faylene Whitaker

Appointed by House

Garth Dunklin (1st Vice Chair)
Stefanie Simpson (2nd Vice Chair)
Jeanette Doran
Ralph A. Walker
Anna Baird Choi

COMMISSION COUNSEL

Joe Deluca	(919)431-3081
Amanda Reeder	(919)431-3079
Abigail Hammond	(919)431-3076
Amber Cronk	(919)431-3074

RULES REVIEW COMMISSION MEETING DATES

April 17, 2014	May 15, 2014
June 19, 2014	July 17, 2014

AGENDA**RULES REVIEW COMMISSION****Thursday, April 17, 2014 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. NC Rural Electrification Authority – 04 NCAC 08 .0101, .0109 (Reeder)
 - B. Industrial Commission – 04 NCAC 10A .0601, .0609A; 10E .0103, .0104 (Reeder)
 - C. State Board of Education – 16 NCAC 06C .0701 (Hammond)
 - D. Cemetery Commission – 21 NCAC 07A .0101, .0103, .0104, .0106, .0201, .0202, .0203, .0204, .0205; 07B .0103, .0104, .0105; 07C .0103, .0104, .0105; 07D .0101, .0102, .0104, .0105, .0201, .0202, .0203 (Reeder)
 - E. State Human Resources Commission – 25 NCAC 01B .0350, .0413, .0414, .0429, .0430; 01C .0311, .0403, .0404, .0411, .0412; 01D .0201; 01E .0901; 01H .0901, .0902, .0904, .0905, .1001, .1003, .1004, .1005; 01I .2002; 01J .0603, .0610, .0615, .0616, .1101, .1201, .1202, .1203, .1204, .1205, .1206, .1207, .1208, .1301, .1302, .1304, .1305, .1306, .1307, .1312, .1313, .1314, .1315, .1316, .1317, .1318, .1319, .1320, .1321, .1322, .1401, .1402, .1403, .1404, .1405, .1406, .1407, .1408, .1409, .1410, .1411, .1412 (DeLuca)
 - F. State Human Resources Commission – 25 NCAC 01J .1310 (DeLuca)
 - G. Building Code Council – 2015 NC Existing Building Code (DeLuca)
- IV. Review of Log of Filings (Permanent Rules) for rules filed between February 21, 2014 and March 20, 2014
 - Department of Justice - Division of Criminal Information (DeLuca)
 - Private Protective Services Board (Reeder)

- Criminal Justice Education and Training Standards Commission (May)
 - Environmental Management Commission (Reeder)
 - Coastal Resources Commission (May)
 - Wildlife Resources Commission (Hammond)
 - Department of Transportation (May)
 - Board of Examiners in Optometry (Reeder)
 - Office of Administrative Hearings
- V. Review of Log of Filings (Temporary Rules) for any rule filed within 15 business days prior to the RRC Meeting
- VI. G.S. 150B-19.1 Certification
- Criminal Justice Education and Training Standards Commission – 12 NCAC 09B .0202, .0205, .0302, .0304, .0401, .0406, .0408, .0413, .0414, .0416; 09C .0211, .0403; 09G .0308, .0314, .0414 (Hammond)
- VII. Commission Business
- Next meeting: May 15, 2014
-

Commission Review
Log of Permanent Rule Filings
February 21, 2014 through March 20, 2014

JUSTICE, DEPARTMENT OF - DIVISION OF CRIMINAL INFORMATION

The rules in Subchapter 04H concern organizational functions and definitions including general provisions (.0100); requirements for access (.0200); agreements (.0300); and standards and certification as a DCIN user (.0400).

<u>Scope</u>	12	NCAC	04H	.0101
Adopt/*				
<u>Definitions</u>	12	NCAC	04H	.0102
Adopt/*				
<u>Function of DCIN</u>	12	NCAC	04H	.0103
Adopt/*				
<u>Eligibility for Access to DCIN</u>	12	NCAC	04H	.0201
Adopt/*				
<u>Management Control Requirements</u>	12	NCAC	04H	.0202
Adopt/*				
<u>Non-Terminal Access</u>	12	NCAC	04H	.0203
Adopt/*				
<u>User Agreement</u>	12	NCAC	04H	.0301
Adopt/*				
<u>Servicing Agreement</u>	12	NCAC	04H	.0302
Adopt/*				
<u>Control Agreements</u>	12	NCAC	04H	.0303
Adopt/*				
<u>Disclosure Agreement</u>	12	NCAC	04H	.0304
Adopt/*				
<u>DCIN Users</u>	12	NCAC	04H	.0401
Adopt/*				
<u>Certification and Recertification of DCIN Users</u>	12	NCAC	04H	.0402
Adopt/*				
<u>Enrollment</u>	12	NCAC	04H	.0403
Adopt/*				

The rules in Subchapter 4I concern security and privacy including security at DCIN device sites (.0100); NCIC restricted and restricted files (.0200); submission of data for criminal history records (.0300); use and access requirements for criminal history record information, NICS information, and N-DEX information (.0400); removal of criminal history record information (.0500); statewide automated fingerprint identification system (.0600); division of motor vehicle information (.0700); and audits (.0800).

<u>Security of DCIN Devices</u>	12	NCAC	04I	.0101
Adopt/*				
<u>Official Use of DCIN</u>	12	NCAC	04I	.0102
Adopt/*				
<u>Personnel Security</u>	12	NCAC	04I	.0103
Adopt/*				
<u>Security Awareness Training</u>	12	NCAC	04I	.0104
Adopt/*				
<u>Documentation and Accuracy</u>	12	NCAC	04I	.0201
Adopt/*				
<u>Timeliness</u>	12	NCAC	04I	.0202
Adopt/*				
<u>Validations</u>	12	NCAC	04I	.0203
Adopt/*				
<u>Hit Confirmation</u>	12	NCAC	04I	.0204
Adopt/*				
<u>Arrest Fingerprint Card</u>	12	NCAC	04I	.0301
Adopt/*				
<u>Final Disposition Information</u>	12	NCAC	04I	.0302
Adopt/*				
<u>Incarceration Information</u>	12	NCAC	04I	.0303
Adopt/*				
<u>Dissemination and Logging of CHRI and NICS Records</u>	12	NCAC	04I	.0401
Adopt/*				
<u>Accessing of CCH Records</u>	12	NCAC	04I	.0402
Adopt/*				
<u>Use of CHRI for Criminal Justice Employment</u>	12	NCAC	04I	.0403
Adopt/*				
<u>Right to Review</u>	12	NCAC	04I	.0404
Adopt/*				
<u>CCH Use in Licensing and Non-Criminal Justice Employment ...</u>	12	NCAC	04I	.0405
Adopt/*				
<u>Restrictive Use of CCH for Employment Purposes</u>	12	NCAC	04I	.0406
Adopt/*				
<u>Research Use and Access of CCH Records</u>	12	NCAC	04I	.0407
Adopt/*				
<u>Limitation Requirements</u>	12	NCAC	04I	.0408
Adopt/*				
<u>Access to CHRI by Attorneys</u>	12	NCAC	04I	.0409
Adopt/*				
<u>Access to CHRI in Civil Proceedings</u>	12	NCAC	04I	.0410
Adopt/*				
<u>Expungements</u>	12	NCAC	04I	.0501
Adopt/*				
<u>Statewide Automated Fingerprint Identification System</u>	12	NCAC	04I	.0601

<u>Adopt/*</u>				
<u>Available Data</u>	12	NCAC	04I	.0602
<u>Adopt/*</u>				
<u>Fingerprinting of Convicted Sex Offenders</u>	12	NCAC	04I	.0603
<u>Adopt/*</u>				
<u>Dissemination of Division of Motor Vehicles Information</u>	12	NCAC	04I	.0701
<u>Adopt/*</u>				
<u>Audits</u>	12	NCAC	04I	.0801
<u>Adopt/*</u>				

The rules in Subchapter 4J concern penalties and administrative hearings including definitions and penalty provisions (.0100); appeals (.0200); and informal hearings (.0300).

<u>Definitions</u>	12	NCAC	04J	.0101
<u>Adopt/*</u>				
<u>Sanctions for Violations by Individuals</u>	12	NCAC	04J	.0102
<u>Adopt/*</u>				
<u>Sanctions for Violations by Agencies</u>	12	NCAC	04J	.0103
<u>Adopt/*</u>				
<u>Notice of Violation</u>	12	NCAC	04J	.0201
<u>Adopt/*</u>				
<u>Informal Hearing Procedure</u>	12	NCAC	04J	.0301
<u>Adopt/*</u>				

PRIVATE PROTECTIVE SERVICES BOARD

The rules in Subchapter 7D concern the Private Protective Service Board and cover organization and general provisions (.0100); licenses and trainee permits (.0200); security guard and patrol guard dog service (.0300); private investigator and counterintelligence (.0400); polygraph (.0500); psychological stress evaluator (PSE) (.0600); unarmed security guard registration (.0700); armed security guard firearm registration permit (.0800); trainer certificate (.0900); recovery fund (.1000); training and supervision for private investigator associates (.1100); continuing education (.1300); and unarmed and armed armored car service guard registration permit requirements (.1400 and .1500).

<u>Prohibited Acts</u>	12	NCAC	07D	.0106
<u>Amend/*</u>				
<u>Experience Requirements for a Polygraph License</u>	12	NCAC	07D	.0501
<u>Amend/*</u>				
<u>Polygraph Trainee Permit Requirements</u>	12	NCAC	07D	.0502
<u>Amend/*</u>				
<u>Polygraph Examination Requirements</u>	12	NCAC	07D	.0503
<u>Amend/*</u>				
<u>Polygraph Instruments</u>	12	NCAC	07D	.0504
<u>Amend/*</u>				
<u>Required Continuing Education Hours</u>	12	NCAC	07D	.1302
<u>Amend/*</u>				

CRIMINAL JUSTICE EDUCATION AND TRAINING STANDARDS COMMISSION

The rules in Chapter 9 are from the Criminal Justice Education and Training Standards Commission. This Commission has primary responsibility for setting statewide education, training, employment, and retention standards for criminal justice personnel (not including sheriffs).

The rules in Subchapter 9B cover minimum standards for: employment (.0100); schools and training programs (.0200);

criminal justice instructors (.0300); completion of training (.0400); school directors (.0500); and certification of post-secondary criminal justice education programs (.0600).

<u>Basic Training - Juvenile Court Counselors and Chief Cour...</u> Amend/*	12	NCAC	09B	.0235
<u>Basic Training - Juvenile Justice Officers</u> Amend/*	12	NCAC	09B	.0236
<u>Juvenile Justice Specialized Instructor Training - Restra...</u> Amend/*	12	NCAC	09B	.0241
<u>Terms and Conditions of Specialized Instructor Certification</u> Amend/*	12	NCAC	09B	.0305
<u>Terms and Conditions of School Director Certification</u> Amend/*	12	NCAC	09B	.0502

The rules in Subchapter 9E relate to the law enforcement officers' in-service training program.

<u>Instructors: Annual In-Service Training</u> Amend/*	12	NCAC	09E	.0104
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The rules in Subchapter 9G are the standards for correction including scope, applicability and definitions (.0100); minimum standards for certification of correctional officers, probation/parole officers, and probation/parole officers-intermediate (.0200); certification of correctional officers, probation/parole officers, probation/parole officers intermediate and instructors (.0300); minimum standards for training of correctional officers, probation/parole officers, and probation/parole officers-intermediate (.0400); enforcement of rules (.0500); professional certification program (.0600); and forms (.0700).

<u>Terms and Conditions of Specialized Instructor Certification</u> Amend/*	12	NCAC	09G	.0311
<u>Corrections Specialized Instructor Training - Firearms</u> Amend/*	12	NCAC	09G	.0415
<u>Corrections Specialized Instructor Training - Controls, R...</u> Amend/*	12	NCAC	09G	.0416

ENVIRONMENTAL MANAGEMENT COMMISSION

The rules in Subchapter 2D are air pollution control requirements including definitions and references (.0100); air pollution sources (.0200); air pollution emergencies (.0300); ambient air quality standards (.0400); emission control standards (.0500); air pollutants monitoring and reporting (.0600); complex sources (.0800); volatile organic compounds (.0900); motor vehicle emission control standards (.1000); control of toxic air pollutants (.1100); control of emissions from incinerators (.1200); oxygenated gasoline standard (.1300); nitrogen oxide standards (.1400); general conformity for federal actions (.1600); emissions at existing municipal solid waste landfills (.1700); control of odors (.1800); open burning (.1900); transportation conformity (.2000); risk management program (.2100); special orders (.2200); emission reduction credits (.2300); clean air interstate rules (.2400); mercury rules for electric generators (.2500); and source testing (.2600).

<u>Toxic Air Pollutant Guidelines</u> Amend/*	15A	NCAC	02D	.1104
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The rules in Subchapter 2Q relate to applying for and obtaining air quality permits and include general information (.0100); fees (.0200); application requirements (.0300); acid rain program requirements (.0400); establishment of an air quality permitting program (.0500); transportation facility requirements (.0600); toxic air pollutant procedures (.0700); exempt categories (.0800); and permit exemptions (.0900).

<u>Applicability</u>	15A	NCAC	02Q	.0701
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Amend/*	
<u>Exemptions</u>	15A NCAC 02Q .0702
Amend/*	
<u>Definitions</u>	15A NCAC 02Q .0703
Amend/*	
<u>New Facilities</u>	15A NCAC 02Q .0704
Amend/*	
<u>Existing Facilities and SIC Calls</u>	15A NCAC 02Q .0705
Repeal/*	
<u>Modifications</u>	15A NCAC 02Q .0706
Amend/*	
<u>Demonstrations</u>	15A NCAC 02Q .0709
Amend/*	
<u>Emission Rates Requiring a Permit</u>	15A NCAC 02Q .0711
Amend/*	
<u>Wastewater Treatment Systems at Pulp and Paper Mills</u>	15A NCAC 02Q .0714
Repeal/*	

COASTAL RESOURCES COMMISSION

The rules in Subchapter 7H are the state guidelines for areas of environmental concern (AECs) including introduction and general comments (.0100); the estuarine system (.0200); ocean hazard areas (.0300); public water supplies (.0400); natural and cultural resource areas (.0500); development standards (.0600); general permits for construction or maintenance of bulkheads and the placement of riprap for shoreline protection in estuarine and public trust waters (.1100); piers, docks and boat houses in estuarine and public trust waters (.1200); boat ramps along estuarine shorelines and into estuarine and public trust waters (.1300); groins in estuarine and public trust waters (.1400); excavation within or connecting to existing canals, channels, basins, or ditches in estuarine waters, public trust waters, and estuarine shoreline AECs (.1500); aerial and subaqueous utility lines with attendant structures in coastal wetlands, estuarine waters, public trust waters and estuarine shorelines (.1600); emergency work requiring a CAMA or a dredge and fill permit (.1700); beach bulldozing landward of the mean high-water mark in the ocean hazard AEC (.1800); temporary structures within the estuarine and ocean hazard AECs (.1900); authorizing minor modifications and repair to existing pier/mooring facilities in estuarine and public trust waters and ocean hazard areas (.2000); construction of sheetpile sill for shoreline protection in estuarine and public trust waters (.2100); construction of freestanding moorings in established waters and public trust areas (.2200); replacement of existing bridges and culverts in estuarine waters, estuarine shorelines, public trust areas and coastal wetlands (.2300); placement of riprap for wetland protection in estuarine and public trust waters (.2400); replacement of structures; the reconstruction of primary or frontal dune systems; and the maintenance excavation of existing canals, basins, channels, or ditches, damaged, destroyed, or filled in by hurricanes or tropical storms (.2500); construction of wetland, stream and buffer mitigation sites by the North Carolina Ecosystem Enhancement Program or the North Carolina Wetlands Restoration Program (.2600); and the construction of riprap sills for wetland enhancement in estuarine and public trust waters (.2700).

<u>AECs Within Ocean Hazard Areas</u>	15A NCAC 07H .0304
Amend/*	

WILDLIFE RESOURCES COMMISSION

The rules in Chapter 10 are promulgated by the Wildlife Resources Commission and concern wildlife resources and water safety.

The rules in Subchapter 10A cover general WRC practices and procedures including petitions for rulemaking (.0400); declaratory rulemaking (.0500); warning tickets (.1000); waivers (.1100); emergency powers (.1200); and wildlife poacher reward fund (.1300).

<u>Funding Sources</u>	15A NCAC 10A .1301
Adopt/*	

<u>Offenses and Reward Amounts</u>	15A	NCAC	10A	.1302
Adopt/*				
<u>Eligibility</u>	15A	NCAC	10A	.1303
Adopt/*				

The rules in Subchapter 10B are hunting and trapping rules and cover general hunting and wildlife provisions (.0100), hunting specific animals (.0200), trapping (.0300), and tagging furs (.0400).

<u>Permitted Archery Equipment</u>	15A	NCAC	10B	.0116
Amend/*				
<u>Sale of Wildlife</u>	15A	NCAC	10B	.0118
Amend/*				
<u>Taking Deer and Bear with Handguns</u>	15A	NCAC	10B	.0120
Amend/*				
<u>Bear</u>	15A	NCAC	10B	.0202
Amend/*				
<u>Deer (White Tailed)</u>	15A	NCAC	10B	.0203
Amend/*				

The rules in Subchapter 10C cover inland fishing including jurisdictional issues involving the Marine Fisheries Commission (.0100); general rules (.0200); game fish (.0300); non-game fish (.0400); primary nursery areas (.0500); and anadromous fish spawning areas (.0600).

<u>Reciprocal License Agreement</u>	15A	NCAC	10C	.0203
Amend/*				
<u>Public Mountain Trout Waters</u>	15A	NCAC	10C	.0205
Amend/*				
<u>Trotlines and Set-Hooks</u>	15A	NCAC	10C	.0206
Amend/*				
<u>Public Access for Anglers Only</u>	15A	NCAC	10C	.0217
Adopt/*				
<u>Manner of Taking Inland Game Fishes</u>	15A	NCAC	10C	.0302
Amend/*				
<u>Striped Bass</u>	15A	NCAC	10C	.0314
Amend/*				
<u>Manner of Taking Nongame Fishes: Purchase and Sale</u>	15A	NCAC	10C	.0401
Amend/*				
<u>Taking Nongame Fishes for Bait or Personal Consumption</u>	15A	NCAC	10C	.0402
Amend/*				
<u>Special Device Fishing</u>	15A	NCAC	10C	.0404
Amend/*				

The rules in Subchapter 10D are game lands rules.

<u>General Regulations Regarding Use</u>	15A	NCAC	10D	.0102
Amend/*				
<u>Hunting On Game Lands</u>	15A	NCAC	10D	.0103
Amend/*				
<u>Fishing on Game Lands</u>	15A	NCAC	10D	.0104
Amend/*				

The rules in Subchapter 10F cover motorboats and water safety including boat registration (.0100); safety equipment and accident reports (.0200); and local water safety regulations covering speed limits, no-wake restrictions, restrictions on swimming and other activities, and placement of markers for designated counties or municipalities (.0300).

<u>Application for Certificate of Vessel Number</u> Amend/*	15A	NCAC	10F	.0102
<u>Transfer of Ownership</u> Amend/*	15A	NCAC	10F	.0103
<u>Display of Vessel Numbers</u> Amend/*	15A	NCAC	10F	.0106
<u>Validation Decal</u> Amend/*	15A	NCAC	10F	.0107
<u>Pamlico County</u> Amend/*	15A	NCAC	10F	.0326
<u>Northampton and Warren Counties</u> Amend/*	15A	NCAC	10F	.0336
<u>Pitt County</u> Amend/*	15A	NCAC	10F	.0354

The rules in Subchapter 10G concern distribution and sale of hunting: fishing: and trapping license including license agents (.0100); boat registration agents (.0200); fur tag agents (.0300); wildlife service agents (.0400); licensee requirements (.0500) and license eligibility (.0600).

<u>Totally Disabled License Eligibility</u> Adopt/*	15A	NCAC	10G	.0601
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The rules in Subchapter K concern the hunter education course.

<u>Course Requirements</u> Amend/*	15A	NCAC	10K	.0101
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TRANSPORTATION, DEPARTMENT OF

The rules in Chapter 3 concern the Division of Motor Vehicles.

The rules in Subchapter 3B concern the driver license section of the DMV including general information (.0100); driver's license issuance (.0200); medical evaluation (.0300); records (.0400); classified drivers' license (.0600); commercial drivers' license (.0700); and gross vehicle weight rating (GVWR) (.0800).

<u>Driver's License Examination</u> Amend/*	19A	NCAC	03B	.0201
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OPTOMETRY, BOARD OF EXAMINERS IN

The rules in Subchapter 42B concern license to practice optometry including license by examination (.0100); responsibility to supply information (.0200); and professional corporations and limited liability companies (.0300).

<u>National Board Examinations</u> Amend/*	21	NCAC	42B	.0107
<u>Military License</u> Adopt/*	21	NCAC	42B	.0114

ADMINISTRATIVE HEARINGS, OFFICE OF

The rules in Chapter 3 are from the Hearings Division and cover procedure (.0100), mediated settlement conferences (.0200), and expedited hearing procedures for complex contested cases (.0300).

<u>Commencement of Contested Case: Notice and Filing Fee</u>	26	NCAC	03	.0103
<u>Amend/*</u>				
<u>Assessment of Reasonable Attorney and Witness Fees by the...</u>	26	NCAC	03	.0132
<u>Adopt/*</u>				

CONTESTED CASE DECISIONS

This Section contains the full text of some of the more significant Administrative Law Judge decisions along with an index to all recent contested cases decisions which are filed under North Carolina's Administrative Procedure Act. Copies of the decisions listed in the index and not published are available upon request for a minimal charge by contacting the Office of Administrative Hearings, (919) 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

Melissa Owens Lassiter Don Overby J. Randall May	A. B. Elkins II Selina Brooks Craig Croom
J. Randolph Ward	

<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
ABC Commission v. Quick Quality, Inc., T/A Rock Star Grill and Bar	11 ABC 14036	07/05/12	
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	
ABC Commission v. Quick Quality, Inc., T/A Rock Star Grill and Bar	12 ABC 07260	12/11/12	
ABC Commission v. Fat Cats Grill and Oyster Bar Inc, T/A Fat Cats Grill and Oyster Bar	12 ABC 08988	12/19/12	
ABC Commission v. Wachdi Khamis Awad T/A Brothers in the Hood	12 ABC 09188	03/06/13	
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	
ABC Commission v. Two Brothers Food Market, Inc., T/A Circle Mart	13 ABC 10356	07/11/13	
Rio Sports Restaurant and Lounge Inc. v. ABC Commission	13 ABC 11233	08/02/13	28:13 NCR 1573
ABC Commission v. Grandmas Pizza LLC T/A Grandmas Pizza	13 ABC 11401	08/13/13	
Hector Diaz v. ABC Commission	13 ABC 13071	11/08/13	
ABC Commission v. Ola Celestine Morris T/A Nitty Gritty Soul Cafe	13 ABC 14197	10/09/13	
ABC Commission v. Alvin Boyd Turner T/A Community Store	13 ABC 15827	11/20/13	
Two Brothers Food Market Inc., Circle Mart, Kenneth Kirkman v. ABC Commission	13 ABC 16233	09/30/13	
ABC Commission v. Art in a Pickle, LLC T/A Neal's Deli	13 ABC 17128	12/03/13	
ABC Commission v. T C Fox, LLC T/A Fig Café and Wine Bar	13 ABC 17131	01/07/14	
ABC Commission v. Republic, LLC T/A Republic	13 ABC 18414	01/07/14	
Leonard Marable v. ABC Commission	14 ABC 00522	03/20/14	
<u>BOARD OF LAW EXAMINERS</u>			
Jason Vicks and Mekeisha Vicks	13 BAR 20223	03/11/14	

BOARD OF MORTUARY SCIENCE

CONTESTED CASE DECISIONS

NC Board of Funeral Services v. John Douglas Bevell, Jr.	13 BMS 08447	11/22/13	28:19 NCR 2400
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BOARD OF NURSING

Douglas E. McPhail v. Board of Nursing	13 BON 20228	02/26/14	
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DEPARTMENT OF CRIME CONTROL AND PUBLIC SAFETY

Maggie Yvonne Graham v. Victims Compensation Commission	09 CPS 05287	04/09/13	
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Vivian Davis Armstrong v. The NC Crime Victims Compensation Commission	11 CPS 10539	12/06/13	
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Brian J. Johnson v. Department of Public Safety Victim Services	12 CPS 01664	12/21/12	
George H. Jagers, III v. Crime Victims Compensation Commission	12 CPS 01693	11/01/12	
Teresa Herbin v. Department of Public Safety Victim Services	12 CPS 03680	08/10/12	
Jacqueline M Davis victim-Antonio T Davis v. Dept. of Public Safety	12 CPS 05919	11/06/12	
Demario J. Livingston v. Dept. of Public Safety Victim Services	12 CPS 06245	10/19/12	
Shirley Ann Robinson v. NC Crime Victims Compensation Commission	12 CPS 07601	12/07/12	
Harold Eugene Merritt v. State Highway Patrol	12 CPS 07852	05/24/13	
Vanda Lawanda Johnson v. Office of Victim Compensation	12 CPS 09709	04/25/13	
Latoya Nicole Ritter v. Crime Victim Compensation Commission, Janice Carmichael	12 CPS 10572	04/25/13	

Ruffin J. Hyman v. Department of Public Safety, Division of Victim Compensation Services	13 CPS 01570	11/19/13	
Garrett's Towing & Recovery LLC v. Department of Public Safety, State Highway Patrol	13 CPS 09535	10/25/13	28:19 NCR 2412
Teresa F. Williams v. Crime Victims Compensation Commission	13 CPS 09790	07/11/13	
Angela Clendenin King v. Office of Administrative Hearings NC Crime Victims Comp Commission	13 CPS 11239	08/02/13	
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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Stonesthrow Group Home Medicaid Provider #6603018 Owned by Alberta Professional Services Inc v. DHHS, Division of Mental Health/Development Disabilities/Substance Abuse, and DMA	09 DHR 05790	01/11/13	
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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	
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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	
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Morrissa Angelica Richmond v. DHHS, Division of Health Service Regulation	10 DHR 05611	02/07/14	
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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	
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Gold Care Inc. Licensee Hill Forest Rest Home Warren W. Gold v. DHHS, Adult Care Licensure Section	10 DHR 05861	05/18/12	
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Robert T. Wilson v. DHHS, DHSR	10 DHR 07700	01/29/13	
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Daniel J. Harrison v. DHHS Division of Health Service Regulation	10 DHR 07883	04/12/13	28:02 NCR 73
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St. Mary's Home Care Services, Inc. v. DHHS, Division of Medical Assistance Finance Management Section Audit Unit	10 DHR 08206	01/08/14	28:19 NCR 2354
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Powell's Medical Facility and Eddie N. Powell, M.D., v. DHHS, Division of Medical Assistance	11 DHR 01451	03/05/12	27:01 NCR 75
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Julie Sadowski v. DHHS, Division of Health Service Regulation	11 DHR 01955	04/03/12	
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Mary Ann Barnes v. DHHS, Division of Health Service Regulation, Health Care Personnel Registry	11 DHR 06488	07/16/12	
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Comprehensive PT Center v. DHHS, Division of Medical Assistance	11 DHR 09197	08/14/12	27:12 NCR 1204
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Cherry's Group Home, Alphonso Cherry v. DHSR Michelle Elliot	11 DHR 09590	07/12/12	
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Leslie Taylor v. DHHS, Division of Health Regulation	11 DHR 10404	10/19/12	
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St. Mary's Home Care Services, Inc. v. DHHS, Division of Medical Assistance Finance Management Section Audit Unit	11 DHR 10487	01/08/14	28:19 NCR 2354
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Carlos Kendrick Hamilton v. DHHS, Division of Social Services	11 DHR 11161	10/16/12	27:16 NCR 1679
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Teresa Diane Marsh v. DHHS, Division of Health Service Regulation	11 DHR 11456	04/27/12	
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Betty Parks v. Division of Child Development, DHHS	11 DHR 11738	06/20/12	
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Lorrie Ann Varner v. DHHS, Regulation Health Care Personnel Registry Section	11 DHR 11867	08/02/12	
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Brenda Brewer v. DHHS, Division of Child Development	11 DHR 12064	08/03/12	27:12 NCR 1210
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Timothy John Murray v. DHHS, Division of Health Service Regulation	11 DHR 12594	06/15/12	
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Holly Springs Hospital II, LLC v. DHHS, Division of Health Service Regulation, CON Section and Rex Hospital, Inc., Harnett Health System, Inc. and WakeMed	11 DHR 12727	04/12/12	27:04 NCR 486
Rex Hospital, Inc., v. DHHS, Division of Health Service Regulation, CON Section and WakeMed, Holly Springs Hospital II, LLC, and Harnett Health System, Inc.	11 DHR 12794	04/12/12	27:04 NCR 486
Harnett Health System, Inc., v. DHHS, Division of Health Service Regulation, CON Section and Rex Hospital, Inc., Holly Springs Hospital II, LLC, and WakeMed	11 DHR 12795	04/12/12	27:04 NCR 486
WakeMed v. DHHS, Division of Health Service Regulation, CON Section and Holly Springs Hospital II, LLC, Rex Hospital, Inc., and Harnett Health System, Inc	11 DHR 12796	04/12/12	27:04 NCR 486
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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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Leslie Taylor, and Octavia Carlton v. Mecklenburg County Department of Social Services Youth and Family Services Division	11 DHR 14335	10/12/12	
Lauren Stewart v. DHHS, Division of Health Service Regulation, Health Care Personnel Registry	11 DHR 14570	06/08/12	
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Andrea D. Pritchett v. DHHS Healthcare Personnel Registry Section	11 DHR 14885	01/04/13	28:02 NCR 91
McWilliams Center for Counseling Inc., v. DHHS, Division of Mental Health, Developmental Disabilities, Substance Abuse Services, and agency of the State of NC	11 DHR 15098	11/13/12	
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Greary Michael Chlebus v. Criminal Justice Education and Training Standards Commission	11 DOJ 4829	04/27/12	
Steven Davis Boone v. Sheriffs' Education and Training Standards Commission	11 DOJ 06781	06/18/13	28:10 NCR 1062
Dillan Nathaniel Hymes v. Criminal Justice Education and Training Standards Commission	11 DOJ 10315	07/23/12	
Barbara Renay Whaley v. Criminal Justice Education and Training Standards Commission	11 DOJ 10316	04/25/12	27:06 NCR 661
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Justin Thomas Medlin v. Alarm Systems Licensing Board	11 DOJ 14493	04/23/12	
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Ricky Lee Ruhlman v. Private Protective Services Board	12 DOJ 01211	04/18/12	
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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	
Danielle Marie Taylor v. Criminal Justice Education and Training Standards Commission	12 DOJ 03838	01/24/13	28:06 NCR 554
Rodney Lyndolph Bland v. Criminal Justice Education and Training Standards Commission	12 DOJ 03839	01/11/13	
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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
Bettina Hedwig Vredenburg v. Sheriffs' Education and Training Standards Commission	12 DOJ 05140	11/09/12	27:21 NCR 2002
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Raymond Louis Soulet v. Sheriffs' Education and Training Standards Commission	12 DOJ 05142	08/27/12	
Graham Avon Hager v. Sheriffs' Education and Training Standards Commission	12 DOJ 05143	12/19/12	28:07 NCR 686
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Glenn Alvin Brand v. Sheriffs' Education and Training Standards Commission	12 DOJ 05146	10/08/12	
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Lawrence W. Sitgraves v. Private Protective Services	12 DOJ 06059	09/13/12	
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John Machouis v. Alarm Systems Licensing Board	12 DOJ 07161	12/19/12	
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Christopher A. Field v. Private Protective Services Board	12 DOJ 07548	12/19/12	
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Kevin Lee Hullett v. Criminal Justice Education and Training Standards Commission	12 DOJ 08007	09/10/13	28:17 NCR 2126
Shannon Pendergrass v. Criminal Justice Education and Training Standards Commission	12 DOJ 08008	12/05/13	
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	
Kareen Jesaad Taylor v. Sheriffs' Education and Training Standards Commission	12 DOJ 08018	04/02/13	28:08 NCR 751
Brian Thomas Jones v. Sheriffs' Education and Training Standards Commission	12 DOJ 08023	11/26/13	
Sheronica Hall Smith v. Sheriffs' Education and Training Standards Commission	12 DOJ 08026	09/11/13	28:15 NCR 1831
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	
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Joseph Ryan Fowler v. Sheriffs' Education and Training Standards Commission	12 DOJ 10184	11/26/13	
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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	
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Clinton Weatherbee Jr v. Criminal Justice Education and Training Standards Commission	12 DOJ 10206	03/25/13	
Scott Douglas Neudecker v. Criminal Justice Education and Training Standards Commission	12 DOJ 01924	09/03/13	28:17 NCR 2165
JonPaul D. Wallace v. Private Protective Services Board	13 DOJ 02422	04/26/13	
Andrew George Anderson v. Sheriffs' Education and Training Standards Commission	13 DOJ 03417	08/29/13	
Frank John Fontana, Jr. v. NC Alarm Systems Licensing Board	13 DOJ 03740	09/12/13	
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Cameron Imhotep Clinkscale v. Private Protective Services Board	13 DOJ 05095	04/26/13	
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Eddie Hugh Hardison v. Private Protective Services Board	13 DOJ 08765	04/02/13	
Antonio R. Dickens v. Private Protective Services Board	13 DOJ 08953	08/09/13	28:14 NCR 1684
Danielle J. Rankin v. Private Protective Services Board	13 DOJ 09038	08/09/13	28:14 NCR 1689
Tony Lynn Cannon v. Sheriffs' Education and Training Standards Commission	13 DOJ 09567	10/22/13	
Trudy Lane Harris v. Sheriffs' Education and Training Standards Commission	13 DOJ 09570	10/01/13	28:17 NCR 2173
Thomas Lee Phillips, Jr. v. Sheriffs' Education and Training Standards Commission	13 DOJ 09571	11/19/13	
Jesse Alan Tyner v. NC Alarm Systems Licensing Board	13 DOJ 09863	08/09/13	28:15 NCR 1837
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Steven Wesley Jones v. Sheriffs' Education and Training Standards Commission	13 DOJ 11188	10/22/13	
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TP's Resurrection Co., LLC, Thomas A. Patterson, Registered Agent v. NC Department of Labor (NCDOL)	13 DOL 18426	01/31/14	

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Lorie Cramer v. NC Quick Pass Customer Service Center and DOT	13 DOT 08753	07/19/13	28:06 NCR 589
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Dwaine C. Coley v. Department of State Treasurer	10 DST 00233	04/05/13	28:02 NCR 81
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
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Ruby J. Edmondson v. Department of Treasurer	13 DST 15268	11/12/13	28:18 NCR 2280
Nathaniel I. Orji v. Department of State Treasurer, Retirement Systems Division	13 DST 16695	02/04/14	

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Reza M. Salami v. UNC-General Administration, UNC President Thomas Ross, UNC Vice President for Legal Affairs Laura B. Fjeld, UNC Board of Governors Peter D. Hans	13 EBD 13914	02/06/14	
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Jeffery Sloan v. NCDPI	11 EDC 14077	11/09/12	27:21 NCR 1974
Lia C Long v. DPI	12 EDC 00805	10/18/13	27:16 NCR 1716
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DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

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	
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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	
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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	
NC Coastal Federation, Cape Fear River Watch, PenderWatch, and Conservancy Sierra Club v. DENR, Division of Air Quality and Carolina Cement Company, LLC	12 EHR 02850	09/23/13	
James D. Halsey v. DENR, Division of Environmental Health	13 EHR 10216	06/05/13	
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NC Coastal Federation, Cape Fear River Watch, PenderWatch, and Conservancy Sierra Club v. DENR, Division of Air Quality	13 EHR 16148	11/04/13	
American Rivers v. DENR, Division of Water Resources	13 EHR 17234	02/06/14	
Paul M. Stella v. DHHS, Division of Public Health	13 EHR 19269	02/06/14	
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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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Jan Fjelsted v. NC State Health Plan	12 INS 04763	01/16/13	28:07 NCR 706
Susan E. Montgomery Lee v. State Health Plan; Blue Cross Blue Shield	12 INS 10145	03/25/13	
Lori Matney v. Blue Cross Blue Shield of NC, State Health Plan	12 INS 10790	08/20/13	
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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
David L. Smith v. NC Innocence Inquiry Commission	13 MIS 12404	06/19/13	28:10 NCR 1160
Thomas Franklin Cross, Jr. v. NC Innocence Inquiry Commission	13 MIS 12642	06/19/13	28:10 NCR 1160
Moses Leon Faison v. NC Parole Commission, Paul G. Butler, Jr.	13 MIS 13004	09/05/13	
Jabar Ballard v. NC Innocence Inquiry Commission	13 MIS 13005	06/19/13	28:10 NCR 1160
Paul Michael Simmons v. Luis Hernandez, Forest City Police Department	13 MIS 14274	11/13/13	

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Amanda Thaxton v. State Ethics Commission	09 OSP 03754	09/20/12	
Jacob W. Scott v. Department of Crime Control and Public Safety Alcohol Law Enforcement	10 OSP 04582	07/19/13	28:12 NCR 1419
Dorothy H. Williams v. DHHS, Central Regional Hospital	10 OSP 05424	03/28/12	27:01 NCR 119
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	
Valerie Small v. NC Agricultural and Technical State University	11 OSP 03245	05/24/13	28:11 NCR 1231
Beatrice T. Jackson v. Durham County Health Department	11 OSP 3835	06/08/12	
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Barry G. Eriksen v. NC State University	11 OSP 4968	12/16/13	
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
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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
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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	
Derick 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
Thomas W. Wheeler v. NC Department of Transportation	11 OSP 13440	12/03/13	
Raeford Quick v. DOC	11 OSP 14436	05/22/12	
Tawana McLaurin v. DOC	12 OSP 00116	08/21/12	
Vera Ricks v. NC Department of Public Safety	12 OSP 00246	03/28/13	28:07 NCR 714

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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
Ladeana Z. Farmer v. Department of Public Safety	12 OSP 00460	04/10/13	28:06 NCR 564
Rhonda Whitaker v. DHHS	12 OSP 00519	05/17/13	28:08 NCR 766
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	
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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

James M. Slowin, REFS LLC v. Department of Revenue

12 REV 02218 02/11/13 28:06 NCR 583

William S. Hall v. Department of Revenue

12 REV 04115 08/27/12

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12 REV 07074 11/14/12

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12 REV 07075 11/14/12

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12 REV 08973 05/06/13

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13 REV 06646 04/29/13 28:06 NCR 593

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13 REV 10115 06/19/13 28:10 NCR 1164

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13 REV 13648 12/18/13

Olivier N. Sayah v. Department of Revenue

13 REV 13956 11/19/13

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13 REV 17720 11/13/13

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Jason Paylor v. UNC Hospitals Patient Accounts	13 UNC 12636	07/26/13
Robbyn L. Labelle v. UNC Hospitals	13 UNC 13685	11/18/13
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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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Filed

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
10DHR08206/11DHR10487/12DHR12145

St. Mary's Home Care Services, Inc.,
Petitioner,
v.
North Carolina Division of Medical Assistance
Finance Management Section Audit Unit
North Carolina Department of Health and
Human Services,
Respondent.

DECISION (as to 11DHR10487)
FINAL DECISION (as to 12DHR12145)

THIS MATTER came on for hearing before Beecher R. Gray, Administrative Law Judge, on July 15-19, 2013 and September 16-17 and 19-20, 2013 in Raleigh, North Carolina. The contested cases addressed in this decision were consolidated upon the joint motion of the parties.

APPEARANCES

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

For Respondent: Brenda Eaddy
Kathleen McCraw
North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602-0629

APPLICABLE LAW

The laws applicable to this contested case are N.C. Gen. Stat. Chapter 150B, Article 3, and N.C. Gen. Stat. Chapter 108C, Articles 1, 2, 5, and 12, 10A NCAC 22F, 10A NCAC 22I, and 10A NCAC 22J.

BURDEN OF PROOF

Under N.C. Gen. Stat. § 108C-12(d), the Agency has the burden of proof as to any “adverse determination.” The definition of “adverse determination” includes the Agency’s decision to recoup funds from the Petitioner. *See* N.C. Gen. Stat. § 108C-2(1).

ISSUE

The issue to be resolved in this case is whether Respondent violated the standards of N.C. Gen. Stat. § 150B-23 when it determined through five individual post-payment reviews that Petitioner was overpaid by Medicaid in the amount of \$4,334,056.09.

EXHIBITS

The following Exhibits were allowed into evidence:

Joint Exhibits

- 1 Pete Jones Deposition in 10-DHR-08002
- 2 Agency 30(b)(6) Deposition

Petitioner’s Exhibits

- 1 DMA Website – Financial Management Scope of Responsibilities
- 2 DMA Website – Personal Integrity Section – Scope of Responsibilities
- 3 Basic Medicaid Billing Guide (April, 2010)
- 4 Agency’s Response to St. Mary’s Discovery Requests
- 5 Agency Prehearing Statement (July 8, 2013)
- 6 Agency Prehearing Statement (March 12, 2013)
- 7 Audit Section Letter (December 2, 2009)
- 8 Audit Section Letter (February 18, 2010)
- 9 Audit Section Check Sheet (August 11, 2008)
- 10 Audit Section – Audit Tool
- 11 CV of Dr. Jeffrey Witmer
- 12 DMA Program Integrity Section Guide for PCS PACT Form Audits
- 13 Audit Section Post Payment Review Form
- 15 DMA Personal Care Services Q & A.
- 17 PCS Claims Sampling Project Power Point
- 18 Personal Care Services Financial Operation Summary & Action Plan Power Point
- 19 Jim Flowers’ September 6, 2011 Memo
- 34 The Greater Choice for Homecare Case Summary
- 35 The Greater Choice for Homecare Claims Spreadsheet
- 37 Shipman Family Home Care Case Summary
- 38 Definition of “Signature” – Black’s Law Dictionary
- 40 St. Mary’s Administrative Conference Written Arguments
- 42 Document showing errors in “conceded” claims [Respondent’s Exhibit 24] (illustrative)

Respondent's Exhibits

- 1A St. Mary's 6601123 Application for Provider Participation 5/28/04
- 1B St. Mary's 6601123 Medicaid Participation Agreement 6/1/04
- 1C St. Mary's 6601123 Medicaid Provider change form 1/29/07
- 1D St. Mary's 6601123 License 2/15/07
- 1E St. Mary's 6601123 License 12/17/04
- 1F St. Mary's 6601123 Medicaid Provider change form 12/17/04
- 2A St. Mary's 6601144 Application for provider participation 5/28/04
- 2B St. Mary's 6601144 Provider Participation Agreement 6/8/04
- 2C St. Mary's 6601144 Medicaid Provider change form 12/28/04
- 2D St. Mary's 6601144 Memo from DMA re: change of Payment Address 1/14/05
- 2E St. Mary's 6601144 License 6/8/04
- 2F 10/16/06 Letter to St. Mary's 6601144 authorizing HIV case management services
- 3 Dr. Kenneth H. Pollock Extrapolation Methodology
- 4 Diagram of Audit Procedure (illustrative)
- 5 Description of Medicaid's Coverage of Personal Care Services (PCS)
- 6 Division of Medical Assistance Clinical Coverage Policy 3C, Personal Care Services (effective October 1, 2007)
- 7A Initial Records Request for 6601144 7/1/05 Audit dated 2/18/10
- 7B Second Records Request for 6601144 7/1/05 Audit dated 7/10/10
- 7C Initial Records Request for 6601144 1/1/06 audit dated 2/19/10
- 7D Second Records Request for 6601144 1/1/06 audit dated 6/30/10
- 7E Initial Records Request for 6601144 -1/1/07 Audit dated 2/25/08
- 7F Second Records Request for 6601144 -1/1/07 Audit dated 9/2/08
- 7G Initial Records Request for 6601123 – 7/1/06 Audit dated 2/12/10
- 7H Second Records Request for 6601123 – 7/1/06 audit dated 6/20/10
- 7I Initial Records Request for 6601123 – 1/1/08 Audit dated 5/18/09
- 8A Notice of Overpayment Letter - 11/30/09 – 6601123-2008-1
- 8B Notice of Overpayment Letter - 11/09/10 – 6601123-2006-1
- 8C Notice of Overpayment Letter - 10/29/10 – 6601144-2006-1
- 8D Notice of Overpayment Letter - 9/30/09 – 6601144-2007-1
- 8E Notice of Overpayment Letter - 10/27/10 – 6601144-2005-1
- 9A Administrative Conference Decision Letter – 6601144-2005-1
- 9B Administrative Conference Decision Letter 5/19/11
- 10A Final Notice of Overpayments with Summaries - Audit 6601123-2008-3
- 10B Final Notice of Overpayments with Summaries - Audit 6601144-2006-2
- 10C Final Notice of Overpayments with Summaries - Audit 6601144-2007-3
- 10D Final Notice of Overpayments with Summaries - Audit 6601123-2006-2
- 10E Final Notice of Overpayments with Summaries - Audit 6601144-2005-2
- 11A Final Notice of Overpayments with Summaries - Audit 6601123-2008-3
- 11B Final Notice of Overpayments Audit 6601123-2006-2
- 11C Final Notice of Overpayments - Audit 6601144-2006-2
- 11D Final Notice of Overpayments -Audit 6601144-2007-3
- 11E Final Notice of Overpayments -Audit 6601144-2005-2
- 12A-E St. Mary's Service Documentation and Summary Information (Summary Information admitted for illustrative purpose only)

- 19 Dr. Alan Kvanli CV
- 21 10A NCAC 22I
- 22 10A NCAC 22J
- 24 Analysis of potentially “conceded” claims (illustrative)

The Following Exhibits were entered as an Offer of Proof by Respondent:
12F - 12N, 13, 14, 15, 16, 17, 18, 23

WITNESSES

Petitioner presented the testimony of:

- 1. Schaefer O’Neill (Tr. Vol. 8)
- 2. Bradford Woodard (Adverse) (Tr. Vol. 8)
- 3. Jeffery Witmer, PhD. (Tr. Vol. 8)

Respondent presented the testimony of:

- 1. James Flowers (Tr. Vol. 1)
- 2. Peter Jones (Tr. Vols. 2-4)
- 3. Alan Kvanli, PhD. (Tr. Vol. 5)
- 4. Maria Mapagu (offer of proof)

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 each 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 St. Mary’s Home Care Service, Inc. (“Petitioner” or “St. Mary’s”) is a provider of personal care services (“PCS”) to Medicaid recipients in North Carolina with offices in Rocky Mount and Charlotte. PCS is a Medicaid service that allows elderly or disabled individuals who are Medicaid eligible to receive assistance with certain Activities of Daily Living (“ADLs”) such as bathing, toileting, and dressing. Medicaid recipients also can receive assistance with certain Instrumental Activities of Daily Living (“IADLs”), such as laundry and cooking, as part of the PCS services provided. (Res. Ex. 6, pp. 1 and 8).

2. Respondent is the North Carolina Department of Health and Human Services, Division of Medical Assistance ("DMA"), which oversees the North Carolina Medicaid program. The Budget Management Section, Audit Unit (the "Agency" or the "Audit Unit") is a subunit of DMA operating under the laws of North Carolina. As a part of DMA, the Audit Unit is charged with settling costs and auditing cost reports from various provider types and organizations. (Pet. Exs. 1 and 3).
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 Actions

4. The Audit Unit conducted two post-payment reviews of the PCS services provided by St. Mary's from its Charlotte location. The Medicaid Provider Number for St. Mary's Charlotte location is 6601123. For the Charlotte location, the Audit Unit reviewed dates of service provided by St. Mary's between July 1, 2006 and December 31, 2006 ("2006 Charlotte Review") and between January 1, 2008 and June 30, 2008 ("2008 Charlotte Review").
5. The Agency issued written findings for each of the Charlotte reviews. (Res. Exs. 8A and 8B). For the 2006 Charlotte Review, the Agency determined that an extrapolated recoupment of \$1,248,538.23 was owed to DMA. (Res. Ex. 8B). For the 2008 Charlotte Review, the Agency determined that an extrapolated recoupment of \$1,708,712.48 was owed to DMA. (Res. Ex. A).
6. The Audit Unit also conducted three post-payment reviews of the PCS services provided by St. Mary's from its Rocky Mount location. The Medicaid Provider Number for St. Mary's Rocky Mount location is 6601144. The Audit Unit conducted post-payment reviews of St. Mary's Rocky Mount location for dates of service between July 1, 2005 and December 31, 2005 ("2005 Rocky Mount Review"), July 1, 2006 and June 30, 2006 ("2006 Rocky Mount Review"), and January 1, 2007 and June 30, 2007 ("2007 Rocky Mount Review").
7. On December 2, 2010, Petitioner filed its Verified Petition for a Contested Case Hearing and Motion for a Temporary Restraining Order and Stay of Contested Action in 10 DHR 08206. This petition contested the agency actions dated October 27, 2010 in DMA Audit PCS Review # 6601144-2005; November 24, 2010 in Review # 6601144-2006, and November 9, 2010 in Review # 6601123-2006. An Order enjoining the agency from recouping payments on these audits was granted on December 2, 2010. Petitioner took a voluntary dismissal of 10 DHR 08206 on November 25, 2013. The parties were informed that 10 DHR 08206 would not be unconsolidated and closed separately, as this would necessitate resubmission of all documents from the parties in order to create a complete record for both 10 DHR 08206 and the remaining two cases (11 DHR 10487 and 12 DHR 12145).

8. The Agency issued written findings for each of the Rocky Mount reviews. (Res. Exs. 8C-8E). For the 2005 Rocky Mount Review, the Agency determined that an extrapolated recoupment of \$701,674.65 was owed to DMA. (Res. Ex. 8E). For the 2006 Rocky Mount Review, the Agency determined that an extrapolated recoupment of \$1,248,538.23 was owed to DMA. (Res. Ex. C). For the 2007 Rocky Mount Review, the Agency determined that an extrapolated recoupment of \$369,897.80 was owed to DMA. (Res. Ex. 8D).
9. St. Mary's requested that the Department reconsider the findings for each of these audits. Two Administrative Conferences were held under the provisions of 10A NCAC 22J.
10. Two months after the conclusion of the first Administrative Conference, the hearing officer issued a written decision for the 2007 Rocky Mount Review and the 2008 Charlotte Review. (Res. Ex. 9B). The Administrative Conference Decision reduced the alleged overpayment amount in the 2007 Rocky Mount Review to \$346,988.63. (Res. Ex. 10C). The 2008 Charlotte Review overpayment was reduced to \$1,288,954.82. (Res. Ex. 10A). St. Mary's timely filed a Contested Case Petition with the Office of Administrative Hearings challenging the Agency's decision, captioned as 11 DHR 10487.
11. Eight months after the conclusion of the second Administrative Conference, the hearing officer issued a written decision for the 2005 Rocky Mount Review, 2006 Rocky Mount Review, and the 2006 Charlotte Review. (Res. Ex. 9A). The Administrative Conference Decision reduced the alleged overpayment amount in the 2005 Rocky Mount Review to \$621,722.70. (Res. Ex. 10E). The 2006 Rocky Mount Review overpayment was reduced to \$897,766.83. (Res. Ex. 10B). The 2006 Charlotte Review overpayment was reduced to \$1,178,623.11. (Res. Ex. 10D). St. Mary's timely filed a Contested Case Petition with the Office of Administrative Hearings challenging the Agency's decision, captioned as 12 DHR 12145.
12. The Parties jointly moved for these cases to be consolidated, which delayed the contested case hearing in 11 DHR 10487. Additionally, the Parties jointly sought several continuances of the contested case hearing in the consolidated cases.

The DMA Audit Unit

13. James ("Jim") Flowers (hereinafter "Audit Chief Flowers") serves as the Chief of the Audit Unit, which is a subdivision of the Budget Section of DMA. (Tr. Vol. 1, p. 37). Peter ("Pete") Jones (hereinafter "Audit Manager Jones") serves as the Audit Manager of the Audit Unit. (Tr. Vol. 2, p. 293).
14. Audit Chief Flowers testified that the Audit Unit's authority to conduct a post-payment review of St. Mary's PCS Medicaid services derives from 10A NCAC 22I. (Tr. Vol. 1, pp. 46 and 48). 10A NCAC 22I(a) states that: "an audit of a provider may be conducted by the Division of Medical Assistance, or by any auditing firm subcontracted by them."

15. The DMA Medicaid Billing Guide and DMA's webpage state that the Audit Unit is responsible for settling costs and auditing cost reports from various provider types including long term care, hospitals, federally qualified health clinics, rural help centers, and local health departments. Financial and statistical data are summarized from the cost reports audited by the Audit Unit to assist DMA in administering the reimbursement to these providers and in rate setting. (Pet. Exs. 1 and 2).
16. Based on the description of the Audit Unit's duties in the Medicaid Billing Guide, the auditing performed by the Audit Unit is limited to audits of cost reports and does not provide that the Audit Unit will conduct post-payment reviews of PCS documentation.
17. The NC DMA Medicaid Billing Guide states that the Program Integrity Section is responsible for conducting post-payment reviews of claims paid by the fiscal agent and identifying overpayments for recoupment. (Pet. Ex. 3). This is consistent with the duties outlined in 10A NCAC 22F entitled "*Program Integrity*."
18. Audit Manager Jones conducted the initial review of the Rocky Mount 2005 Review and Rocky Mount 2007 Review. (Tr. Vol. 2, pp. 309-310). Audit Manager Jones completely re-reviewed the audit findings for the two audits he conducted prior to sending the notices of overpayment to St. Mary's. He also reviewed the audit findings of the remaining three St. Mary's audits that were completed by his staff. Audit Manager Jones made revisions to these three sets of audit findings prior to sending the findings to St. Mary's. (Tr. Vol. 2, pp. 402-403).
19. The Audit Unit did not provide any formal training or credentialing process to Audit Manager Jones or any of the other auditors involved in this audit. (Tr. Vol. 2, pp. 393-397). Instead, the Audit Unit uses on-the-job training such that new trainees learn by reviewing past audits and conducting audits under a more senior staff member. (Tr. Vol. 2, p. 402). The St. Mary's audits were the first PCS post-payment reviews that Audit Manager Jones had conducted at the Audit Section. (Tr. Vol. 2, p. 408).
20. As Chief of the Audit Unit, Jim Flowers reviewed the post-payment review findings with staff prior to Audit Manager Jones sending out the overpayment notices to St. Mary's. (Tr. Vol. 1, pp. 51 and 62).

Lack of Evidence to Support Audit Section Decision

21. Audit Chief Flowers provided no testimony that identified or explained any of the specific findings made by the Audit Unit in its post-payment reviews of St. Mary's. Audit Chief Flowers did provide testimony regarding the Audit Unit's interpretation of the PCS policies applied to the St. Mary's post-payment reviews.
22. Despite the fact that Audit Manager Jones conducted, oversaw, and re-reviewed each of the Agency's post-payment review findings, he provided no testimony during his direct examination to identify any documents to support the Agency's decision. Audit Manager

Jones also provided no testimony identifying or explaining any of the specific findings made by the Audit Unit in its post-payment review of St. Mary's.

23. During his cross-examination and redirect, Audit Manager Jones provided testimony regarding the general policies that he believed formed the basis of the Agency's findings. Audit Manager Jones also testified about a limited number of the specific findings identified in Respondent's Exhibit 12. (Tr. Vol. 2, pp. 435-468; Tr. Vol. 3, pp. 650-670; Res. Exs. 12A, 12B, and 12E).

St. Mary's Alleged Violations of Best Practices Correcting Documentation Errors

24. The Audit Section contends that it used "best practices" when determining whether a document reviewed would result in an overpayment. (Tr. Vol. 1, pp. 156 and 207; Tr. Vol. 2, p. 447; Tr. Vol. 4, pp. 707, 742). The best practices that the Audit Section contends St. Mary's were expected to follow are contained in the Clinical Coverage Policy and are not written down or published anywhere to the Agency's knowledge. (Tr. Vol. 1, pp. 156 and 207; Tr. Vol. 3, p. 707). Audit Chief Flowers did not identify any specific documents that the Agency contends violated "best practices." (Tr. Vol. 1, pp. 156-158).
25. The Audit Section contends that "best practices" for documentation should be used by corporations, the military, healthcare providers, and the Agency. (Tr. Vol. 1, pp. 156-157). However, the Agency's own internal documentation relating to this audit did not conform with the documentation best practices described by Audit Chief Flowers in his testimony. (Tr. Vol. 1, pp. 156 and 169-173; Pet. Exs. 9 and 10).
26. Audit Manager Jones testified that violations of "best practices" served as his basis for determining whether the documentation reviewed should have resulted in an overpayment (Tr. Vol. 2, p. 447; Tr. Vol. 3, pp. 532, 625; Tr. Vol. 4, pp. 742). Specifically, Audit Manager Jones stated that St. Mary's failed to follow "best practices" in the way it amended information in documents such as the Physicians Authorization and Certification for Treatment form ("PACT form") and service notes. (*Id.*).
27. The Medicaid Participation Agreement between the Department and St. Mary's provides that St. Mary's is obligated to comply with federal and state laws, regulations, and policies. (Res. Ex. 1, p. 1). It does not contain any provisions relating to best practices. (*Id.*)
28. Audit Manager Jones testified that best practices required St. Mary's to either create a new document or to strike through the corrected portion, enter the correction, sign the name of the individual making the correction, and append an explanation for the correction to the document. (Tr. Vol. 2, p. 449). Audit Manager Jones believes that these best practices create a proper "audit trail" for DMA auditors. (Tr. Vol. 2, p. 429).
29. In making its findings relating to how changes should be made to Physician's Authorization and Certification for Treatment ("PACT") forms and other service

documentation, the Agency also relied on Medicaid Coverage Description Section 6 - Personal Care Services (effective January 1, 1999). (Res. Ex. 5; Tr. Vol. 2, pp. 359-360). Specifically, the Agency relied on Pages 6-12 and 6-16, Step 6.11 of The Medicaid Coverage Description – Section 6 Personal Care Services (effective January 1, 1999). (Res. Ex. 12A). There is no guidance in The Medicaid Coverage Description that directs a Medicaid provider on how to make changes to a PACT form or other service documentation. (Res. Ex. 5).

30. In making its findings relating to how changes should be made to PACT forms and other service documentation, the Agency also relied on Clinical Coverage Policy 3C (effective October 1, 2007). Clinical Coverage Policy 3C sets forth the clinical and administrative policies that govern the PCS program. The Agency relied on this document in its review of all the St. Mary's documents in the audits at issue. (Tr. Vol. 2, pp. 420-421). However, Clinical Coverage Policy 3C (effective October 1, 2007) could only apply to the 2008 Charlotte Review.
31. Clinical Coverage Policy 3C contains no provision that directs a provider on how to make contemporaneous corrections or changes to documentation. (Res. Ex. 6). The Agency cited Clinical Coverage Policy Sections 7.6 and 7.8.1, 7.8.2, and 7.8.3 to support its findings that St. Mary's incorrectly altered or corrected its PACT forms. (Res. Ex. 12(a); Tr. Vol. 2, p. 414).
32. Clinical Coverage Policy Section 7.6 states only that the provider is responsible for the accuracy of the assessment and contains no guidance on how changes or alterations to a document should be made. (Res. Ex. 6, p. 13).
33. Clinical Coverage Policy § 7.8.1 and 7.8.2 involve revision to the PACT plan of care that are identified after services have been certified as necessary because of either a significant or non-significant change in the recipient's conditions. (Res. Ex. 6, p. 14). These sections of the policy contain no guidance on how changes or alterations should be made by a provider during the completion of the PACT prior to certification.
34. Clinical Coverage Policy Section 7.8.3 sets forth the process for changing PACT documentation when an individual who is receiving PCS qualifies for PCS Plus, a more intensive service. (Tr. Vol. 2, pp. 426-427). This section of the policy contains no guidance on how changes or alterations should be made by a provider during the completion of the PACT prior to certification and is not applicable in any manner to this audit.
35. Audit Manager Jones testified that any changes to a PACT require the revisions set forth in Section 7.8. (Tr. Vol. 2, p. 440). Audit Manager Jones believed that this was required even if the document was changed or revised at the time of the document's creation, prior to services being provided or certification of the documentation by the caregiver or nurse. (*Id.*)

36. The Audit Section contends that its position regarding how PACT forms should be changed or altered is supported by the FAQ published by DMA (the "FAQ"). (Tr. Vol. 2, p. 430; Pet. Ex. 15). The DMA FAQ is not contained in Clinical Coverage Policy 3C. (Tr. Vol. 2, p. 431).
37. The DMA FAQ appears to have been published by DMA in March 2009. (Pet. Ex. 15). Although Audit Manager Jones did not know the publication date of the DMA FAQ, he testified that he assumed the publication date to be March 2009. (Tr. Vol. 3, p. 515). The publication date of this document is subsequent to the review periods in all five of the St. Mary's audits. (Tr. Vol. 3, p. 516).
38. Question 27 of the DMA FAQ specifically addresses how changes should be made to a PACT form after the form has been certified, stating "a RN cannot correct an original, signed PACT Form but rather the changes should be done on a copy of the PACT." (Pet. Ex. 15, p. 10). This guidance is consistent with Clinical Coverage Policy 3C and contradicts Audit Manager Jones' contention that RNs are directed to follow certain protocols for correcting or changing a PACT form prior to signing the PACT.
39. Question 27 includes a date of July 2007 below the answer. (Pet. Ex. 15, p. 10). Audit Manager Jones did not know whether this guidance was published in March 2009 or July 2007. (Tr. Vol. 3, pp. 826-827). Even considering the earlier publication date of July 2007, the guidance provided in DMA FAQ 27 is only applicable to the 2008 Charlotte Review. (Tr. Vol. 3, p. 529). The Agency did not limit its use of the DMA FAQ to only the 2008 Charlotte Review but instead generally used this document in making findings in all of the St. Mary's audits. (Tr. Vol. 2, pp. 430-432; Tr. Vol. 3, pp. 528-520).
40. Based on the language of Clinical Coverage Policy 3C and the DMA FAQ, a registered nurse is limited only in how changes are made to the PACT after it is signed. Prior to signing the document, the Agency has provided no direction to providers on how to make corrections to the PACT. Without evidence that a change, correction, or alteration was made after the certification by the physician, the Agency cannot demonstrate that St. Mary's has violated Clinical Coverage Policy 3C or the DMA FAQ.
41. In response to a question regarding how aides should fix mistakes on an original service note, Question 117 of the DMA FAQ states: "Agency policy should establish requirements for documentation. Medicaid requires the notes to be legible and signed. See Policy 3C Section 7.11. Generally, the accepted standard to correct an error in documentation is to strike a single line through the error, initial and date the entry." (Pet. Ex. 15, p. 36). The date under this FAQ is June 2008. (*Id.*).
42. DMA FAQ 117 makes clear that the policy requires legible, signed service notes. To the extent that DMA informed providers of what it believed were generally accepted standards to correct an error, such guidance was not published until June 2008, after the audit period in all five of these audits. (Pet. Ex. 15, p. 36).

43. Although the guidance provided in DMA FAQ 117 is not applicable to the time periods under review, DMA FAQ 117 does not comport with Audit Manager Jones' testimony that the provider should append a written explanation for a change or correction to a service document. (Tr. Vol. 2, p. 449).

44. Audit Manager Jones also provided testimony relating to Respondent's Exhibit 12A, which he contends provides two specific examples of changes or alterations to a PACT form in violation of best practices and Clinical Coverage Policy 3C. (Tr. Vol. 3, pp. 650-660). Specifically, for Recipient L.R., the Agency believed that there were alterations made to the time needed to accomplish the tasks in the plan of care which did not meet "best practices." (*Id.*) Audit Manager Jones believed that--if changes were to be made to the plan of care--an entirely new document should have been created. (Tr. Vol. 2, p. 437; Tr. Vol. 3, pp. 533). The PACT form--which is handwritte--contains changes to the various individual times to accomplish certain activities. However, the total time for the week does not appear to be altered in any way. (Res. Ex. 12A). The Agency does not know if these changes were made during the creation of the PACT, prior to certification. (Tr. Vol. 2, pp. 440-441) The physician certified the plan of care after creation of the plan of care, including the change to the individual task time, indicating that the changes were made prior to certification. (*Id.*) This certification indicates that the physician supports the plan of care, as corrected. (*Id.*)

45. Respondent introduced Exhibit 12A, Bates Number 1530-1531, as the second specific claim for which it believed showed alterations to the PACT plan of care. However during its original review of this document, the Audit Unit made no finding that the plan of care in question had been altered or changed. (Tr. Vol. 3, pp. 729-731; Res. Ex. 12A).

46. The fact that the Agency identified a new finding regarding the alteration of a PACT plan of care that it did not identify as an error in its initial audit demonstrates the subjective and arbitrary nature of this finding.

47. The Audit Section's understanding of the Agency's policy and its reliance on unpublished "best practices" invalidates the Agency's findings and discredits the Audit Unit's ability to properly conduct post-payment reviews of PCS providers.

Physician Authorization After 60 Day Authorization Time Period

48. Audit Chief Flowers testified that when a PACT is signed by the physician after 60 days, it is the policy of the Agency to allow all dates of service, beginning after the date the physician signs the PACT form. (Tr. Vol. 1, pp. 196-197). Audit Chief Flowers testified that he believes his auditors followed this guidance. (Tr. Vol. 1, p. 197).

49. Audit Chief Flowers' testimony is consistent with the Audit Unit's Post-Payment Tool Review Form which states that claims should be allowed after the 60th day once the physician has signed the PACT form. (Pet. Ex. 13, ln. 9). DMA's Program Integrity Section has set forth a similar position in its Audit Tool Review Form. (Pet. Ex. 12, ln. 113).

50. Audit Manager Jones directly contradicted Audit Chief Flowers' testimony and the Audit Unit's Post-Payment Review Form, stating that it was his understanding of the policy that all dates of service would be recouped after the 60th day even if the physician signed the PACT form. (Tr. Vol. 2, pp. 465-466). Audit Manager Jones specifically identified 3 examples of recoupments for which he contends the basis for the Agency's finding is that the physician signed the PACT form after the 60th day. (Tr. Vol. 2, pp. 459, 464-466; Res. Ex. 12E).
51. Audit Manager Jones' understanding of the Agency's physician signature policy is erroneous and in direct contradiction to the testimony of Audit Chief Flowers and the Agency's policy. The specific documents reviewed in Respondent's Exhibit 12E do not evidence an overpayment.

PACTS Authorized by Nurse Practitioners and Physician Assistants

52. The Agency contended that the PACT must be signed only by the primary care physician and, if a nurse practitioner or physician assistant signed a PACT form, the provider was required to maintain documentation that the specific nurse practitioner or physician assistant was under the supervision of the recipient's primary care physician. (Tr. Vol. 1, pp. 181-183). The Audit Unit contends that, without such documentation, recoupment is appropriate for all services provided under the PACT. (Tr. Vol. 1, p. 179).
53. The Agency provided no testimony or evidence regarding the Medicaid recipients or claims for which this finding might apply and provided no evidence to support its interpretation of the policy as requiring the provider to maintain such documentation.
54. Even assuming that the Audit Unit could have provided such evidence, the Medicaid Coverage Description – Section 6 Personal Care Services (effective January 1, 1999) and Clinical Coverage Policy 3C (effective Oct. 1, 2007) contain no provision that requires PCS providers to maintain documentation demonstrating that a nurse practitioner or physician assistant is under the direct supervision of a specific physician. (Tr. Vol. 1, p. 190; Res. Exs. 5 and 6). The Audit Section cited no other documentation to support its understanding of this purported PCS policy requirement.
55. The DMA Program Integrity PCS Audit Guide directly contradicts the Audit Unit's understanding of the policy stating that the PACT form must be authorized by a "primary physician's practice." The Program Integrity Audit guide also states that if the appropriate practice signs page 4 of the PACT authorizing the need for service, there should be no recoupment. (Tr. Vol. 1, p. 191; Pet. Ex. 12, ln. 24).
56. Subdivisions of DMA should not apply different standards to providers when conducting post-payment reviews. Audit Chief Flowers testified that it is important that the Program Integrity Section and the Audit Unit apply the rules in similar ways. (Tr. Vol. 1, p. 210).
57. The Audit Section has no basis for recoupment on this ground and evidences a misunderstanding of DMA's policy.

RN's Use of Stamped Signature

58. The Agency contends that for 32 or 33 recipients reviewed in the St. Mary's audit, the PACT contained a copy of an RN signature stamp in violation of DMA policy. (Tr. Vol. 3, p. 661). The Audit Unit was concerned that the RN signature stamp appeared to be in the same location on each PACT. (*Id.*). The Agency identified only 2 specific recipients for which this finding was made by the Agency. (Res. Ex. 12B).
59. PCS policy allows for the use of stamped signatures. (Tr. Vol. 3, p. 662). PCS policy also allows providers to use electronic signatures. (Tr. Vol., 4, pp. 727, 729). When using an electronic signature, Audit Manager Jones testified that he would expect the signature to be in the same place each time it was used. (*Id.*)
60. The PACT forms that contained the stamped signature related to a single registered nurse employed by St. Mary's--Patti Jones. (Res. Ex. 12B; Tr. Vol.4, p. 711). RN Jones' PACTs were typewritten instead of handwritten and contained her stamped signature affirming the PACT. (Res. Ex. 12B). St. Mary's provided the Audit Unit with an explanation regarding the stamped signature stating that RN Jones had a debilitating medical condition that made it difficult to write and that the use of the stamp was only made as an accommodation to the nurse in question. (Tr. Vol. 4, p. 714; Res. Ex. 40).
61. The agency disregarded this explanation because, on a limited number of documents, RN Jones signed her name using a pen. (Tr. Vol. 4, pp. 714-15). It is unreasonable to reject RN Jones' need to use a stamped signature on the basis that she was able to sign her name on some occasions.
62. A comparison of two of the stamped-signature PACT forms that were admitted into evidence shows that all of the information required for the assessment is unique to the individual recipient being assessed. (Tr. Vol. 4, pp. 716-720; Res. Ex. 12B). The PACTs also show that RN Jones entered distinct typewritten dates to document the date of her certification of these PACT forms. (*Id.*) Additionally, for each of the two PACTs discussed, the physician agreed with the assessment and ordered the service by signing and dating the PACT. (*Id.*) The fact that the PACTs are unique and individualized is critical because it refutes any concern the Audit Unit may have had that the RN was not completing the assessments.
63. The Agency did not consider or review the contents of the documents to determine whether they were unique PACT forms, containing unique clinical information documenting the need for services. (Vol. 3, p. 720).
64. The use of the stamped signature by RN Jones is not a violation of DMA's policy.

Claims the Agency Contends St. Mary's Is Not Challenging

65. Audit Chief Flowers provided no testimony or evidence identifying any claims the Agency contends St. Mary's conceded at the reconsideration hearing. Similarly, Audit

Manager Jones provided no testimony regarding any potential concessions made by St. Mary's at the reconsideration review hearing.

66. The Audit Unit attempted to provide evidence of concessions by introducing an audit spreadsheet that estimated what the extrapolated overpayment would be if the Agency recouped only for those services St. Mary's purportedly "conceded." (Tr. Vol. 5, p. 900; Res. Ex. 24).
67. Dr. Kvanli was asked to testify about the veracity of this document. Dr. Kvanli did not create the document and did not review any of the information contained in the document. (Tr. Vol. 5, pp. 900, 979). Dr. Kvanli could not confirm if the information contained in the spreadsheet was accurate. (*Id.* at p. 979)
68. Respondent's Illustrative Exhibit 24 contains many errors. For example, Petitioner's expert, Dr. Witmer, states that dozens of names listed in Respondent's Illustrative Exhibit 24 as being conceded were not listed as conceded claims in the Administrative Conference Decision. (Tr. Vol. 8, pp. 1577-1582; Respondent Ex. 42). Dr. Kvanli also noted an error in Respondent's Illustrative Exhibit 24. (Tr. Vol. 5, pp. 986-987)
69. Respondent's Illustrative Exhibit 24 is unreliable and does not accurately reflect alleged concessions made by St. Mary's prior to the contested case.
70. The Hearing Officer's decision also appears to contain errors. The decision indicated that certain claims were conceded by St. Mary's when the documentation submitted to the Hearing Officer sets forth specific challenges to the findings. For example, the Hearing Officer found that St. Mary's did not challenge the findings for Recipient S.R. [Strata 1-12]. (Res. Ex. 9A, p. 21). Documentation submitted by St. Mary's expressly set forth a challenge to the findings for Recipient S.R.. (Pet. Ex. 40, Bates p. 000192). The Hearing Officer found that St. Mary's did not challenge the findings for Recipient M.F. [Strata 1-4]. (Res. Ex. 9A, p. 32). Documentation submitted by St. Mary's also expressly sets forth a challenge to the findings for Recipient M.F. (Pet. Ex. 40, Bates p. 000191). The Hearing Officer found that for Recipient V.P. [Strata 5-1], St. Mary's had not challenged the Audit Unit's findings. (Res. Ex. 9A, p. 30). St. Mary's expressly challenged the Audit Section's finding for Recipient V.P. [Strata 5-1]. (Pet. Ex. 40, p. 9).
71. The Hearing Officer's findings are inconsistent with the evidence in the record and on their face do not establish by a preponderance of the evidence that the basis for the Audit Section's recoupment was proper or that St. Mary's conceded liability for repayment of these claims. Even to the extent St. Mary's did not challenge certain findings at the Administrative Conference, this does not mean that the Audit Section has established that there was an error or that the error should result in recoupment.
72. The written arguments submitted to the Hearing Officer by St. Mary's expressly reserved St. Mary's right to challenge findings at a later stage in the proceeding. (Pet. Ex. 40, Bates p. 000131). St. Mary's Petition for Contested Case Hearing challenged the findings of the Reconsideration Decisions issued in this case. Nothing in the Petitions for

Contested Case Hearings indicate that St. Mary's was challenging only part of the reconsideration review decisions. The parties entered into no stipulations prior to or during the course of the hearing regarding any conceded claims.

73. The Agency did not provide sufficient evidence to determine that St. Mary's conceded any claims in these audits. To the extent that the Audit Unit attempted to provide such evidence through the introduction of Respondent's Illustrative Exhibit 24, this document contained numerous errors, making it unreliable.

The Audit Unit's Extrapolation of the Post-Payment Review Findings

74. As part of the post-payment review process, the Audit Unit extrapolated the results of the St. Mary's audits. Extrapolation is a process by which the results of a review of a statistical sample of claims are used to estimate the repayment owed by a provider for the entire claims universe billed by the provider during the time period under review.

Audit Unit's Purported Authority to Use Extrapolation

75. Audit Unit Chief Flowers testified that the Audit Unit conducted the St. Mary's audits under the authority of 10A NCAC 22I. (Tr. Vol. 1, p. 104). 10A NCAC 22I is entitled "Title XIX Reimbursement and Administrative Review Process." 10A NCAC 22I does not contain any provision that provides the Audit Unit with authority to extrapolate the results of an audit. (*Id.*)
76. The Audit Unit contends that its authority to extrapolate the results of the St. Mary's post-payment reviews is expressly derived from 10A NCAC 22F .0606, entitled "Technique for Projecting Medicaid Repayments Through Use of Extrapolation." (Tr. Vol. 1, pp. 106-108).
77. 10A NCAC 22F, entitled "Program Integrity," is a section of the North Carolina Administrative Code that applies to the DMA Program Integrity Section, and DMA Program Integrity is not the Audit Section. (Tr. Vol. 1, pp. 244-245).
78. 10A NCAC 22F .0606 is the only portion of 10A NCAC 22F that was used by the Audit Section during its post-payment review of St. Mary's. (Tr. Vol. 1, pp. 106, 108, and 110). The Audit Section did not follow any of the other requirements for post-payment reviews set forth in 10A NCAC 22F. (*Id.*)
79. 10A NCAC 22F .0606(d) states that when extrapolation is used, the provider may challenge the validity of the findings in the sample in accordance with the provisions found at 10A NCAC 22F .0402. (Tr. Vol. 1, p. 108).
80. The reconsideration of the Audit Unit's decision did not proceed under 10A NCAC 22F .0402, as required in 10A NCAC .0606(d). (Tr. Vol. 1, pp. 105, 108-109). Instead, St. Mary's was provided the opportunity to appeal the Audit Unit's decision under 10A NCAC 22J.

81. The reconsideration process found in 10A NCAC 22F .0402 differs significantly from the appeal rights found in 10A NCAC 22J.
82. 10A NCAC 22F .0402, entitled "*Reconsideration Review for Program Abuse*" sets forth the reconsideration process referenced in the 10A NCAC 22F .0606(d). 10A NCAC 22F .0402(d) states:

The purpose of the Reconsideration Review includes:

- (1) Clarification, formulation, and simplification of issues;
 - (2) Exchange and full disclosure of information and materials;
 - (3) Review of the investigative findings;
 - (4) Resolution of matters in controversy;
 - (5) Consideration of mitigating and extenuating circumstances;
 - (6) Reconsideration of the administrative measures to be imposed;
 - (7) Reconsideration of the restitution of overpayments.
83. Under 10A NCAC 22F .0402, the hearing officer must consider not only whether the post-payment finding was correct but also must determine that the administrative measures imposed were appropriate. 10A NCAC 22J contains no such provision, and the St. Mary's reconsideration review process did not involve any consideration of the administrative measures that should be imposed on St. Mary's, as required by 10A NCAC 22F .0401(d). (Tr. Vol. 1, p. 102).
 84. The use of 10A NCAC 22F .0606 also is problematic because this regulation purports to provide appeal rights for "provider abuse." The Audit Unit did not use 10A NCAC 22F .0301, which defines "provider abuse" in determining whether overpayments were appropriate in the St. Mary's review, and it did not consider its findings to relate to "provider abuse." (Tr. Vol. 1, pp. 99, 108-109).
 85. The Audit Unit also did not consider any administrative remedy other than recoupment when it conducted the St. Mary's post-payment review, which is required under 10A NCAC 22F. (Tr. Vol. 1, pp. 99-100 and 250-252). Under 10A NCAC 22F .0302, when the Agency finds provider abuse, it is directed to consider administrative remedies that include not only recoupment, but also remedial measures, warning letters, and provider probation.
 86. The Agency used the authority found in 10A NCAC 22F to extrapolate but failed to follow the other procedural and substantive requirements of 10A NCAC 22F, which are mandated by the rule when extrapolation is used.

Agency Use of the Pollock Extrapolation Model

87. The Audit Unit sought the services of Kenneth Pollock, PhD to aid in the design of an extrapolation methodology that could be used by the Agency. (Tr. Vol. 1, p. 67). Dr. Pollock is a professor of statistics and zoology in the Department of Zoology at North

Carolina State University in Raleigh, North Carolina. (Tr. Vol. 1, p. 68; Res. Ex. 3). The Agency relied on Dr. Pollock to design the extrapolation model, provide it with statistical information, and determine an acceptable relative standard error. (Tr. Vol. 1, pp. 144-145).

88. Dr. Pollock designed a two-stage extrapolation model for the Audit Section. The Pollock Model uses stratified disproportionate random sampling to select the claims that would be reviewed by the Audit Section. (Res. Ex. 3).
89. The first stage of the Pollock Model requires the Agency to create five strata, each containing twelve randomly-selected Medicaid recipients. Under the second stage of the Pollock Model, the Audit Section selects a random sample of five "claims" from each of the randomly-selected recipients selected for the review. (Tr. Vol. 1, pp. 75, 79-80; Res. Exs. 3 and 4).
90. Neither of the two statistical experts--Dr. Kvanli and Dr. Witmer--who testified in this case ever have seen an extrapolation model similar to the Pollock Model used in a Medicaid or Medicare audit. (Tr. Vol. 5, p. 940; Tr. Vol. 8, p. 1544).
91. Both experts opined that the Pollock Model was a mathematically valid methodology. (Tr. Vol. 5, p. 892; Tr. Vol. 8, p. 1545). Mathematically valid formulas, however, are subject to errors if the required procedures are not followed and the inputs are flawed. (Tr. Vol. 8, p. 1545). Flawed inputs or failure to follow underlying assumptions of a statistically valid mythology will result in invalid and unreliable results. (Vol. 8, p. 1595-1598).
92. The Pollock Model suggests that auditors should consider both overpayments and underpayments. (Res. Ex. 3, p. 5). Under the post-payment review process put in place by the Audit Unit, the Agency did not attempt to identify any underpayments in its findings. (Tr. Vol. 1, p. 139, p. 141; Tr. Vol. 5, p. 991). Identifying underpayments would have the effect of reducing the extrapolation amount determined by the Agency. (Tr. Vol. 5, p. 991).
93. Although Audit Chief Flowers testified that a probe sample was used in the review of St. Mary's cases, the Audit Section's expert witness, Dr. Kvanli, stated in his opinion that a probe sample was not used by the agency. (Tr. Vol. 1, p. 83; Tr. Vol. 5, p. 942).

Audit Section's Use of "Claims" and Its Effect on the Required Independence for Extrapolation Audit

94. The Audit Unit's extrapolation purports to select a random sample of paid "claims" submitted by St. Mary's during the relevant audit periods.
95. The Audit Unit determined that a "claim" would consist of consecutive paid dates of services submitted for payment by St. Mary's for a given payment cycle. (Tr. Vol. 1, p. 80). Typically the "claims" selected by the Audit Section contained either five

- consecutive dates of service or ten consecutive dates of service. (Tr. Vol. 1, p. 80; Tr. Vol. 8, p. 1552).
96. The Pollock Model does not define what constitutes a claim, and the Audit Section had no knowledge of how claims were adjudicated when it defined claims to be consecutive dates of service. (Tr. Vol. 1, p. 133).
 97. As President of SembraCare, Schaefer O'Neill is responsible for submitting requests for payment to Medicaid for over 400 PCS providers in North Carolina. In the last ten years, Mr. O'Neil has requested payment for over 10,000,000 PCS claims in North Carolina. (Tr. Vol. 8, p. 1442).
 98. As an expert in electronic submissions and adjudication of Medicaid claims, Mr. O'Neill testified that for the purposes of payment, DMA adjudicates claims based on a request for payment for each individual date of service provided. (Tr. Vol. 8, pp. 1443, 1463, 1470 and 1495). This process commonly is referred to as "claim adjudication." (Tr. Vol. 8, p. 1470).
 99. If multiple consecutive claims are submitted for payment by a provider, DMA does not approve or deny payment for these services as a whole. Instead, each date of service is reviewed and analyzed as a stand-alone request for payment. (Tr. Vol. 8, p. 1487). DMA approves or denies each individual date of service separately. (Tr. Vol. 8, p. 1470).
 100. Bradford Woodard is employed by DMA as a Senior Data Analyst with the Program Integrity Section. (Tr. Vol. 8, p. 1509). Mr. Woodard's duties include producing random sample of claims to be audited by Program Integrity and creating summary statistical data for audits using extrapolation. (Tr. Vol. 8, p. 1510). Mr. Woodard has worked with DMA on post-payment reviews involving PCS providers. (*Id.*)
 101. Mr. Woodard cited 10A NCAC 22F .0606 as the basis for the extrapolation process used in the audits conducted by DMA Program Integrity. (Tr. Vol. 8, pp. 1514 and 1520). DMA Program Integrity defines the term "claim" in 10A NCAC 22F .0606 to mean individual dates of service and not consecutive dates of service. (Tr. Vol. 8, p. 1518; Pet. Exs. 34 and 35). Mr. Woodard testified that he could not recall one example of the Agency selecting consecutive dates of service as a "claim" in a PCS audit. (Tr. Vol. 8, p. 1530).
 102. At the time the decision was made by the Audit Unit to define a "claim" to be consecutive dates of service, the Agency was not aware that PCS claims are adjudicated by DMA by each individual date of service. (Tr. Vol. 1, p. 133). Audit Chief Flowers subsequently has learned that DMA approves or denies payment to PCS providers for each individual date of service submitted for payment. (Tr. Vol. 1, p. 132).
 103. Dr. Kvanli, DMA's statistical expert, initially had concerns that the Audit Unit had not reviewed claims in the St. Mary's audit. (Tr. Vol. 5, pp. 987-988). To confirm that the Agency properly had considered what constitutes a "claim," Dr. Kvanli spoke with Audit

Chief Flowers about this issue. (*Id.*) Dr. Kvanli relied solely on the statements of Audit Chief Flowers in determining that the Audit Unit had properly defined a “claim” in the St. Mary’s post-payment reviews. (*Id.*).

104. Dr. Jeffery Witmer, St. Mary’s statistical expert, testified that based on his experience, claims selected by a Medicaid or Medicare audit would not be consecutive dates of service. (Tr. Vol. 8, p. 1553). Dr. Witmer cited DMA Program Integrity as an example of how auditors typically select random, nonconsecutive, independent claims. (Tr. Vol. 8, p. 1555).
105. No one at the Audit Section discussed with DMA Program Integrity how it defined a claim when it conducts post-payment reviews of PCS providers. (Tr. Vol. 1, p. 133). Audit Chief Flowers agreed that it is important that if the Program Integrity Section and the Audit Unit are doing similar audits, they should apply the rules in similar ways. (Tr. Vol. 1, p. 210).
106. The Audit Section’s definition of “claim” demonstrated an erroneous understanding of how PCS claims are defined and adjudicated in North Carolina. A PCS claim in North Carolina is billed and adjudicated as one single date of service and not multiple sequential dates of service.
107. Dr. Jeffery Witmer, St. Mary’s statistical expert, testified that a critical underlying assumption in the Pollock Model is independence of observations. (Tr. Vol. 8, pp. 1545, 1549-1552, 1556, and 1630-1631). Independence is achieved when each particular determination made for each date of service does not affect the other dates of service reviewed. (Tr. Vol. 8, pp. 1549-1551).
108. The use of consecutive dates of service eliminates independence in the Audit Section’s extrapolation process. Defining a claim to be consecutive dates of service makes the individual dates of service dependent inputs. An input is dependent when a single audit decision can affect multiple dates of service contained in the “claim.” The Audit Section’s decision to define a “claim” to be consecutive dates of service resulted in the dependence of the inputs used by the Agency. (Tr. Vol. 8, pp. 1549-1552, 1556, and 1630-1631).
109. Because the Audit Section’s extrapolation included dependent observations among consecutive dates of service, the results of the extrapolation are untrustworthy and not valid. (Tr. Vol. 8, p. 1556). Having dependence among consecutive dates of service completely invalidates the use of the extrapolation methodology designed by Dr. Pollock. (Tr. Vol. 8, p. 1567).

Audit Section’s Use of 20% Relative Standard Error

110. The Pollock Model allows for a Relative Standard Error of twenty percent (20%). (Tr. Vol. 1, p. 143; Res. Ex., 3, p. 2). Relative Standard Error is commonly referred to as “Precision”. (Tr. Vol. 5, p. 859). Precision is a measurement of uncertainty in a

- statistical estimate. (Tr. Vol. 5, p. 859; Tr. Vol. 8, p. 1556). In statistical terms, the higher the precision, the less certain one can be about the results of the extrapolation. Conversely, a lower precision number results in more accurate and reliable results. (Tr. Vol. 8, pp. 1556-1558).
111. Dr. Kvanli testified that in his opinion, the twenty percent (20%) precision threshold set forth in the Pollock Model was acceptable and that precision in the St. Mary's findings was around twelve percent (12%), which he believed was good. (Tr. Vol. 5, p. 872). Dr. Kvanli provided no testimony for why he believed the precision in the St. Mary's audit was good and provided no basis for comparing the precision found in the St. Mary's audit against the precision sought in similar Medicare and Medicaid audits.
 112. Dr. Witmer testified that in his experience, he cannot recall ever seeing a target precision close to twenty percent (20%). (Tr. Vol. 8, p. 1558). Typically, in Medicare and Medicaid extrapolation audits, an agency would have a precision goal of no more than five percent (5%). (*Id.*) When the federal government conducts extrapolation audits, its precision goal is between 2.5% and 3.0%. (*Id.*) When DMA Program Integrity uses extrapolation, it has a precision goal of 5%. (Tr. Vol. 8, p. 1522-1533; Pet. Exs. 34 and 37).
 113. The Agency did not discuss whether Dr. Pollock's precision goal was comparable to other Medicare or Medicaid audits and is not aware whether Dr. Pollock had any knowledge or did any research about the precision goals that are typically sought in such audits. (Tr. Vol. 1, pp. 142-143).
 114. The precision found in the St. Mary's audits exceeds the precision goals used by both the federal government and the DMA Program Integrity Section and is too high to ensure fair and accurate results.
 115. The Pollock Model's precision goal of twenty percent (20%) also directly affects the sample size used in the audit. To achieve better precision, larger sample sizes should be selected. (Tr. Vol. 8, p. 1559).
 116. A probe audit assists statisticians in determining the size of the sample selected. By conducting an independent probe sample, a statistician could determine how large the sample size should be to achieve good precision. (Tr. Vol. 8, pp. 1544-1545, 1556-1559, 1567, 1637).
 117. The sample size selected by the Pollock Model is always made up of five (5) strata consisting of twelve (12) recipients in each strata. (Tr. Vol. 5, pp. 946-947). By having a poor precision goal, Dr. Pollock's model allows for the pre-determined sample size. Because the precision goals in the St. Mary's audits were not in line with the precision goals sought in other governmental audits, this is indicative that the sample size reviewed should have been larger. (Tr. Vol. 8, pp. 1544-1545, 1567, 1637).

118. The Pollock Model allows for a much higher relative standard error (lower precision) than what is typically sought in Medicaid and Medicare audits, including those audits conducted by North Carolina's DMA Program Integrity Section. The precision allowed and achieved in the St. Mary's audit resulted in an arbitrary selection of sample size that was not based on solid statistical practices. (Tr. Vol. 8, pp. 1546-1547).

Audit Section's Failure to Consider Non-Sampling Error

119. In creating this extrapolation model with Dr. Pollock, the Audit Unit did not discuss the possible effects that non-sampling error might have on the extrapolation results. (Tr. Vol. 1, p. 83).
120. Sampling errors are errors that would occur based on the selection of the sample. Non-sampling errors are errors outside the selection of the sample that may affect the results of an extrapolation. (Tr. Vol. 8, p. 1546). An example of non-sampling error could be different auditors having different opinions about what should result in a recoupment or what constitutes a violation of policy.
121. Statisticians should be concerned with both sampling and non-sampling error. (Tr. Vol. 8, pp. 1563-1565). Statisticians worry about non-sampling error because it can have significant implications on the outcome of the extrapolation. (Tr. Vol. 8, pp. 1564-1565).
122. Dr. Kvanli testified that he was not asked to review or comment on possible non-sampling error in the St. Mary's audit and that non-sampling error is not something he would review as a statistician. (Tr. Vol. 5, pp. 966-968).
123. Dr. Witmer strongly disagreed with Dr. Kvanli and opined that all statisticians should be concerned with non-sampling error. (Tr. Vol. 8, p. 1565). Without consideration or review of possible non-sampling error, you cannot know if the results of an extrapolation are reliable.
124. The DMA Program Integrity Section devotes significant time in considering the possibility that an extrapolation it conducted was affected by non-sampling error. (Tr. Vol. 8, p. 1522 and 1566; Pet. Exs. 34 and 37).
125. Without a review of non-sampling error by the Audit Section, the audit results in the St. Mary's case are not reliable.
126. Based on the Findings of Fact 74 through 125 cited above, the Audit Section's extrapolation was not statistically reliable or valid.

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. All parties properly are before the Office of Administrative Hearings, and this tribunal has jurisdiction of the parties and subject matter.
2. 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).

The Audit Unit's Findings

3. N.C. Gen. Stat. § 108C-12(d) provides that Respondent "shall have the burden of proof in appeals of Medicaid providers or applicants concerning an adverse determination." The actions taken by the Audit Unit meet the definition of an adverse determination. *See* N.C. Gen. Stat. § 108C-2.
4. For a vast majority of the claims that were audited in this case, the Agency failed to identify or introduce: (1) the claims reviewed during the audit; (2) the findings for the claims reviewed; (3) any documentation to support the findings; (4) the amount of the recoupment sought by the Agency; and (5) any basis for concluding that the documentation reviewed evidenced violations of law, regulation, or policy.
5. For the limited number of specific claims that were presented by the Agency as Respondent Exhibits 12A – 12E, the Agency failed to provide sufficient evidence to support its purported findings.
6. The Agency's misunderstanding of the policy and use of unpublished "best practices" as a justification for its decision is erroneous, in violation of rule and law, exceeds the Agency's authority, and is arbitrary and capricious.
7. A provider has no obligation to follow "best practices" when documenting services provided to Medicaid recipients, unless such "best practices" have been adopted as policy. The Agency cannot hold a provider accountable for announcements that were not in publication and available to the provider during the time period of the review.
8. The Medicaid Provider Agreement entered into between St. Mary's and DMA creates no obligation for St. Mary's to follow documentation "best practices." Under the Provider Agreement, St. Mary's has an obligation to follow applicable laws, rules, and policies.
9. The Agency failed to meet its burden of proving that St. Mary's violated clinical coverage policy when it made changes or corrections to PACT form plans of care.
10. The Agency failed to meet its burden of proving that recoupment is appropriate for services provided under a physician's order that is entered 60 days after the PACT form is completed.

11. The Agency failed to meet its burden of proving that St. Mary's violated any law, statute, or policy by allowing RN Jones to use a stamp signature.
12. The Agency failed to meet its burden of proving that St. Mary's conceded and waived its right to appeal the Audit Section's findings during the reconsideration hearing.
13. The Agency failed to provide any evidence or any reliable evidence of: (1) the claims that may have been conceded by St. Mary's during the reconsideration review process; (2) the basis of the finding of these conceded claims; (3) the documentation supporting the finding for these conceded claims; (4) the amount of the recoupment sought; and (5) the basis that the documentation reviewed evidenced any violation of law, regulation, or policy for the claims.
14. Respondent failed to meet its burden of proving that St. Mary's failed to follow any applicable laws, rules, or policies or that any recoupment of funds from St. Mary's is appropriate.
15. The Agency substantially prejudiced Petitioner's rights by recouping, and attempting to recoup, funds from St. Mary's based on the results and reconsideration of the five post-payment reviews at issue.

The Agency's Use of Extrapolation

16. 10A NCAC 22I does not grant the Agency the authority to use extrapolation. Instead, the use of extrapolation only is authorized when the Agency operates under the authority of 10A NCAC 22F.
17. The appeal rights afforded to providers under 10A NCAC 22F .0402 are more expansive than the appeal rights afforded to St. Mary's under 10A NCAC 22J.
18. Specifically, under 10A NCAC 22F .0402, the hearing officer must consider the propriety not only of the finding, but it also must consider the appropriate administrative remedy for the finding in question.
19. The Audit Unit does not have authority to conduct audits under 10A NCAC 22I while at the same time using 10A NCAC 22F .0606 to justify its use of extrapolation without applying the protections and procedures set forth in 10A NCAC 22F. In order to use extrapolation under the authority of 10A NCAC 22F .0606, the Agency must apply the other provisions of 10A NCAC 22F, which it failed to do.
20. The Agency's use of 10A NCAC 22F .0606 to support its authority to conduct an extrapolation audit was erroneous, in violation of rule and law, and in excess of its authority.
21. Even if the use of extrapolation had been authorized in these cases, the application of the Pollock Extrapolation Model was not statistically sound.

22. 10A NCAC .0606(c), the only regulation that allows extrapolation in the Administrative Code, allows for extrapolation after a review of a statistical sampling of “claims.”
23. The Agency’s use of consecutive dates of service to represent a “claim” is erroneous and contrary to the manner in which DMA interprets a claim under the PCS program.
24. The Agency’s use of consecutive dates of service to represent a “claim” also is erroneous because it has the effect of invalidating the independence required for a valid and trustworthy extrapolation result.
25. The Agency’s use of extrapolation was erroneous because it allowed for a Relative Standard Error or Precision that far exceeded the typical precision goals sought by other Medicare and Medicaid agencies, including North Carolina’s DMA Program Integrity Section.
26. The Audit Unit erred by not considering the effects of non-sampling error on its audit results. Non-sampling error is a critical consideration when using extrapolation and is considered in other audits conducted by Medicare and Medicaid agencies, including the DMA Program Integrity Section.
27. The Audit Unit’s application of the Pollock Model was not statistically valid.

Extrapolation and N.C. Gen. Stat. § 108C-5

28. N.C. Gen. Stat. § 108C-5 contains certain requirements that the Agency must follow in order to use extrapolation in an audit. N.C. Gen. Stat. § 108C-5 became effective on July 25, 2011 and applied to “audits instituted on or after that date and to final overpayments, assessments, or fines due on or after that date.” (See S.L. 2011-399, emphasis added).
29. N.C. Gen. Stat. § 108C-2(5) defines a final overpayment to be “the amount the provider owes after appeal rights have been exhausted, which shall not include any agency decision that is being contested at the Department or the Office of Administrative Hearings...”
30. Although 108C-5 was passed by the General Assembly after the initial audits were completed, these decisions were not final overpayments as of July 25, 2011 and were all at some stage of the reconsideration review process at the time that the law was enacted.
31. Where the language of a statute is clear and unambiguous, the courts must give such language its plain and definite meaning. *In re Total Care*, 99 N.C. App. 517, 520, 393 S.E.2d 338, 340 (1990). Additionally, a court must assume the legislature understood its choice of words when drafting a statute. *Housing Auth. of Greensboro v. Farabee*, 284 N.C. 242, 245, 200 S.E.2d 12, 15 (1973); *see also N.C. Dept. of Revenue v. Hudson*, 196 N.C. App. 763, 768, 675 S.E.2d 709, 711 (2009).

32. By extending the protections of N.C. Gen. Stat. § 108C-5 to audits that were conducted prior to the passage of the statute but had not yet become final overpayments, the General Assembly was unambiguously expressing its intent to apply the statute to providers such as St. Mary's. If the General Assembly had not intended to extend the requirements of N.C. Gen. Stat. § 108C-5 to providers for which an audit had been completed but had not yet become a final overpayment, it would not have included such language in Session Law 2011-399.
33. N.C. Gen. Stat. § 108C-5(i) requires the Department to demonstrate and inform the provider that (1) the provider failed to substantially comply with the requirements of State or federal law or regulation or (2) the Department has credible allegation of fraud concerning the provider.
34. The use of extrapolation is erroneous and in contradiction of N.C. Gen. Stat. § 108C-5(i) because the Agency has failed to demonstrate that St. Mary's failed to substantially comply with the requirements of State or federal law or regulation or that the Department has credible allegation of fraud concerning the provider, as required by N.C. Gen. Stat. § 108C-5(i).
35. N.C. Gen. Stat. § 108C-5(j) states that "audits that result in the extrapolation of results must be performed and reviewed by individuals who shall be credentialed by the Department, as applicable, in the matters to be audited, including, but not limited to, coding or specific clinical issues."
36. The Audit Unit erred and acted in violation of law by conducting an extrapolation audit using individuals that were "trained" only through an apprenticeship process but were not credentialed by the Department in the proper use and interpretation of applicable PCS policies and the services rendered.
37. N.C. Gen. Stat. § 108C-5(q) states that except as required by federal agency, law, or regulation, or instances of credible allegation of fraud, the provider shall be subject to audits which result in the extrapolation of results for a time period of up to 36 months from date of payment of a provider's claim.
38. The Audit Unit erred and acted in violation of law by subjecting St. Mary's to extrapolation audits for time periods that far exceed the 36 month time limitation set forth in N.C. Gen. Stat. § 108C-5(q).
39. For all of the above reasons, the use of extrapolation by the Agency was erroneous, in violation of rule or law, and exceeded the Audit Unit's authority.
40. Petitioner substantially was prejudiced by the Agency's use of extrapolation.
41. N.C. Gen. Stat. §108C-12 requires this tribunal to issue a final agency decision within 180 days of the date of filing of the contested case petition. The time to make a final decision shall be extended in the events delays caused or requested by the Department.

42. Because the Department requested several continuances in these cases and requested these cases be consolidated, requiring a lengthy delay due to the extended time it took the Department Hearing Office to issue its final administrative conference decision, the time for making the final agency decision was extended both as a result of and at the request of the Agency.
43. Under N.C. Gen. Stat. § 108C-12 this final decision is timely.

DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, Respondent Agency's decision to recoup any funds from St. Mary's is not supported by a preponderance of the evidence and is REVERSED. Any funds recouped by the Respondent Department as a result of the audits that are the subject of these consolidated contested cases shall be returned to Petitioner within thirty (30) days of the issuance of this Final Agency Decision.

NOTICE (11DHR10487)

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

The Agency is required to give each party an opportunity to file exceptions to the decision and to present written arguments to those in the Agency who will make the final decision. N.C. Gen. Stat. § 150-36(a). The Agency is required by N.C. Gen. Stat. § 150B-36(b) to serve a copy of the final decision on all parties and to furnish a copy to the parties' attorneys of record and to the Office of Administrative Hearings.

In accordance with N.C. Gen. Stat. § 150B-36 the Agency shall adopt each finding of fact contained in the Administrative Law Judge's decision unless the finding is clearly contrary to the preponderance of the admissible evidence. For each finding of fact not adopted by the agency, the agency shall set forth separately and in detail the reasons for not adopting the finding of fact and the evidence in the record relied upon by the agency in not adopting the finding of fact. For each new finding of fact made by the agency that is not contained in the Administrative Law Judge's decision, the agency shall set forth separately and in detail the evidence in the record relied upon by the agency in making the finding of fact.

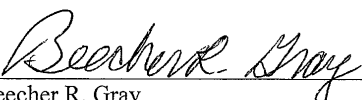
NOTICE (12DHR12145)

This is a Final Decision issued under the authority of N.C. Gen. Stat. § 150B-34.

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 the county where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the final decision was filed. **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 03.0102, 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 08 day of January, 2014.



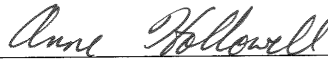
Beecher R. Gray
Administrative Law Judge

On this date mailed to:

Renee Montgomery
Robert Leandro
Matthew W Wolfe
Parker Poe Adams & Bernstein, LLP
P.O. Box 389
Raleigh, NC 27602
Attorneys For Petitioner

Brenda Eaddy
N.C. Department Of Justice
9001 Mail Service Center
Raleigh, NC 27699-9001
Attorney For Respondent

This the 8th day of January, 2014.



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

FILED
OFFICE OF ADMINISTRATIVE HEARINGS
8/22/2013 10:02 AM

STATE OF NORTH CAROLINA
COUNTY OF ROCKINGHAM

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
12DHR09022

<p>ANN-CATHERINE BAKER Petitioner,</p> <p>v.</p> <p>NC DEPARTMENT OF HEALTH & HUMAN RELATIONS HEALTH CARE PERSONNEL REGISTRY Respondent.</p>	<p>FINAL DECISION</p>
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THIS MATTER came on for hearing before the undersigned, J. Randall May, Administrative Law Judge, on May 23, 2013 in High Point, North Carolina.

APPEARANCES

For Petitioner: Selena D. Lackey
Attorney at Law
2807 Earlham Place
High Point, NC 27263

For Respondent: Josephine N. Tetteh
Assistant Attorney General
North Carolina Department of Justice
9001 Mail Service Center
Raleigh, NC 27699-9001

ISSUE

Whether Respondent otherwise substantially prejudiced Petitioner's rights and failed to act as required by law or rule when Respondent substantiated the allegation that Petitioner abused a client of Lindley Habilitation Services in Greensboro, NC and entered a finding of abuse by Petitioner's name in the Health Care Personnel Registry.

APPLICABLE STATUTES AND RULES

N.C. Gen. Stat. § 131E-256
N.C. Gen. Stat. § 150B-23
42 CFR § 488.301
10A N.C.A.C. 130.0101

EXHIBITS

Respondent's exhibits 1-8, 11-16, 20-21 were admitted into the record.

Petitioner's exhibits 1-2 were admitted into the record.

WITNESSES

Ann-Catherine Baker (petitioner)

BD (client)

ND (client's sister)

Shelley Diaz (client's mother)

Negat Gabrielle Negussie Retta (Clinical Supervisor, Lindley Habilitation Services)

Latoya Chancey (Enhanced Services Specialist, Lindley Habilitation Services)

Jenny Baxter (HCPR Nurse Investigator)

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing 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, or the lack thereof, and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including but not limited to the demeanor of the witness; any interests, bias, or prejudice the witness may have; the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified; whether the testimony of the witness is reasonable; and whether the testimony is consistent with all other believable evidence in the case. From the sworn testimony of witnesses, the undersigned makes the following:

FINDINGS OF FACT

1. At all times relevant to this proceeding, Petitioner, Ann-Catherine Baker, was a Habilitation Technician at Lindley Habilitation Services ("Lindley Habilitation") in Greensboro, North Carolina. Lindley Habilitation is a health care facility and therefore subject to N.C. Gen. Stats. §131E-256. (T pp 8, 10-11, 84; R Exs 1, 8, 20)
2. Petitioner was trained on her duties, which included dressing BD, and appropriate communication techniques for BD. Petitioner received clients' rights training on abuse; working with individuals with developmental disabilities; as well as communicating positively and effectively with BD. Petitioner was also trained on corporal punishment being a prohibited intervention. (T pp 14-15, 18-22, 78-80; R Exs 1-5, 20)
3. Petitioner was assigned to work with BD on June 12, 2012. During the shift, Petitioner went into BD's bathroom to provide care. (T p 11; R Ex 20)
4. At all times relevant to this proceeding, BD has been a client of Lindley Habilitation in Greensboro, North Carolina. BD has been diagnosed with Autistic Disorder and Attention Deficit Hyperactivity Disorder. BD is oriented to person, place, and time. BD

is subject to emotional outbursts. In response to BD's behavior concerns, staff is to redirect her without agitating her. BD requires verbal prompting during dressing activities and responds well to positive reinforcement. (T pp 8-10, 22, 62, 72-73; R Exs 5, 14, 18, 20)

5. While Petitioner was with BD in the bathroom on June 12, 2012, BD refused to put on her clothes. As a response to this refusal, Petitioner made a clapping noise and then spanked BD two times on the butt. BD cried after the spanking and told Petitioner she was going to tell her mother. (T pp 12-13, 17, 23-24, 26, 49-50, 52, 57, 61; R Exs 7, 9, 20)
6. Prior to her testimony and because of her age (10), a *voir dire* was conducted of ND's competency during the proceeding pursuant to *State v. Higginbottom*, 312 NC 760 (1985). After the examination, the undersigned found that ND was able to understand her obligations under oath; knew the difference in right and wrong; what it meant to tell the truth; had sufficient intelligence to give evidence which would assist the fact finder in rendering a decision; and that there was no showing to the contrary that ND was not competent to testify in this case. (T pp 44-46, 66-67)
7. ND told her mother, Shelley Diaz, and subsequently Jenny Baxter, the investigator, that she was standing outside the bathroom door and heard what she thought at first was BD Clapping her hands. ND then stated that she opened the door a little bit and looked into the bathroom where BD was with Petitioner and she saw Petitioner spank BD two times.
8. ND also testified "...I didn't know if it hurt her or not..." (Tp54)
9. ND's testimony was credible, but left the finder of fact confused at times as to her ability to articulate what she witnessed. She testified that she did not know if the Petitioner spanked BD two times or if it was three times. She further testified that she did not know if the spanking was hard or if it was a tap. Even further she testified that she was unable to tell if the alleged spanking hurt or had any effect on BD.
10. ND entered the bathroom while Petitioner was with BD and saw Petitioner spank BD twice. ND reported the incident to her mother immediately after. BD confirmed the information ND provided to Ms. Diaz. (T pp 38, 49-50, 58-59, 61; R Exs 11-12, 20)
11. Ms. Diaz subsequently communicated the information to Lindley Habilitation by contacting Negat Negussie Retta ("Negussie Retta") and documenting the information. At all times relevant to this proceeding, Negussie Retta was the Clinical Supervisor at Lindley and reported the incident to the Health Care Personnel Registry. (T pp 59, 68-71; R Exs 11-12, 15)
12. In the two years that Petitioner has taken care of BD, Petitioner has not known BD to tell lies. During the time that Petitioner has taken care of BD, she has not known ND to tell lies. Petitioner also did not know of any reason why BD or ND would lie about

Petitioner's actions on June 12, 2012. ND is not given to exaggerations. (T pp 17-18, 65-66; R Ex 20)

13. Lindley Habilitation Services conducted an investigation and was unable to substantiate a claim of abuse, but terminated Petitioner's employment with Lindley Habilitation Services for failing to adhere to an appropriate method of redirection by patting BD on the bottom and calling her a "silly goose."
14. At all times relevant to this matter, Jenny Baxter ("Nurse Investigator Baxter") has been a nurse investigator with the Health Care Personnel Registry. Nurse Investigator Baxter is a nurse with twenty years' experience and is charged with investigating allegations against health care personnel. Accordingly, she received and investigated the allegation that Petitioner had abused BD at Lindley Habilitation. (T pp 83-86; R Ex 20)
15. Nurse Investigator Baxter has had many cases in front of the undersigned and she has always presented as an experienced and credible witness.
16. Nurse Investigator Baxter reviewed the facility documents and conducted her own investigation which included interviewing Petitioner, BD, and ND. Nurse Investigator Baxter spoke with BD's father and brother. Both individuals indicated they had not seen what transpired in the bathroom and they were not interviewed further.
17. At the hearing, Nurse Investigator Baxter, testified under oath that she did not question BD's father because he spoke Spanish and did not speak English well.
18. BD's mother testified under oath that BD's father was present the day Nurse Investigator Baxter came to the home to conduct an investigation. Ms. Diaz further indicated that she is fluent in Spanish and could have interpreted for BD's father.
19. The undersigned gives little weight to the statements of the sole witness, ND, due to the fact that she was conflicted as to what she had actually seen. She testified that she did not know if the Petitioner spanked BD two times or if it was three times. She further testified that she did not know if the spanking was hard or if it was a tap. Even further, she testified that she was unable to tell if the alleged spanking hurt or had any effect on BD.
20. Following the conclusions of her investigation, Nurse Investigator Baxter notified Petitioner of her decision to substantiate the allegation of abuse. (T p 88; R Ex 21).
21. Abuse is defined as the "willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain, or mental anguish." (T p 87; R Ex 20)
22. This was the third year that Petitioner had worked with the Diaz family and Ms. Diaz testified under oath that she had not had any prior complaints about Petitioner and that she considered her like family.

23. After reviewing all the other evidence in the record, the undersigned finds Petitioner's testimony to be credible regarding the fact that on June 12, 2012, when the alleged abuse occurred, that BD refused to get dressed, and that Petitioner clapped her hands together, like she does often, as a means of grabbing BD's attention. Petitioner further testified that she patted BD on the bottom following the hand clap in a soft encouraging way and called BD a "silly goose."
24. There was no medical, psychological, or illustrative evidence offered by Respondent as to how a minor child with BD's conditions and diagnosis could or should exhibit any different reaction to pain than a typical child.
25. There was no evidence offered by Respondent that BD suffered any physical harm, pain, or mental anguish.
26. It has not been shown that BD was hurt or injured due to the circumstances surrounding this allegation, and did not receive medical treatment of any kind.
27. The factual showing for Respondent to show willful abuse of this child was weak.

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 pursuant to chapters 131E and 150B of the North Carolina General Statutes.
2. All parties have been correctly designated and there is no question as to misjoinder or nonjoinder.
3. ND meets the test of competency pursuant to *State v. Higginbottom*, 312 NC 760 (1985) and had sufficient intelligence to give evidence that would assist the finder of fact in rendering a decision.
4. As a Habilitation Technician working in a health care facility, Petitioner is a health care personnel and is subject to the provisions of N.C. Gen. Stat. § 131E-256.
5. "Abuse" is defined as the "willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain, or mental anguish." 10A NCAC 13O .0101
6. Petitioner did not willfully inflict injury, unreasonable confinement, intimidation, or punishment upon BD that resulted in physical harm, pain, or mental anguish, and therefore cannot be found to have "abused" BD.
7. Respondent's decision to substantiate this allegation of abuse against Petitioner is not supported by a preponderance of the evidence. Therefore, Respondent substantially

prejudiced Petitioner's rights and acted erroneously by placing a substantiated finding of abuse against Petitioner's name on the Health Care Personnel Registry.

8. The conundrum presented by the evidence in this case is basically a "he said, she said" scenario of the only eye witness, a minor child, to offer testimony; based on ND's report of the allegations, and the fact that she did not articulate exactly what she witnessed, *viz-a-viz* the definition of abuse. Therefore, the undersigned is unable to conclude by the greater weight of the evidence that Respondent has not prejudiced Petitioner's rights by its arbitrary and capricious findings.
9. Respondent did not conduct a complete investigation when it failed to interview potential witnesses, including but not limited to, the biological father who was present in the home, just mere feet away when the alleged incident of abuse occurred.
10. Petitioner proved by a preponderance of the evidence that she did not abuse BD within the meaning of the Statute, Administrative Code, or any other law. Therefore, Respondent substantially prejudiced Petitioner's rights and acted erroneously by placing a substantiated finding of abuse against Petitioner's name on the Health Care Personnel Registry.

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

FINAL DECISION

This case presents a threshold showing of alleged "abuse" and because of the terminal sanction to Petitioner, it places the decision maker in the position of weighing evidence, although less than convincing against a petitioner who faces the loss of her ability to work in her chosen field for five (5) years. Because there is no discretion in the sanction which must be imposed, a clear and convincing showing of "abuse" must be apparent from the facts. This was not established by Respondent and Petitioner was able to show by a preponderance of the evidence that Respondent's decision was erroneous and not pursuant to law.

Therefore, the undersigned hereby determines that Respondent's decision to place a finding of abuse at Petitioner's name on the Health Care Personnel Registry should be, and is, **REVERSED**.

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 22nd day of August, 2013, *remote supplicio*.

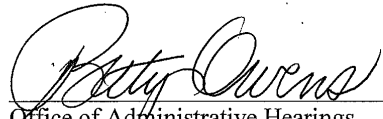

J. Randall May
Administrative Law Judge

On this date mailed to:

SELENA D. LACKEY, ESQ.
CAROLINA LEGAL SOLUTIONS
2807 EARLHAM PLACE
HIGH POINT, NC 27263
ATTORNEY FOR PETITIONER

JOSEPHINE N TETTEH
ASSISTANT ATTORNEY GENERAL
NC DEPARTMENT OF JUSTICE
9001 MAIL SERVICE CENTER
RALEIGH, NC 27699
ATTORNEY FOR RESPONDENT

This the 22nd day of August, 2013.


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

FILED
OFFICE OF ADMINISTRATIVE HEARINGS
11/18/2013 10:42 AM

STATE OF NORTH CAROLINA

COUNTY OF DAVIDSON

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
12DHR10538

CHARLES AND CYNTHIA COLLINS PETITIONER, V. DEPARTMENT OF HEALTH AND HUMAN SERVICES, CHILD WELFARE SERVICES SECTION REGULATORY & LICENSING SERVICES RESPONDENT.	FINAL DECISION
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THIS MATTER came on for hearing on September 16 and 17, 2013, before the Honorable J. Randall May, Administrative Law Judge, in High Point, North Carolina. The Petitioners appeared *pro se*. The Respondent was represented by Jane R. Thompson, Assistant Attorney General. Both parties were given the opportunity to submit, for consideration, proposed decisions. The Respondent made such a submission; however, the Petitioners did not.

ISSUE

Whether Respondent properly revoked Petitioner's family foster home license based on a substantiation of neglect against Petitioner and lack of compliance with foster home licensing rules.

EXHIBITS

For Petitioner: Exhibits A, B, C, D, E, F, and G were admitted into evidence.

For Respondent: Exhibits 2, 3, 4, 5, 6, 7, 8, and 9 were admitted into evidence.

THE FINDINGS OF FACT are made after careful consideration and observation of the sworn testimony of the witnesses presented at the hearing, either by their audio and/or video presentation and the entire record in this proceeding. In making the findings of fact, the undersigned has weighed all the evidence, and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including but not limited to the demeanor of the witness; any interests, bias, or prejudice the witness may have; the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified; whether the testimony of the witness is reasonable; and whether the testimony is consistent with all other believable evidence in the case. From the sworn testimony and the

admitted evidence, the lack thereof, or the attempt to offer deceptive evidence, the undersigned makes the following:

FINDINGS OF FACT

1. Without prior notice to Respondent or the Court, Petitioner made a pre-trial motion for summary judgment. The written motion and materials submitted by the Petitioner were a summary of Petitioner's responses and allegations to issues presented by this action. After hearing arguments of Mr. Collins and counsel for Respondent, the summary judgment motion was denied as not meeting the service requirements of Rule 56(c), and because this case presents numerous genuine issues of material fact; and thus, summary judgment, even if timely sought, was not warranted under Rule 56.

2. Petitioners were foster parents, licensed by the Respondent's Regulatory and Licensing Services, and supervised by Davidson County Department of Social Services. They were first licensed in August 2011 and their two-year license expired on August 4, 2013. Respondent issued a Notice of Administrative Action on September 20, 2012, revoking their foster home license based on a case decision of neglect of foster children and licensing rule violations. The Petitioners filed a contested case petition on November 19, 2012, alleging that the Respondent had exceeded its authority; acted erroneously, arbitrarily or capriciously; failed to use proper procedure; and failed to act as required by law or rule.

3. Two children were placed in the Collins foster home in October 2011 – two year old Hayden and his 11 month old sister, Medinah. The Collins also have an adopted son, Caleb, age seven.

4. Ashley Collins, a foster home licensing worker with Davidson County Department of Social Services (DSS), assisted the Collins with the licensure process and monitored their home. She observed that the Collins provided good care for Hayden and Medinah and added required safety features to their home. Ms. Collins was home full-time with the children, and Mr. Collins worked from home. After her mother became ill with cancer, Ms. Collins began spending more time in South Carolina with her in late fall 2012.

5. On January 3, 2012, the Albemarle Police Department made a child protective services report to Stanly County Department of Social Services regarding an incident at a McDonald's restaurant on December 22, 2011. According to the report, Mr. Collins left Caleb, Hayden, and Medinah in the care of ten year old Hannah Wells while he handled some personal business at the Stanly County Courthouse. Stanly County DSS notified Davidson County DSS on January 4, 2012, upon learning that the Collins resided in Davidson County.

6. On January 4, 2012, Ashley Collins learned of the child protective services report from Stanly County DSS. She knew that Hannah Wells was the daughter of Jane Wells, a former Davidson County DSS employee who had also served as a licensing worker for the Collins.

7. Ashley Collins made a home visit to the Collins later on January 4, 2012. As a licensing worker, she had no role in a child protective services investigation, but she wanted to ensure that the Collins would use only appropriate adult babysitters for the two foster children in the future. Ms. Collins stated that she was on her way back from a visit with her mother when the incident occurred; that she would not have left the children at McDonald's; and she thought Jane Wells would be there with Hannah. Mr. Collins said he knew it was a huge mistake even though Hannah Wells knew his children.

8. Also on January 4, 2012, Michelle Swaim, child protective services investigator for Davidson County DSS, initiated the investigation by visiting the Collins' home. Neglect investigations must be initiated within 72 hours. Because the Collins were foster parents for Davidson County, the remainder of the investigation and the ultimate case decision would be made by another county; in this case, Rowan County DSS.

9. Ms. Collins told Ms. Swaim that she was out of town on December 22, 2011, and this incident would not have occurred if she had been home. Mr. Collins stated he needed to file an extension of a court date in a case involving his rental property. He did not think he could bring children to the courthouse so he hired Hannah Wells, the ten year old daughter of family friend, and former social worker, Jane Wells. He thought she was responsible enough to watch the younger children because she had younger siblings, but he found out that was not the case. When she could not comfort Hayden, the McDonald's manager stepped in, called Jane Wells, and then the police. Mr. Collins also explained he first considered letting the children play at a park, but when it began to rain, he decided to buy them lunch and let them play at McDonald's. He saw no signs saying children could not be left unattended. Neither Hannah nor Caleb had a cell phone in case of an emergency, but they knew his phone number.

10. Mr. Collins was very matter-of-fact in sharing this information with Ms. Swaim, stating it was not really a big deal, and was being blown out of proportion. He did say that, after speaking with the police, he had become aware of the dangers of leaving children at a public place, and he was remorseful. Later, on cross-examination, Mr. Collins testified he thought remorse was the appropriate response given the scrutiny his decision received.

11. Ms. Swaim agreed that leaving the children alone at McDonald's was unacceptable and asked the Collins to sign a safety plan that Hannah Wells would no longer babysit the children. The children were not removed at that time because Mr. Collins had acknowledged his actions were wrong; recognized the risk of his actions; signed a safety plan; and Ms. Collins had returned to the home.

12. Ms. Swaim spoke with Caleb on the same day at his elementary school where he was in second grade. He said he was left at a McDonald's while his father went to the courthouse. He was not scared, but Hannah became scared when she could not comfort Hayden and thought they would get in trouble. Caleb denied ever being left alone before.

13. Following her initiation of the investigation, Ms. Swaim sent the case file to Rowan County DSS and notified DHHS Licensing in Black Mountain that an investigation of a

foster home had begun. Barbara Griffith, child protective services social worker with Rowan County DSS since 1999, was assigned the Collins case on January 6, 2012.

14. Ms. Griffith made a visit to the Collins' home on January 9, 2012. Mr. Collins stated he had to drop off papers at the Stanly County Courthouse on December 22, 2011, and his wife was in South Carolina with her ill mother, so he arranged for Hannah Wells to babysit. The Wells lived in Guilford County, and he met them halfway in Lexington. He first went to a park, but it was drizzling heavily so they went to McDonald's. He fed the children and left Hannah to supervise while he went to the courthouse. Mr. Collins acknowledged that neither Hannah nor Caleb had a cell phone. When the McDonald's manager intervened when Hayden would not stop crying, Hannah gave him her mother's number. Caleb knew his number, and the manager tried to reach Mr. Collins before calling the police. Hannah's mother was in Charlotte. Mr. Collins did not seem overly concerned about the incident, but did say he was sorry it happened and it would not happen again.

15. Ms. Collins told Ms. Griffith that she was returning from a visit with her mother on December 22, 2011; that she did not know her husband's plan to leave the children at McDonald's; but she did not criticize his decision. She simply stated it would not have happened if she had been home.

16. Ms. Griffith then went to Davidson County DSS where Hayden and Medinah were visiting with their parents. Both were in diapers and too young to be interviewed. She was surprised they had been left in the Collins home, but that decision was up to Davidson County DSS. She later interviewed Caleb at his school on January 18, 2012. He reiterated that they were dropped off at McDonald's, that Hayden began to cry and so did Hannah when she could not comfort him. The police came and spoke to his father and then they went home. He had been left alone one time when he did not want to go to Tae Kwan Do with his father.

17. Guilford County DSS interviewed Hannah and her mother on January 11, 2012, for Rowan County DSS. Hannah stated that she and the three children were left at McDonald's. She became scared when the manager asked her about adult supervision and did not know what to do. Ms. Wells said Hannah was helping Mr. Collins because of Ms. Collins' family emergency.

18. Ms. Griffith spoke to Ms. Wells directly on February 15, 2012. Ms. Wells knew Hannah would babysit for the Collins, but did not know it would be at McDonald's. Hannah did not have a cell phone or Mr. Collins' number. The McDonald's manager called her. She had no concerns about the Collins' parenting. She said Mr. Collins just had not thought through this plan, and it would not happen again.

19. Ms. Griffith also spoke with Brandon Brown, McDonald's manager, on February 6, 2012. He stated that the children had been there approximately 30 minutes when he intervened because one of the children would not stop crying. The babysitter did not have a phone, but had the numbers for her mother and Mr. Collins. He could not initially reach Mr. Collins, but spoke to Ms. Wells, and then called the police. In all, the children were at his restaurant for over an hour.

20. Ms. Griffith spoke to Officer Hinson of the Albemarle Police Department and obtained a copy of the police report, which indicated they were called at 4:06 p.m. on December 22, 2011. Mr. Collins arrived about ten minutes later, explaining that he had been at the courthouse for two civil cases, sharing those case numbers with the police. Prior to the conclusion of her investigation, Ms. Griffith was not aware Mr. Collins was charged with misdemeanor child abuse.

21. Following her investigation, Rowan County DSS staffed the case internally and with their State policy consultant, and made a case decision of neglect for improper supervision. They found that Mr. Collins was responsible for four children, and he first chose a park and then McDonald's to leave the children. The children had no way to contact him without the help of a stranger. Hannah was not capable of caring for two very young children for even a short period of time. Neither Hannah's mother, nor Ms. Collins, knew that she would be solely responsible for the children; and Mr. Collins was unaware of the obvious risk to the children left unattended at a McDonald's or any other public place. While he expressed remorse, he also believed the incident was being blown out of proportion. Rowan County DSS found his lack of judgment regarding the supervision needs of the children fell below minimally adequate care and constituted neglect.

22. On February 21, 2012; Ms. Griffith and her supervisor met with Davidson County DSS staff to discuss the case decision, after which Ashley Collins shared the neglect substantiation with Mr. and Ms. Collins, as well as Davidson County's decision to remove Hayden and Medinah. The children were moved later that day. Ms. Griffith informed DHHS Licensing in Black Mountain of the final case decision.

23. The Collins later expressed their desire to appeal any revocation of their license and wanted to know if there were specific guidelines for children as babysitters. Ashley Collins emailed them that MAPP, foster parent training, did not specifically address that issue. She told them she would expect them to use the same sound judgment any parent would in choosing a babysitter, given all the circumstances of each situation. Ashley Collins continued to have contact with the Collins and learned that Ms. Collins had become pregnant, and that Mr. Collins had been criminally charged in Stanly County with three counts of misdemeanor child abuse. She later confirmed that those charges were dismissed by the District Attorney on October 15, 2012.

24. Nicole Jensen is a licensing consultant for Respondent's Regulatory and Licensing Services located in Black Mountain. She facilitates the licensure of family foster homes that then operate under the supervision of a county DSS or a licensed child placing agency. In determining whether a foster home license should later be revoked, the licensing staff in Black Mountain reviews information from the supervising county DSS or agency and the investigating county DSS. The Division staff is not authorized to conduct its own child abuse or neglect investigation. Licenses can be revoked based on case decisions of abuse or neglect by a county DSS, and/or licensing violations. The Collins' license was revoked on both bases by Notice of Administrative Action issued on September 20, 2012. The Office of Administration Hearings appeal by the Collins stayed the revocation of their license until its expiration date of

August 4, 2013. All foster home licenses expire two years after issuance and must be renewed to remain in place.

25. On January 5, 2012, Ms. Jensen learned that a child protective services investigation in this case had begun, when she received the DSS-5282 form from Davidson County DSS. Notice of the final case decision was received on February 28, 2012, from Rowan County DSS. In addition, DHHS Licensing received a letter from Davidson County DSS dated February 29, 2012, that no further foster children would be placed in the Collins home as a result of the case decision of neglect. The child protective services investigation of Rowan County DSS extended past the 30 day time frame found in DHHS policy, but that was not unusual in conflict investigations where there must be coordination between counties and additional travel. Exceeding 30 days does not invalidate an investigative assessment and was not relevant to the licensing decision. Noting the involvement of law enforcement, Ms. Jensen checked for any criminal charges and learned of the three misdemeanor child abuse charges in August 2012.

26. After reviewing all the information submitted, Ms. Jensen staffed the case with the other foster home licensing consultant, Rhoda Ammons, and its supervisor, Bob Hensley; as well as Assistant Attorney General David Gordon. It was determined that the case decision of neglect by Rowan County DSS had a substantial basis for its finding of improper supervision. In addition to the reasons given by Rowan County DSS, there was no indication that Mr. Collins sought the advice of anyone from Davidson County DSS before making the decision to leave two young foster children at McDonald's. DHHS Licensing was unaware that he first considered a park, but that reinforced its revocation decision.

27. Even without a case decision of neglect, DHHS Regulatory and Licensing found the Collins had violated the licensure rules set out in the Notice of Administrative Action requiring appropriate supervision. The agency - foster parent agreement signed by every foster parent also specifically requires supervision at all times. The ordinary use of babysitters, as opposed to longer term substitute care, such as respite care, is left to the sound judgment of foster parents, as is most of the day to day care of foster children. Licensure rules cannot address every possible safety issue confronting a foster parent. In addition, the Collins were required to contact their supervising agency, Davidson County DSS, about this incident, and failed to do so.

28. Ms. Jensen discussed the Swain County DSS Minimum Standards of Care for Children, a summary of which was provided by Mr. Collins. First, these guidelines are an effort by one county DSS to give guidance on common child welfare issues, including supervision of children, to its citizens. They do not have statewide application. Secondly, they do not address the care of foster children since, for example, they discuss appropriate corporal punishment of children when none is allowed with foster children. Thirdly, the summary provided by Mr. Collins stated, under supervision guidelines for various age ranges of children, that children ages nine and ten should not regularly be left alone for longer than one hour, when in fact the actual Swain County DSS website version adds that nine and ten year old children cannot be responsible for supervising younger children.

29. Ms. Jensen also testified regarding several errors in the Notice of Administrative Notice revoking the Collins' foster home license, including an incorrect number of foster

children involved because Hannah's status was not specified in the material they received, and the incorrect date of the McDonald's incident. None of these errors, however, affected the licensure decision. The dismissal of the criminal charges against Mr. Collins postdated the revocation decision, but that dismissal would not have changed the licensure decision.

30. Whether the revocation was based on the case decision of neglect and/or violations of licensing rules, appropriate supervision and the safety of foster children is at the heart of foster parenting. DHHS Licensure was not willing to risk the placement of other children in the Collins home given the serious lack of judgment shown by Mr. Collins in leaving four children, ages ten, seven, two, and one, alone at a McDonald's restaurant for at least 30 minutes.

31. Petitioner Cynthia Collins testified that around 4:00 p.m. on December 22, 2011, she was driving to Charlotte from her mother's home in South Carolina to meet her husband and the children at their church in Charlotte. She received a call from Jane Wells, mother of Hannah Wells that the children were at a McDonald's in Albemarle. She called Mr. Collins, who shortly returned her call and told her he was on his way back to McDonald's from the Stanly County Courthouse. She knew Hannah would help care for the children that day and join them in Charlotte with her mother, Jane Wells. She did not know Hannah would babysit at McDonald's with no adult supervision. Hannah had spent a lot of time with Caleb, Hayden, and Medinah at their home and was very motherly to the younger children. In retrospect, she did not think the plan was well thought out, but her husband had no intention of putting the children at risk.

32. Hannah Wells was found to be competent to testify, and a credible witness, and testified that she was now in seventh grade, and the Collins' were friends of her family. She had cared for Hayden and Medinah at the Collins' home, although Hayden had never thrown a temper tantrum as bad as the one at McDonald's. She agreed to babysit for Mr. Collins and thought she would do that at the Collins' home. Mr. Collins needed to be in Albemarle for an appointment, and they discussed her babysitting in the courtroom. They were late arriving in Albemarle, Mr. Collins missed his appointment, and the younger children were hungry, so Mr. Collins decided to take them to McDonald's. He still wanted to file papers before 4:00 p.m. so he left them there, saying he would return in 15-20 minutes. Hayden became very fussy, and she asked Caleb to buy ice cream for Hayden, but that did not help. She then asked Caleb to ask an adult for help, and the McDonald's manager asked where their parents were. Caleb gave him his father's number, and later she spoke to her mother on the manager's phone. The manager gave Hayden chicken nuggets, and he calmed down. About five minutes later the police arrived, and after an additional five minutes Mr. Collins returned. She confirmed that she had later prepared a written statement for the Collins in which she said she felt she needed some help when Hayden would not stop crying, and when the McDonald's manager asked her for her name and her mother's contact information, she was not sure she should answer him and thought she was going to cry.

33. Caleb Collins was found competent to testify and testified that he was now nine years old and enjoyed soccer, football, baseball, and Tae Kwan Do. He had cerebral palsy and was in two very small classes for math, writing, and occupational therapy, in addition to his regular school class. On December 22, 2011, he was at McDonald's with Hannah Wells and

Hayden and Medinah when Hayden pitched a big fit and Hannah could not console him. She asked him to get help and the manager came over and asked about their parents. He gave his father's number to the manager, who bought Hayden a Happy Meal. About 5-10 minutes later the police came and questioned them and about 5-10 minutes after that, his father returned. He was not afraid, but Hannah was crying about half the time.

34. Petitioner Chris Collins testified that he and his wife became foster parents because they did not think they could have children of their own and they wanted children in their life. Hayden and Medinah were placed with them in October 2011; they treated them as their own children and wanted to adopt them. On December 22, 2011, his wife was out of town with her ill mother. He and the children arrived at the Albemarle McDonald's, which was about three miles from the Stanly County Courthouse, around 3:45 p.m. on December 22, 2011. He had missed his 3:00 p.m. hearing in small claims court to evict a tenant, but he still wanted to get to the courthouse before 4:00 p.m. to follow up on the case. He thought the courthouse would be closed the next day for the holidays and did not want to wait until early January. Upon arriving at the courthouse, he found out his action had been dismissed when he did not appear, so he filled out the forms to file a new action, and got a copy of that filed action from the clerk before he left. The new action was filed at 4:16 p.m. At that point he was hearing from the police, Jane Wells, and his wife, that he needed to return to McDonald's. He had initially hoped the Stanly County Courthouse had an open area like the Mecklenburg County Courthouse where the children could stay while he conducted his business. That is what he meant when he said a "park" was his first plan, although he never mentioned a courthouse area as a "park" to Michelle Swaim or Barbara Griffith.

35. Mr. Collins acknowledged that he was charged with three counts of misdemeanor child abuse in Stanly County in May or June 2012 and that those charges were dismissed in October 2012 when a State's witness was not present, and the State's motion for a continuance was denied. He also acknowledged that his summary of the Swain County DSS Minimum Standards of Care had redacted the second requirement for proper supervision of children ages 9-10. He left in the part that said they could be left alone for an hour, but omitted the second part of that sentence that prohibited them from supervising other children. He explained that he was just trying to focus on Hannah's ability as a ten year old to be left alone.

36. The Court finds that Mr. Collins knowingly altered the document he sought to use in support of his position, the Swain County DSS Minimum Standards of Care of Children, that Hannah Wells was an appropriate babysitter at McDonald's. Mr. Collins prepared a one page summary of that document, which omitted critically relevant information, that nine and ten year old children may not be responsible for the care of other children. (Pet. Ex. C) That omission was only brought to the Court's attention after the entire document was found on the Swain County DSS website by Respondent's licensing consultant, Nicole Jensen, during the course of the hearing. (Resp. Ex. 9) This intentional act of deception by Mr. Collins occurred while he was under oath, and the deceit was admitted by him while still under oath. Mr. Collins' knowing submission of inaccurate information to this Court seriously damages the credibility of the Petitioner in the eyes of the Court.

37. After due consideration of all the evidence presented, the Court finds that the Respondent appropriately relied on the child neglect case decision of Rowan County DSS as a basis for its revocation action. Rowan County DSS had a substantial basis for its case decision of inappropriate supervision by Mr. Collins in leaving four children, ten and younger, unattended at a McDonald's restaurant on December 22, 2011. The Court further finds that violations of the rules set out in the Notice of Administrative Action warrant revocation of the Petitioners' foster home license for inappropriate supervision.

38. The Court is troubled by Mr. Collin's lack of a supervision plan for the children, shared with and approved by at least his wife and Hannah Wells' mother, prior to arriving in Albemarle. Petitioner knew he had missed his 3:00 p.m. small claims hearing. Rather than simply proceed on to Charlotte where he would meet his wife and Jane Wells, he decided to leave the four children at McDonald's and go to the courthouse, three miles away. Hannah, by her own testimony, was almost immediately faced with a crying child, a situation she could not handle alone. She then relied on seven year old Caleb to find adult help and provide the McDonald's manager with Mr. Collins' phone number. His response to this Court was that he should have been given specific instructions about the use of minors as babysitters, rather than recognize his responsibility for using sound judgment in that regard. The Court is even more troubled by the fact that Mr. Collins, by his own statements to Michelle Swaim, which he did not dispute, was unaware of the dangers in leaving children unattended at a McDonald's restaurant. These concerns raise serious issues about the Petitioner's ability to safely foster children for the Respondent and support Respondent's decision to revoke Petitioner's family foster home license.

CONCLUSIONS OF LAW

1. The Petitioners had an opportunity to confront the allegations against them, and they have not carried their burden of showing by a preponderance of the evidence that the Respondent has exceeded its authority; failed to use proper procedure; acted erroneously, arbitrarily, or capriciously; or failed to act as required by law or rule.

2. The Court concludes that the Respondent had a reasonable basis for its decision to revoke Petitioner's family foster home license and that there exists sufficient evidence to support its revocation decision.

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.

FINAL DECISION

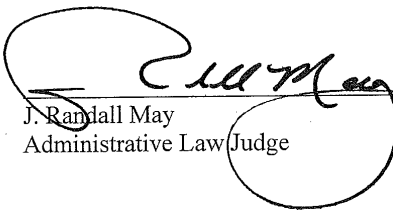
It is hereby ORDERED that the revocation of the Petitioner's family foster home license by the Respondent is AFFIRMED and UPHELD.

NOTICE

This is a Final Decision issued under the authority of N.C. Gen. Stat. § 150B-34.

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 the county where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the final decision was filed. **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 03.0102, 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 18th day of November, 2013.



J. Randall May
Administrative Law Judge

On this date mailed to:

CHARLES AND CYNTHIA COLLINS
1506 HEALING SPRINGS
DENTON, NC 27239
PETITIONER

NATALIE W. BACON
ASSISTANT ATTORNEY GENERAL
NC DEPARTMENT OF JUSTICE
952 OLD US HIGHWAY 70
BLACK MOUNTAIN NC 28711
ATTORNEY FOR RESPONDENT

This the 18th day of November, 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 WAKE

Filed
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IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
13BMS08447

<p>NC BOARD OF FUNERAL SERVICES Petitioner</p> <p>v.</p> <p>JOHN DOUGLAS BEVELL JR. Respondent</p>	<p align="center">ORDER ALLOWING SUMMARY JUDGMENT FOR RESPONDENT AND DENYING SUMMARY JUDGMENT FOR PETITIONER</p>
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THIS MATTER comes before the Honorable Donald W. Overby, Administrative Law Judge presiding, for consideration of all pending motions.

I. PROCEDURAL HISTORY

A contested case petition was filed February 13, 2013 by the Petitioner North Carolina Board of Funeral Services in the Office of Administrative Hearing (OAH) file number 13 BMS 08447 (hereinafter "Bevell 1"). On March 1, 2013, Respondent Bevell filed a pleading captioned as a petition and response to Petitioner's petition. On March 7, 2013, Respondent Bevell moved this Court for a special provisional license, which was denied by Order dated March 27, 2013. Petitioner Board moved for partial summary judgment on June 21, 2013. Respondent Bevell filed with OAH on July 3, 2013 its Motion for Summary Judgment or in the Alternative for Inactive Status and Response to Petitioner's Motion for Summary Judgment.

By Order dated July 22, 2013, this Tribunal issued an Order for Stay. There had been a statutory change which had the potential for affecting Respondent's application. Respondent Bevell filed another renewal application with Petitioner Board on July 2, 2013 so that the Board could consider the new application in light of those statutory changes. By letter dated September 6, 2013, Petitioner Board denied Bevell's second renewal application. Bevell filed a contested case petition with OAH on September 12, 2013, OAH file number 13 BMS 17605 (hereinafter "Bevell 2"). By its Documents Constituting Agency Action filed with OAH on October 14, 2013 Petitioner Board acknowledges that the two letters of denial dated December 21, 2012 and September 6, 2013 respectively constitute the bases for the two contested cases. Chief Administrative Law Judge Julian Mann III consolidated the two actions by Order dated October 2, 2013.

There is no disagreement as to the facts of these contested cases. The pertinent facts were articulated in Petitioner Board's Prehearing Statement, filed with OAH on March 28, 2013, and were restated and updated to reflect the action taken on the second application on October 14,

2013. Those recitations are an accurate recitation of the facts. In as much as both parties have moved for summary judgment and each acknowledge that there is no genuine issue of material facts, summary judgment is appropriate.

II. “OLD” LAW—N.C.G.S. 90-210.25

After his criminal convictions in the State of Virginia, Respondent Bevell first applied for re-licensure from Petitioner Board in 2002. At that time N. C. Gen. Stat. §90 – 210.25 was the statute most applicable to the facts and circumstances at issue herein. Pursuant to that statute anyone applying to be licensed to practice funeral directing, embalming or funeral service must “be of good moral character.” Further, G.S. §90 – 210.25(e)(1)states:

Whenever the Board finds that an applicant for a license or a person to whom a license has been issued by the Board is guilty of any of the followings acts or omissions and the Board also finds that the person has thereby become unfit to practice, the Board may suspend or revoke the license or refuse to issue or renew the license . . . : a. Conviction of a felony or a crime involving fraud or moral turpitude. a1. Denial, suspension, or revocation of an occupational or business license by another jurisdiction. g. Gross immorality, . . . (Emphasis added)

In any case in which the Board is entitled to suspend, revoke or refuse to renew a license, the Board may accept from the licensee an offer to pay a penalty of not more than five thousand dollars (\$5,000). The Board may either accept a penalty or revoke or refuse to renew a license, but not both.

N. C. Gen. Stat. §90 – 210.25(e)(1)

N. C. Gen. Stat. §90 – 210.25(e)(1) applied each year that Bevell applied for re-licensure from 2002 until 2012. There is no question that Bevell had committed felonies involving moral turpitude which is the crux of his reapplication now being denied.

At the time Petitioner sought to be relicensed by the Petitioner Board in 2002, the Petitioner had statutory authority to deny his application for any number or reasons associated with his prior convictions in the state of Virginia, but consciously chose not to. The Board likewise had an option to assess a penalty instead of denying the license renewal, but consciously chose not to. These were conscious, knowing acts of a properly promulgated Board of the Petitioner. For ten years each successive Board had this same statute upon which to rely, but consciously chose to continue to relicense Bevell.

By continuing to relicense Bevell each year the Board was either deciding that the statute was only to be interpreted as having prospective application or that the Board had weighed all the applicable conditions each year and found in Bevell’s favor. In either event, the Board was making an affirmative decision that Bevell had NOT “become unfit to practice.” The reasonable interpretation is that the Board interpreted the statute to have only prospective application, and,

therefore, once Bevell was relicensed the Board did not have to consider those matters yearly as applicable to his prior convictions.

III. “NEW” LAW—N.C.G.S. 90-210.25B

The only thing that has changed which lead to Bevell’s denial is the enactment of N.C. Gen. Stat. § 90-210.25B which became effective July 12, 2012. The effects of the statutory changes are what are at issue herein. N.C. Gen. Stat. § 90-210.25B states: “(a) The board shall not issue or renew any licensure, permit, or registration to any person or entity who has been convicted of a sexual offense against a minor.” (Emphasis added) There is no question that Bevell was convicted of a sexual offense against a minor as defined in the statute. In its denial letter, the Respondent Board articulates that N.C. Gen. Stat. § 90-210.25B is the basis upon which Bevell was denied reapplication in “Bevell I.”

N.C. Gen. Stat. § 90-210.25B is mandatory; however, N. C. Gen. Stat. §90-210.25(e)(1) is discretionary. Both use the same language in that each refers to the issuance or renewal of a license. There is no articulation and thus no distinction between the two as to whether or not the statute is to be applied prospectively as opposed to retroactively. They should be interpreted consistently. Clearly the Board applied N. C. Gen. Stat. §90-210.25(e)(1) prospectively, but applied N.C. Gen. Stat. § 90-210.25B retroactively.

The operative language of both the “old” and the “new” statutes is the same in that both applied to issuance and renewal. The fact that the “old” was discretionary and the “new” was mandatory has absolutely no effect on whether or not the statute is to be applied retroactively as opposed to prospectively. There is no logic in applying the two statutes differently.

A. Prospective Application versus Retroactive Application

A question to be resolved is whether or not N.C. Gen. Stat. § 90-210.25B has retroactive effect so as to be applicable to Bevell whose convictions were approximately eighteen years before the effective date of this statute. A statute is presumed to have prospective effect only and will not be construed to have retroactive effect unless such intent is clearly expressed or arises by necessary implication from the terms of the legislation. *In re Will of Mitchell*, 285 N.C. 77, 79-80, 203 S.E.2d 48, 50 (1974); *In re Estate of Proctor*, 79 N.C. App. 646, 649, 340 S.E.2d 138,141 (1986). Any reasonable doubt should be resolved against retroactive application of the law. *Hicks v. Kearney*, 189 N.C. 316, 127 S.E.2d 205, 207 (1925).

When a statute is silent or ambiguous with respect to a specific issue, the courts must consider other indicia in order to try to determine the intent of the General Assembly in enacting the particular statute. N.C.G.S. § 90-210.25B is silent as to the effective date of the statute. N.C.G.S. § 90-210.25B was an amendment to Senate Bill 847, which included a number of other amendments which were specifically enacted to be applied retroactively. Had the General Assembly intended for this statute to have retroactive application, then it very easily could have done so but did not. The logical inference and conclusion to be drawn is that the intent was not for this statute to have retroactive application.

The traditional legislative history of this particular statute is not especially helpful in understanding the reason for enacting this statute; however, the dialogue between the statute's primary proponent and the Board is instructive of the true intention behind its enactment which will be discussed further below.

B. Board's Course of Conduct.

The fact that Petitioner Board contends that the current Board is much more strict and such acts as Bevell's would not have been abided is in essence an acknowledgment that the current Board felt it had no authority to overrule the prior decisions of the Board granting Bevell his licenses; i.e., any enforcement of more punitive punishments could only be prospective. The Board's course of conduct prior to enactment of N.C. Gen. Stat. § 90-210.25B shows that it intended only prospective application and continued to license Bevell in the intervening ten years.

That the Board's intention was to continue that course of conduct is also demonstrated in its published application for renewal which Bevell completed and returned to the Board. In the application it shows that Bevell's license is to expire December 31, 2012, meaning this is the application for 2013. In the body of the application it asks: "have you been convicted of any crime, either felony or misdemeanor (other than traffic convictions) since your last renewal?" (Emphasis added) Bevell received a letter from the Board dated December 21, 2012 citing Senate Bill 847 as the reason for denying his application even though Senate Bill 847 does not address retroactivity and is contrary to the Board's interpretation and instruction on the application.

III. EFFECT OF N.C.G.S. 93B-8.1

The General Assembly enacted N.C. Gen. Stat. Ann. § 93B-8.1 which became effective July 1, 2013. It states in pertinent part:

(b) Unless the law governing a particular occupational licensing board provides otherwise, a board shall not automatically deny licensure on the basis of an applicant's criminal history. If the board is authorized to deny a license to an applicant on the basis of conviction of any crime or for commission of a crime involving fraud or moral turpitude, and the applicant's verified criminal history record reveals one or more convictions of any crime, the board may deny the license if it finds that denial is warranted after consideration of the following factors:

- (1) The level and seriousness of the crime.
- (2) The date of the crime.
- (3) The age of the person at the time of the crime.
- (4) The circumstances surrounding the commission of the crime, if known.
- (5) The nexus between the criminal conduct and the prospective duties of the applicant as a licensee.
- (6) The prison, jail, probation, parole, rehabilitation, and employment records of the applicant since the date the crime was committed.
- (7) The subsequent commission of a crime by the applicant.
- (8) Any affidavits or other written documents, including character references.

N.C. Gen. Stat. Ann. § 93B-8.1 (effective July 1, 2013)

Respondent Bevell filed his second application for renewal of his license with Petitioner Board on July 2, 2013 (Bevell 2). An initial question is whether or not G.S. § 93B-8.1 applies to Bevell's second application. The first sentence states "[u]nless the law governing a particular occupational licensing board provides otherwise. . . ." If N.C.G.S. § 90-210.25B(a) is to be applied retroactively, one could argue that the statute does "provide otherwise" by stating that the board "shall" not renew a licensee who has been convicted of the enumerated crimes. Conversely, if G. S. § 90-210.25B(a) is to be read prospectively, then G.S. § 93B-8.1 would not apply to Bevell 2.

It is important to note that in its September 6, 2013 letter to Bevell, Petitioner Board refers to § 90-210.25B(a) as the basis for denying his first application. The letter then goes on to state that it did in deed consider the mandates of § 93B-8.1. This acknowledgement infers that the Board is looking at § 90-210.25B(a) as applying retroactively.

The letter very specifically lists three of the enumerated factors for consideration in § 3B-8.1. It is important to note that in listing those three enumerated factors the Petitioner Board omitted a very important word from the statute: "(5) The nexus between the criminal conduct and the prospective duties of the applicant." (Emphasis added). Obviously, the intent as stated is prospective application. There is no nexus at all between the criminal conduct and the particular duties of Bevell and certainly no nexus prospectively and especially in light of the fact that he has been licensed for ten years without any problems. Lastly, the September 6 letter acknowledges "consideration of the applicable statutes," in the plural and there are only two statutes referenced in the letter.

Even if § 93B-8.1 is applicable, this Tribunal takes exception to the Board's position that it weighed the considerations of § 93B-8.1 and found the three listed factors to outweigh all other factors. It must be remembered that the "level and seriousness" and the "circumstances surrounding the commission of the crimes" has been known from the very outset. While those factors are significant, the fact that the crimes had been committed approximately eighteen years before is significant as well. The fact that Bevell went through the criminal justice system and did everything that was asked of him is also significant. He was incarcerated, complied with post release supervision and probation and complied with every requirement. The Board was aware of his employment history in the intervening years because it had sanctioned his employment. The Board was aware that he had had no further involvement with the criminal justice system. The Board was keenly aware of the tremendous support Bevell had within the community and the industry. And, finally, the Board misapplied factor number 5 as stated above. An honest weighing of these factors enumerated in the statute would weigh in favor of Bevell.

IV. CORRESPONDENCE BETWEEN BOARD AND REP. JUSTICE

Perhaps the most telling and compelling piece of this puzzle is the dialogue between former Representative Carolyn Justice and Petitioner Board. In her letter dated January 4, 2012, Representative Justice expresses great concern on having learned that someone with a prior

felony conviction for child molestation and other offenses could be licensed to transport human bodies in North Carolina. Her concern is directed solely at Mr. Bevell who had been the center of a report in the *Wilmington Star News* to which Rep. Justice refers, as well as the various entities who may play a role in his licensing.

Rep. Justice's letter seeks information about how Mr. Bevell was able to become licensed with those convictions on his record. Her questions are very pointed and appropriately ask probing questions which should be answered in order for someone to be license by any board in North Carolina. The Board answered each of Rep. Justice's questions by, in essence, stating that those matters had in fact been considered by the Board in reviewing Bevell's application and that he had satisfactorily answered those questions. It is of import to note that on the last page of her letter, in addressing possible legislation to address her concerns, Rep. Justice proposes that for anyone who's license has previously been revoked that they "may not" be license in North Carolina; that is, discretionary language and not mandatory. (Emphasis added)

Petitioner Board responded to Rep. Justice by letter dated February 8, 2012. Bevell was first license by the Board as it was then constituted in 1981, and he was convicted of his crimes thirteen years later in 1994. Rep. Justice's first question is whether or not Bevell revealed that he was a convicted felon. The written answer to that question only addresses his 1999 application which was the first after his conviction; however in answering questions throughout, it is shown that Bevell always answered questions concerning his conviction in an honest and straight-forward manner, admitting his convictions. Bevell was denied in 1999. He reapplied two years later in 2001 for a transport license which was granted.

Rep. Justice asks how anyone with such a record could have been licensed. Petitioner Board used two and a half pages to explain Bevell's licensure history, which reflects, among other things, tremendous support within the profession and among his peers.

Petitioner Board was asked to define "good moral character." Petitioner responded by explaining its process if there is a question about an applicant's moral character. The Board referred to the State's appellate courts' decisions which have held that a criminal conviction is not necessarily conclusive that the person lacks good moral character, although it is some evidence that can be considered. The Board also stated that there had been some personnel changes at the Board in 2003 and 2004 which made things much tighter for applicants. The answer states that all applicants with felony convictions are sent straight to the Disciplinary Committee and are then sent to the full Board for a hearing. (Emphasis in the original) Since 2004 the Board also has taken affirmative steps to insure that all applicants are "fit to practice" by conducting background checks on all individual applicants. (Emphasis in the original) It is not clear but current licensees may only be subjected to background checks on their initial application. The letter is clear, however, that such is the case on transport permittees.

Again, one of two possible scenarios exists. Either the newly constituted and more vigilant Board subjected Bevell to that same scrutiny since it was applied to "all," or this new

Board applied its stricter scrutiny prospectively. Since Bevell was subjected to the Board's heightened scrutiny and was licensed each year since 2004, it necessarily flows that he was found "fit to practice." The only logical explanation is that the statute was interpreted as being prospective. It is crystal clear that the Board has had ten years within which to review Bevell's applications, but the Board has treated the then existing statute as prospective and without effect on Bevell.

Rep. Justice asked for copies of the letters of recommendation submitted on Bevell's behalf. The Board complied by providing letters for three years including 1999 in which he was denied. Rep. Justice asked if Bevell's probation status had been checked or to see if his license had been suspended. The Board answered basically that Bevell had supplied all that information.

Rep. Justice asks the very poignant question of how the public should have any confidence in the State statute. The Board answers by citing the composition of the Board at that time and the quality and quantity of the numerous letters to the Board on Bevell's behalf. The Board also answers that the current Board is very different from the one in existence when Bevell was given back his license. In conjunction with the prior answer the inference is that this current Board would not be inclined to return a license to one similarly situated as Bevell—prospectively. There is no inference that it would undertake any different action on Bevell himself. In fact, the Board's course of conduct demonstrates that it would not, since the newly constituted and more critical Board also re-licensed Bevell for eighth years.

Finally, in addressing Rep. Justice's concerns, the Board notes that Bevell had been a successful and compliant licensee. In other words, Bevell has done what has been asked of him by the Board and he has abided by all rules and regulations, with very minor exceptions.

Counsel for Petitioner Board wrote to Rep. Justice as well, noting that the Board in 2002 decided that Bevell was of good moral character even though he had been convicted of those certain crimes. She goes on to say that the current process of vetting applications is much improved and that the current process "provides a safeguard against future applicants who are convicted sexual predators from being licensed without a full evidentiary hearing." (Emphasis added) The tenor of all discussions is that everything is prospective and there is no hint from anyone that there should be any retroactive application that would deprive Bevell or anyone else of his or her license.

V. APPLICABILITY OF N.C.G.S. 90-210.25B—BILL OF ATTAINDER

Looking at the statute's applicability to the facts and circumstances of this case, only one of two interpretations exists: either the statute is for prospective application and is of no consequence to Bevell; or it has retroactive application and is applicable ONLY to Mr. Bevell. Respondent Bevell has represented that at the time § 90-210.25B became effective, Mr. Bevell was the only person who held a license to whom the statute would apply. That fact has not been challenged.

Retroactive application of § 90-210.25B would be an unconstitutional bill of attainder. A bill of attainder is a legislative act which inflicts punishment on a particular individual or designated group of persons without a judicial trial. *United States v. Lovett*, 328 U.S. 303, 315, 106 Ct.Cl. 856, 66 S.Ct. 1073, 1079, 90 L.Ed. 1252, 1259 (1946).

Bills of attainder are prohibited by the United States Constitution: "No State shall ... pass any bill of attainder." U.S. Const. art. I § 10, cl. 1. A bill of attainder is "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 468, 97 S.Ct. 2777, 53 L.Ed.2d 867 (1977) (citations omitted). "In forbidding bills of attainder, the draftsmen of the Constitution sought to prohibit the ancient practice of the Parliament in England of punishing without trial 'specifically designated persons or groups.' " *Selective Serv. Sys. v. Minn. Pub. Interest Research Grp.*, 468 U.S. 841, 847, 104 S.Ct. 3348, 82 L.Ed.2d 632 (1984) (quoting *United States v. Brown*, 381 U.S. 437, 447, 85 S.Ct. 1707, 14 L.Ed.2d 484 (1965)).

State v. Whitaker, 364 N.C. 404, 411-12, 700 S.E.2d 215, 220 (2010)

In its original and purest form, bills of attainder referred only to punishment by death and anything less than death is termed a bill of pains and penalties. The terms are used within the meaning of the Constitution interchangeably today and are generally referred to as bills of attainder without any distinction. *Lovett*, 328 U.S. at 315.

The North Carolina Constitution does not specifically prohibit bills of attainder. N.C. Const. art. I, § 16 is a prohibition against ex post facto laws which are specifically reserved for criminal laws. U.S. Const. art. I § 10, cl. 1 makes the prohibition applicable to the states.

The prohibition embodied in U.S. Const. art. I § 10, cl. 1 is not to be strictly and narrowly construed in the context of traditional forms but is to be interpreted in accordance with the designs of the framers so as to preclude trial by legislature, a violation of the separation of powers concept. J. Story, *Commentaries on the Constitution of the United States* (Boston: 1833) § 1338. The clause thus prohibits all legislative acts, "no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial . . ." *Lovett*, 315 U.S. at 315

As it relates to an individual, a legislative act which singles out an individual for legislatively prescribed punishment because of past conduct is evidence that such act is unconstitutional. *Selective Serv. Sys. v. Minnesota Pub. Interest Research Group*, 468 U.S. 841, 852 (1984). In the case of *Cummings v. Missouri*, 4 Wall. 277, 18 L. Ed 356 (1867), the United States Supreme Court struck down a provision of the Missouri post-Civil War Reconstruction Constitution that barred persons from various professions unless they stated under oath that they had not given aid or comfort to any person engaged in armed hostility to the United States. The Court recognized that the oath as required was not a means of ascertaining whether the individual was qualified for his profession, but rather to effect a punishment for having associated with a particular group.

This present case at issue with Mr. Bevell is analogous. If applied retroactively, N.C.G.S. § 90-210.25B is a legislative act that punishes Bevell for prior acts which have no effect on his ability to perform his professional services as a funeral service director.

VI. THREE-PRONG TEST

The United States Supreme Court established the test for determining whether a legislative act or statute amounts to a bill of pains and penalties by inflicting punishment prohibited by the Constitution:

In deciding whether a statute inflicts forbidden punishment, we have recognized three necessary inquiries: (1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, “viewed in terms of the type and severity of burdens imposed, reasonably can be said to further non-punitive legislative purposes”; and (3) whether the legislative record “evinces a congressional intent to punish.”

Selective Serv. Sys. v. Minnesota Pub. Interest Research Group, 468 U.S. 841, 852, 104 S.Ct. 3348, 3355, 82 L.Ed.2d 632, 643 (1984) (citations omitted).

A. Historical Meaning of Legislative Punishment.

The first inquiry under the *Selective Service* test is whether § 90-210.25B falls within the historical meaning of legislative punishment. In recent years, courts in the United States have noted the lists of punishments forbidden by the Bill of Attainder Clause to be more commonly seen to bar participation by individuals or groups in specific employments or professions. *Id.* at p. 852

In the case at bar, § 90-210.25B, as applied to Bevell, is exactly the type of punishment that courts across the United States, including those in North Carolina, have deemed to be forbidden. Applied retroactively as the Board is attempting to do, this statute is barring an individual, Bevell, from participation in the funeral service industry as the result of a 20-year-old criminal conviction.

B. Furtherance of Non-punitive Legislative Purposes.

The second inquiry under the *Selective Service* test is whether the statute or legislative act can be said to further non-punitive legislative purposes. As previously noted, there is little to no legislative history regarding § 90-210.25B. However, correspondence between Representative Justice and the Board reveals that the introduction and passage of § 90-210.25B was not for the betterment of the funeral service industry in North Carolina, but rather was to punish Bevell.

With the backdrop of the dialogue with Rep. Justice, § 90-210.25B was enacted, effective July 12, 2012. Determining anyone’s “intent” is often difficult and is generally only discernible from extrinsic evidence. In this instance, it is abundantly clear that the only inquiry from Representative Justice was concerning Bevell and no other. Her entire focus was on Bevell and no other. Her entire focus was on the crimes he had committed and no other types of crimes.

Representative Justice’s interest was piqued after reading the article in the *Wilmington Star News* about Bevell. In her correspondence there is no mention of how to better the funeral

service industry. The tenor of that correspondence is that Representative Justice was not seeking guidance on how to better the funeral service industry as it related to Bevell's felony criminal convictions. The entirety of the inquiry is about Bevell and how the Board could possibly fathom licensing HIM. There was no inquiry about sanctioning someone similarly situated or someone who might have any other felony convictions. The inquiry was solely and completely about Bevell. The only logical inference to be drawn was that her purpose—i.e., her “intent”—was to remove Bevell from the funeral service industry based upon a 20-year-old criminal conviction.

There is no legislative discussion or history relating to § 90-210.25B other than the correspondence between Representative Justice and the Board which is nevertheless telling. Correspondence refers to legislative changes relating to licensees of the funeral service industry who had been convicted of sexual acts with a minor, but does not address how any legislative changes discussed would benefit either the funeral service industry or the people of North Carolina. Rather, a March 30, 2012 letter defends the Board's decision in licensing Bevell in 2002 and each year since.

At no point in any of the correspondence is there a reference or even inference to any benefit to the State of North Carolina. From the legislative history and intent, the goal of N.C. Gen. Stat. § 90-210.25 was to punish if applied retroactively.

While the crimes listed in § 90-210.25B may be perceived to be reprehensible, the same is true for a myriad of felony crimes within North Carolina's criminal laws which are not included in the list intended as a prohibition from entering the funeral service industry. There is no explanation anywhere as to how the crimes listed in § 90-210.25B affects one's ability to perform the responsibilities of a funeral service professional. While the legislative history in this matter comes from unconventional means, it is clear that no one considered the good of the funeral service profession in this matter or the general welfare of the public of North Carolina.

In “viewing the severity of the burdens imposed,” this statute does not “further non-punitive legislative purposes.” It is abundantly clear that in this contested case retroactive application of this statute as the Board has done in denying Bevell's application to be relicensed can have no other purpose than the punishment of Bevell.

C. Intent to Punish Bevell.

The final inquiry under the *Selective Service* test is whether the legislative record evinces a congressional intent to punish. As noted above, the legislative history relating to § 90-210.25B is limited to correspondence between the Board and Representative Justice. This correspondence clearly evinces an intent to punish Bevell.

It is again interesting to note that the only crimes which would automatically prohibit one from being licensed by this Board are sex offenses against minors. With the host of heinous felonies enumerated in North Carolina criminal law, it is interesting indeed that this group of crimes is the only ones identified. The only logical inference in light of the totality of circumstances is that this legislation was aimed specifically at Bevell.

It is both incongruous and inconceivable that the Board has licensed Bevell for ten years, defended him in correspondence and then refused to relicense him. The only inference that can be drawn is that the Board was determined to get rid of Bevell although he has had no further criminal law involvement and his record with the Board is only blemished by very minor violations.

As the *Selective Service* analysis reveals, § 90-210.25B is an unconstitutional bill of attainder as applied in this contested case.

VII. CONCLUSION

Retroactive application of § 90-210.25B and/or § 93B-8.1 is in the very least an erroneous interpretation and application of the statutes. The statutes are to be interpreted and applied prospectively, just as the Board had been doing with §90 – 210.25(e)(1) in relicensing Bevell for ten years. The critical factor, however, is that retroactive application in this particular contested case is an unconstitutional bill of attainders.

“When a statute or ordinance is susceptible to two interpretations—one constitutional and one unconstitutional—the Court should adopt the interpretation resulting in a finding of constitutionality.” *Smith v. Keator*, 285 N.C. 530, 206 S.E.2d 203 (1974). The only constitutional application of those statutes is a prospective application to Mr. Bevell.

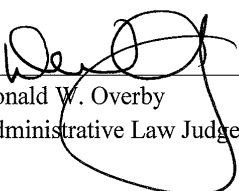
Respondent Bevell’s Motion for Summary Judgment is **ALLOWED**. The Board should only apply the applicable statutes prospectively from the effective date of each such statute; and, therefore, the Board should issue Mr. Bevell his funeral service license.

Petitioner Board’s Motion for Summary Judgment is **DENIED**.

NOTICE AND ORDER

The North Carolina Board of Funeral Services will make the Final Decision in this case. That agency is required to give each party an opportunity to file Exceptions to the Proposal for Decision, to submit Proposed Findings of Fact and to present oral and written arguments to the Agency. N.C. Gen. Stat. §150B-40(e)

This the 21st day of November, 2013.




Donald W. Overby
Administrative Law Judge

On this date mailed to:

Anna Baird Choi
Allen Pinnix & Nichols, PA
PO Drawer 1270
Raleigh NC 27602
Attorney for Petitioner

Thomas E Stroud Jr.
Ward & Smith, PA
PO Box 8088
Greenville NC 27835
Attorney for Respondent

This the 21st day of November, 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

Filed
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IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
13CPS09535

GARRETT'S TOWING & RECOVERY LLC,
Petitioner,

v.

NORTH CAROLINA DEPARTMENT OF
PUBLIC SAFETY, STATE HIGHWAY
PATROL,
Respondent.

FINAL DECISION

THIS MATTER comes before the Office of Administrative Hearings on a petition for a contested case hearing under G.S. 150B-23(a) filed on March 5, 2013, by Petitioner, GARRETT'S TOWING & RECOVERY, LLC. The hearing occurred before Administrative Law Judge Beecher R. Gray on September 25, 2013, in High Point, North Carolina. Petitioner's Summary Judgment Motion and Affidavit, filed on September 13, 2013, and Respondent's Response in Opposition were considered, and Petitioner's Summary Judgment Motion was denied at the beginning of this hearing. After hearing the testimony of the witnesses presented for Petitioner and Respondent; reviewing all exhibits and materials presented; and considering all relevant cases, laws, and rules, I make the following:

FINDINGS OF FACT

1. 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.
2. By letter dated January 14, 2013 (R. Ex. 11), Captain M.D. Hayes of the N.C. Department of Public Safety, State Highway Patrol, acting on behalf of Respondent, confirmed to Petitioner that Respondent was removing Petitioner's company, Garrett's Towing & Recovery, LLC, from the Highway Patrol's Rotation Wrecker List in Davidson County. The letter states as grounds for the removal that Petitioner did not have a previously-inspected and approved small wrecker assigned only to the Thomasville Rotation Wrecker List or a previously-inspected and approved large wrecker solely assigned to the Davidson County Large Wrecker Rotation List. Respondent's letter consequently determined that Petitioner was not in compliance with N.C. Administrative Code 14A NCAC 09H.0321(a)(3), (now codified at 14B NCAC 07A.0116(a)(3)), which provides:

- (a) The Troop Commander shall include on the Patrol Rotation Wrecker List only those wrecker services which agree in writing to adhere to the following provisions:
 - [...]
 - (3) Wrecker service facilities and equipment, including vehicles, office, telephone lines, office equipment and storage facilities may not be shared with or otherwise located on the property of another wrecker service and must be independently insured. Vehicles towed at the request of the Patrol must be placed in the storage owned and operated by the wrecker service on the rotation list. A storage facility for a small wrecker shall be located within the assigned zone. For wrecker services with large wreckers the storage facility for vehicles towed with the large wrecker may be located anywhere within the county. To be listed on the large rotation wrecker list, a wrecker service must have at least one large wrecker. To be listed on the small rotation wrecker list, a wrecker service must have at least one small wrecker. In any case where husband and wife or other family members are engaged in the business of towing vehicles and desire to list each business separately on the Patrol wrecker rotation list, the wrecker service shall establish that it is a separate legal entity for every purpose, including federal and state tax purposes.
- 3. The phrase "wrecker service" is defined in 14A NCAC 09H.0308(2) (now codified at 14B NCAC 07A.0103(2)) as follows:
 - (2) Wrecker Service. A person or corporation engaged in the business of, or offering the services of, and owning a wrecker service or towing service whereby motor vehicles are or may be towed or otherwise removed from one place to another by the use of a motor vehicle manufactured and designed for the primary purpose of removing and towing disabled motor vehicles.
- 4. Petitioner's evidence included the testimony of the company's owners, Terry and Misty Scarlette, as well as the testimony of Douglas Monroe, a former Lieutenant with the State Highway Patrol. Petitioner's evidence established that:
 - a. Petitioner was incorporated as a Limited Liability Company ("LLC") in North Carolina on April 6, 2000, and operates from three business locations, one each in Guilford, Randolph, and Davidson Counties, all three business locations being a part of and under Garrett's Towing and Recovery Service, LLC.

- b. Petitioner's insurance policy was admitted into evidence as P. Ex. 8; Captain Babb, testifying on behalf of Respondent, stated that Petitioner properly was insured.
 - c. Captain Babb also testified that Respondent treats this Petitioner as operating three (3) separate wrecker services, as defined and used in 14B NCAC 07A.0116(a)(3) and 14B NCAC 07A.0103(2), and therefore violates the prohibition against sharing of facilities, equipment, or storage facilities of *another wrecker service*. (emphasis added).
 - d. Petitioner began participating in the Highway Patrol's Rotation Wrecker List for Randolph and Davidson Counties in 2000 and for Guilford County in 2004. In 2009, the State Highway Patrol removed Petitioner from the Davidson County large wrecker rotation list.
 - e. By agreement of the parties following Petitioner's petition for a contested case (09 CPS 06104), Petitioner was added back to the Davidson County large wrecker rotation in or about April 2010. Petitioner continued to service the wrecker rotation list for all three counties until November 2012 when Respondent again removed Petitioner from the Davidson County list for large and small wrecker service. Petitioner appealed Respondent's action.
 - f. Throughout its period of operation, Petitioner normally serviced the wrecker lists for Guilford, Randolph, and Davidson Counties by using seven vehicles, which included two small wreckers, two large wreckers, and three rollbacks.
 - g. During its period of service on the wrecker lists for the three counties, Petitioner did not have any incident where it failed to provide service as requested in a timely fashion.
 - h. According to the testimony of former state trooper Douglas Monroe, Petitioner operated a respected company maintaining full compliance with the rules codified under N.C. Administrative Code 14B NCAC 07A.0116(a)(3) for participation in the State Highway Patrol rotation wrecker service.
5. Respondent's evidence included the testimony of Captain Jeffrey Babb and First Sergeant D.B. Garland. Respondent's evidence established that Respondent did remove Petitioner from the Davidson County wrecker rotation list in November 2012 as set forth in R. Ex. 6 and confirmed that decision in January 2013 as set forth in R. Ex. 11.
 6. According to the testimony of Captain Babb and First Sergeant Garland on behalf of Respondent, Respondent removed Petitioner from the list because Petitioner failed to comply with the requirements of N.C. Administrative Code 14B NCAC 07A.0116(a)(3) by (1) failing to assign one small and one large wrecker for use exclusively in Davidson County and by (2) sharing facilities and equipment with another wrecker service.

Based upon the foregoing findings of fact, I make the following:

CONCLUSIONS OF LAW

1. The parties properly are before the Office of Administrative Hearings.
2. Petitioner's use of three business locations--one each in Davidson, Guilford, and Randolph Counties--does not violate the rules cited by Respondent because all three business locations used by Petitioner are under one Limited Liability Company, and Petitioner's use of three business locations does not constitute a sharing arrangement with another wrecker service.
3. Respondent acted erroneously and failed to act as required by its own rules by removing Petitioner from the Davidson County wrecker list as contained in Respondent's Exhibits 6 and 11 in that N.C. Administrative Code 14A NCAC 09H.0321(a)(3) and 14A NCAC 09H.0308(2) (now codified at 14B NCAC 07A.0116(a)(3) and 14B NCAC 07A.0103(2), respectively) do not contain provisions requiring Petitioner to designate a small and large wrecker for use solely in Davidson County--or in any other county--and do not prohibit one corporation from having three business locations for its wrecker service. Respondent's treatment of Petitioner's three business locations under one LLC as constituting three unrelated wrecker services is erroneous as a matter of law.
4. Petitioner is one corporation operating in three locations and does not share facilities or equipment with "another wrecker service" as that term is defined by 14B NCAC 7A.0103(2) (previously 14A NCAC 09H.0308(2)); Petitioner therefore complies with the rules under N.C. Administrative Code 14B NCAC 07A.0116(a)(3) (previously 14B NCAC 09H.0321(a)(3)).

FINAL DECISION

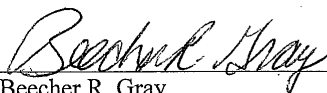
Based upon the foregoing Findings of Fact and Conclusions of Law, I find that Respondent's interpretation of its rules in this case is erroneous and that Respondent did not act as required by its own rules. Petitioner has been harmed by the action of Respondent in this case and is entitled to relief in the form of reinstatement to the top of the Davidson County wrecker rotation list until such time as Petitioner adequately has been compensated for its erroneous exclusion from that list. Respondent is directed to refrain from requiring Petitioner to designate a small or large wrecker for use solely in one county as a condition precedent to Petitioner's participation in Respondent's Rotation Wrecker Service List, until such time as Respondent properly amends its rule to include such provisions in a manner that does not exceed its statutory authority and jurisdiction.

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 03.0102, 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 25 day of October, 2013.


Beecher R. Gray
Administrative Law Judge

On this date mailed to:

Walter C Holton
Attorney At Law
301 N Main Street Suite 804
Winston Salem, NC 27101
Attorney For Petitioner

Tammera S Hill
N.C. Department Of Justice
9001 Mail Service Center
Raleigh, NC 27699-9001
Attorney For Respondent

This the 25th day of October, 2013.



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