

RRC STAFF OPINION

PLEASE NOTE: THIS COMMUNICATION IS EITHER 1) ONLY THE RECOMMENDATION OF AN RRC STAFF ATTORNEY AS TO ACTION THAT THE ATTORNEY BELIEVES THE COMMISSION SHOULD TAKE ON THE CITED RULE AT ITS NEXT MEETING, OR 2) AN OPINION OF THAT ATTORNEY AS TO SOME MATTER CONCERNING THAT RULE. THE AGENCY AND MEMBERS OF THE PUBLIC ARE INVITED TO SUBMIT THEIR OWN COMMENTS AND RECOMMENDATIONS (ACCORDING TO RRC RULES) TO THE COMMISSION.

AGENCY: Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services.

RULE CITATION: 10A NCAC 27G .0104 and 28A .0102

RECOMMENDED ACTION:

- X Note staff's comment
- Object, based on:
 - Lack of statutory authority
 - Unclear or ambiguous
 - Unnecessary
 - Failure to comply with the APA
- Extend the period of review
- No action necessary

COMMENT:

Session Law 2017-32 became effective on June 8, 2017 and required amendments to rules regarding the qualifications for Qualified Professionals within the mental health, developmental disability, and substance abuse services system under the authority of the Commission for Mental Health, Developmental Disabilities and Substance Abuse Services. In order for the Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services to make the necessary rule amendments, DHHS was required to first seek approval of the changes in the Medicaid State Plan from the Centers for Medicaid and Medicaid Services (CMS.) Specifically, S.L. 2017-32 required DHHS to submit any necessary changes no later than December 1, 2017. S.L. 2017-32 then required the Commission for Mental Health, Developmental Disabilities and Substance Abuse Services to amend Rules no later than 6 months following the receipt of CMS approval of the necessary Medicaid State Plan amendments. Following receipt of the approval, the Commission for Mental Health, Developmental Disabilities and Substance Abuse Services is submitting these temporary rules for review by the RRC in accordance with 150B-21.1(a)(4) or alternatively, in accordance with 150B-21.1(a)(2).

The Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services is submitting temporary rule amendments in accordance with 150B-21.1(a)(4), as it is the contention of the agency that the approval of the State Plan Amendment qualifies as a recent federal regulation.

Alternatively, if the RRC determines that the approval of the Medicaid State Plan by CMS does not qualify as a "recent federal regulation," the agency is submitting the temporary rule amendments in accordance with 150B-21.1(a)(2), as a recent act of the General Assembly, in response to S.L. 2017-32, effective June 8, 2017. A "recent act" is defined by 150B-21.1(a2) as "an act, change, regulation, or order occurring or made effective no

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more than 210-days prior to the submission of a temporary rule to the Rules Review Commission.” Because the agency has submitted the temporary rule after the expiration of the 210 day period, they have also submitted a waiver request to be reviewed by the RRC.

The pertinent timeline for these Rules is as follows:

Effective Date of 2017-32	June 8, 2017
Expiration of 210-day requirement as set forth in 150B-21.1(a2)	January 4, 2018
Date DHHS submitted Medicaid State Plan	June 29, 2018
Approval by CMS	July 13, 2018
Publication of temporary rules	November 16, 2018
Public comment period of temporary rules	November 27, 2018 – December 18, 2018 (15 business days)
Public Hearing	December 5, 2018
Adoption of temporary rules	January 9, 2019
Expiration of 6 months from approval of CMS as set forth in S.L. 2017-32	January 13, 2019

In accordance with 150B-21.1(a2), the RRC may waive the 210 requirements upon consideration of the following:

- (1) Degree of public benefits;
- (2) Whether the agency had control over the circumstances that necessitated the waiver;
- (3) Notice to and opposition from the public;
- (4) The need for the waiver; and
- (5) Previous requests submitted from the agency.

If the RRC finds that the State Plan approval qualifies as a “recent federal regulation” or it grants the waiver of the 210-day filing requirement, staff is recommending approval of the temporary rules submitted