



NC DEPARTMENT OF
**HEALTH AND
HUMAN SERVICES**

Division of Mental Health, Developmental
Disabilities and Substance Abuse Services

ROY COOPER • Governor

MANDY COHEN, MD, MPH • Secretary

J. KEITH HENRY • Chair, Commission for Mental Health,
Developmental Disabilities, and Substance Abuse Services

January 18, 2019

MEMORANDUM

TO: Amber May, J.D., Counsel
Rules Review Commission

FROM: J. Keith Henry, Chair
Commission for MH/DD/SAS *JKH*
W. Denise Baker, Rulemaking Coordinator *WDB*
Commission for MH/DD/SAS

RE: Request for Waiver of G.S. § 150B-21.1

In accordance with G.S. § 150B-21.1(a2), the Commission for Mental Health, Development Disabilities, and Substance Abuse Services (Commission) requests a waiver of the 210 day limitation provided in G.S. § 150B-21.1(a1). The waiver request relates to the following adopted, via amendment, as Temporary Rules during the Commission's January 9, 2019 meeting: 10A NCAC 27G .0104, *Staff Definitions*, and 10A NCAC 28A .0102, *Definitions*.

S.L. 2017-32 required the Department of Health and Human Services (DHHS) to amend the qualifications for Qualified Professionals (QPs) to ensure that the years of full-time mh/dd/sa experience required by rule may be obtained either before or after obtaining the required educational degree. It also required the DHHS to seek approval from the Centers for Medicare and Medicaid Services (CMS) of the State Plan Amendment(s) (SPA) necessary to facilitate compliance with this mandate. A copy of S.L. 2017-32 and the SPA are attached for your reference.

In addition, S.L. 2017-32 required the Commission to amend its existing rules to permit all years of full-time mental health, developmental disabilities, and substance abuse services to be used in credentialing an individual as a QP within six months of approval of the SPA by CMS. As reflected in the attached, CMS approved the SPA July 13, 2018. In order to comply with the mandate to amend its existing rules for QPs within six months of approval of the SPA by CMS, the Commission voted to amend these rules via temporary rulemaking procedures and completed its adoption of these rule amendments January 9, 2019.

In adopting the rule amendments via temporary procedures, the Commission acted in reliance on G.S. § 150B-21.1(a)(4), a recent federal regulation, namely approval of the SPA by CMS July 13, 2013. If, however, the Rules Review Commission objects to adoption of the temporary rules on the basis of G.S. §

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150B-21.1(a)(4), the Commission respectfully requests a waiver of the 210-day requirement pursuant to G.S. § 150B-21.1 (a2). Specifically, S.L. 2017-32, which became effective June 8, 2017, made the Commission's amendment of its rules governing QPs contingent upon approval of the SPA by CMS. A waiver of the 210-day requirement permits the Commission to rely upon S.L. 2017-32 in amending its QP rules via temporary procedures. The request for a waiver of the 210-day requirement is based upon consideration of the following factors.

1. **Degree of Public Benefit:** The Commission has authority to adopt rules governing the delivery of mental health, developmental disabilities, and substance abuse services in Community facilities and State-operated facilities as well as the delivery of mental health and mental retardation services provided to inmates in the custody of the Department of Public Safety (DPS). Approval of the temporary rules adopted by the Commission permits the rule changes to be implemented in community and state-operated settings almost immediately. This result will expand the pool of QPs available in these settings. In addition, the legislative mandate that the rules be adopted within six months of approval of the SPA by CMS anticipates a more immediate application of the rule changes; approval of the temporary rules permits realization of this more immediate result.
2. **Commission control over the circumstances:** S.L. 2017-32 made clear that responsibility for preparing and submitting the necessary amendments to the State's SPA was solely the responsibility of DHHS. The Commission had no control over the amendment of the SPA or its submission to CMS by DHHS. Likewise, there was no clear indication of whether and when the SPA might be approved by CMS. Rather, the Commission viewed the amendment of its QP rules via temporary procedures as the most expeditious route for meeting the legislative mandate to amend its existing rules within six months of approval of the SPA by CMS. The SPA was approved July 13, 2018; the Commission adopted the QP amendments January 9, 2019.
3. **Notice to the Public:** The Commission has consulted with staff of multiple agencies potentially impacted by its amendment of its QP rules. In addition, interested persons were provided notice of the Commission's intent to amend the rules via temporary procedures. The Commission received no comments nor objections during publication of the proposed temporary rule amendments November 27, 2018 – December 18, 2018. In addition, the Commission received no comments nor objections during its Public Hearing December 5, 2018. Finally, this waiver request has been posted on the Commission's webpage (<https://www.ncdhhs.gov/divisions/mhddsas/commission>) and distributed to persons on its interested persons list.
4. **Need for the waiver:** This waiver is needed to permit the Commission's amendment of its QP rules via temporary procedures to become effective immediately as anticipated by the session law.
5. **Requests for previous waivers:** Current records of the Commission reflect that it has not requested a waiver related to the rulemaking process in the past.

In conclusion, the Commission acted in reliance upon G.S. 150B-21.1(a)(4) fulfilling its mandate to amend its existing QP rules within six months of approval of the SPA by CMS. If the RRC opines this criteria does not apply, the Commission respectfully requests a waiver of the 210-day requirement pursuant to G.S. 150B-21.1(a2) for the reasons set forth above. Approval of this waiver will permit the Commission's reliance upon G.S. 150B-21.1(a)(2) in amending its existing QP rules via temporary rulemaking procedures thereby allowing the temporary rules to become effective immediately.

Please do not hesitate to contact either of us should you have any questions related to this request: khenry@bchfamily.org; denise.baker@dhhs.nc.gov.

Attachments: SPA, S.L. 2017-32

cc: Mandy Cohen (via electronic mail)
Kody Kinsley (via electronic mail)
Jessica Macari (via electronic mail)
Lisa Corbett (via electronic mail)
Joel Johnson (via electronic mail)
Commission (via electronic mail)
Interested Persons (via electronic mail)
W. Denise Baker (via electronic mail)

