



April 11, 2019

**VIA Electronic Mail**

Amanda Reeder  
Commission Counsel  
Office of Administrative Hearings  
6714 Mail Service Center  
Raleigh, NC 27699-6700

Dear Ms. Reeder:

Pursuant to 26 NCAC 05 .0103, this is the written request of Disability Rights North Carolina (Disability Rights NC) to provide comment to various provisions in the Proposed Readoption of the rules for Jails and Local Confinement Facilities, 10A NCAC 14J at the meeting of the Rules Review Commission on April 18, 2019.

Disability Rights NC has no objections to the proposed rules as currently written, but is making this request to respond to the comments and objections of the Sheriff's Association (SA), as presented in their March 19, 2019 request, which assert that some of the proposed rules are either unclear or beyond the authority of the Department of Health and Human Services (DHHS). More prisoners died in North Carolina jails in 2018 than in the previous five years. Deaths by suicide have increased in the last year, and at least half the jail deaths in 2019 so far are attributable to suicide. Overdose deaths in NC jails increased 175% from 2017-2018. Under the current jail standards, prisoners in North Carolina run a high risk of dying from these preventable causes. The proposed rules should not be altered, as they enact crucial changes to jail policy that would stem the rising tide of jail deaths in North Carolina and put into place essential protections to prisoner health, safety, and welfare. With these rules DHHS has clearly and unambiguously adopted policy changes to protect the NC jail population and increase jail safety; changes which they have the clear authority, and in many cases the duty, to make.

For these reasons, Disability Rights North Carolina requests that the Rules Review Commission adopt the proposed jail rules, 10A NCAC 14J, as currently submitted. The following is an outline of our positions regarding the rules challenged by the Sheriff's Association, and our responses to their criticisms of the proposed rules.

**1. 10A NCAC 14J .0101 Definitions**

The SA objects to proposed changes to 10A NCAC 14J .0101. Specifically, the SA claims this change exceeds the authority of the DHHS and proposes a change that would

remove the requirement that jail staff perform “in-person” checks on prisoners during Supervision Rounds. The SA requests that the Rules Review Commission change the definition of Supervision Rounds to allow Sheriff’s to perform Supervision Rounds either in-person via a walk-through or visually from a distance.

**Disability Rights NC requests that this proposed rule be approved as currently drafted with no further changes.** The proposed rule does not exceed the authority of the DHHS, as the “in-person” requirement of the proposed rule is necessary to maintain prisoner safety.

Under both N.C.G.S. §153A-221 and controlling case law, the DHHS has the authority to create and enforce minimum standards for the secure custody and protection of prisoners, including protecting their health and welfare and providing for their humane treatment.<sup>1</sup> Given the recent level of jail deaths, particularly deaths by suicide and overdose where the Division of Health Services Regulation found jail staff had failed to follow required procedure during rounds, the requirement of in-person checks during Supervision Rounds is directly related to inmate safety.

Inherent in the SA’s request to change this rule is the assumption that the DHHS does in fact have the authority to define Supervision Rounds as they see fit. Thus, the SA’s argument that DHHS does not have the authority to change these rules is undermined by their request that DHHS use their authority to change the rules to allow for less thorough observations during Supervised Rounds.

## **2. 10A NCAC 14J .0203 Contents of Operations Manual**

The SA objects to the proposed changes to 10 NCAC 14J .0203 on the grounds that they are ambiguous and unclear. The SA states that DHHS previously stated their intent to develop a suicide “plan”, not a suicide “program”, with a “plan” being a set of procedures to be followed if it is determined that an inmate presents a suicide risk, and a “program” being a “long term set of treatment procedures that is not defined in the rule.”

**Disability Rights NC requests that this proposed rule be approved as currently drafted with no further changes.** The language is neither ambiguous nor unclear, and DHHS did indeed intend to create a suicide *program* as evidenced by their decision not to change the language of the proposed rule despite a previous similar objection from the SA. Further, the SA’s proposed “plan” language would put inmates at substantial risk for death by suicide.

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<sup>1</sup> See Multiple Claimants v. N.C. HHS, Div. of Facility Servs., 361 N.C. 372, 377-8, 646 S.E.2d 356, 359-60 (2007), State v. Wilson, 183 N.C. App. 100, 104, 643 S.E.2d 620, 623 (2007), Medley v. N.C. Dep’t of Corr., 330 N.C. 837, 844, 412 S.E.2d 654, 659 (1992), and N.C.G.S. § 153A-221.



The language of the proposed rule is not unclear. In response to a similar complaint from the SA in their comments submitted in March 2018, the proposed rule was clarified, with language added to define the requirements of the suicide programs.

The intent of DHHS is clearly to create suicide programs over suicide plans. In response to a similar objection from the SA, DHHS chose to keep the word “program”, which has not changed since the first version of the proposed rules were issued. This in combination with the clarifying language on what constitutes an adequate program clearly shows DHHS intends that detention facilities be required to have suicide programs over suicide plans.

Requiring only suicide plans would put inmates at significant risk for death by suicide in contravention of DHHS’s duties to maintain minimum standards for inmate safety. The increasing number of jail deaths by suicide indicates that current screening procedures are not adequate to determine suicide risk. Therefore, a suicide plan would be completely ineffective as it would depend entirely on an inadequate screening mechanism to implement protections against inmate suicide. Given the SA’s concurrent objection to improved mental health screening, requiring only a suicide plan would fail to protect inmates from a growing risk of death by suicide or injury from self-harm.

### 3. 10A NCAC 14J .0301 Classification System and Total Design Capacity

The SA objects to proposed changes to 10A NCAC 14J .0301, claiming that this change exceeds the authority of the DHHS. The SA proposes a change that would remove the requirement that jails transfer inmates to different facilities if a jail has exceeded its inmate capacity. They cite failure of the proposed rule to account for temporary influxes of inmates into jails, and propose that jails be allowed to operate at 10% over their capacity, only violating the rule if they operate above 10% capacity for 30 consecutive days.

**Disability Rights NC requests that this proposed rule be approved as currently drafted with no further changes.** The proposed rule does not exceed the authority of the DHHS, there are other statutory provisions in place to account for temporary jail influxes, and the SA’s preferred version of this rule would allow dangerous overcrowding that would decrease jail safety and put prisoners at serious risk for harm.

Under both N.C.G.S. §153A-221 and controlling case law, DHHS has the authority to create and enforce minimum standards for the secure custody and protection of prisoners, including protecting their health and welfare and providing for their humane treatment.<sup>2</sup> Exceeding inmate capacity makes jails more dangerous by increasing inmate interaction while decreasing jail staff’s ability to safely monitor and control jail populations. Thus, creating a minimum standard requiring inmate transfer if a facility exceeds capacity is well within DHHS’s authority. Further, as in sub-paragraph one, the SA’s argument that

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<sup>2</sup> See footnote 1.

DHHS lacks the authority to make this rule is undermined by the SA's request that DHHS use their authority to change the rule.

The current Safekeepers Law<sup>3</sup> provides an adequate method for jails to quickly transfer prisoners to the Division of Adult Corrections and Juvenile Justice facilities if the jail reaches capacity. Further, the Statewide Misdemeanant Confinement Program<sup>4</sup> allows the transfer of prisoners within jails and provides another avenue for jails to safely transfer prisoners once they reach capacity.

The SA's proposed version of this law would effectively allow Sheriffs to ignore jail capacity and house as many inmates as they'd like in their jails, so long as they managed to get below 10% over capacity for one day every 29 days so as not to run afoul of the "30 consecutive day" requirement. Adopting the SA's suggestions would allow jails to permanently operate at 10% over capacity with no incentive to adhere to the designed jail capacity.

#### 4. 10A NCAC 14J .0601 Supervision

Objecting to this proposed rule, the SA restates their objections to the "in-person" requirement for Supervision Rounds. **Disability Rights NC in response restates our position supporting these changes, which address the critical need for improving Supervision Round policy, and request that this proposed rule be approved as currently drafted with no further changes.**

#### 5. 10A NCAC 14J .1001 Medical Plan

The SA objects to proposed changes to 10A NCAC 14J .1001. Specifically, they state this change exceeds the authority of the DHHS because it requires jails to provide routine care and treatment for inmate mental health needs, intellectual and developmental disability, and substance abuse treatment needs. The SA objects on the grounds that they are only required to provide emergency medical care under G.S. 153A-225, and that the proposed rule expands coverage and must be mandated by the General Assembly.

**Disability Rights NC requests that this proposed rule be approved as currently drafted with no further changes.** The proposed rule does not exceed the authority of the DHHS. Both the General Assembly and NC Courts have stated their opinion that inmates must be provided health care, and have never limited that duty to "emergency care" only. Indeed, providing routine care to inmates with mental illness, intellectual and developmental disability, and substance abuse treatment needs will serve to reduce "emergency situations" which will undoubtedly occur if this inmate population is denied care.

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<sup>3</sup> N.C.G.S. §162-39

<sup>4</sup> N.C.G.S. §148-32.1



State law requires that the DHHS set minimum requirements to ensure that inmate health and safety is protected and provide for medical care, “including mental health, mental retardation<sup>5</sup>, and substance abuse services.”<sup>6</sup> NC Courts have also repeatedly stated that jails are duty bound to provide medical care, including all services listed in § 153A-221<sup>7</sup>. Neither the statute nor the Court’s decisions limit this duty to only the provision of “emergency” medical care. It is thus well within DHHS’s authority, and indeed its duty, to create minimum standards regarding the provision of these services to prisoners. The fact that §153A-225 requires jails to develop a medical plan for emergency purposes does not relieve DHHS of its authority to set minimum standards for all prisoner medical care. Indeed, §153A-225(a)(1) requires that the medical plan “be designed to protect the health and welfare of the prisoners and to avoid the spread of contagious disease”, with no restriction that the plan only protect prisoners’ health and welfare in emergency situations.

## **6. 10A NCAC 14J .1002 Screening of Inmates**

The SA objects to the requirement in proposed 10A NCAC 14J .1002 that officers screen inmates for medical and mental health needs, developmental and intellectual disabilities, substance use disorders, and risk of suicide. The SA requests that the rule remain unchanged because it is unclear what is meant by “screening” and the rule does not provide clear guidance on the type of screening required.

**Disability Rights NC requests that this proposed rule be approved as currently drafted with no further changes.** The language of the rule is neither ambiguous nor unclear, and not only provides a list of required screening factors but is also far more specific in describing the required screening than the old rule that the SA would prefer.

The proposed rule clearly sets out the five factors that must be assessed and documented: inmate screening, medical needs, mental health needs, developmental and intellectual disabilities, substance use disorders, and suicide risk. The older version of the rule the SA would like to revert back to only states that a health screening form be completed by an officer upon admission of an inmate, with no description of what topics the screening form should cover.

## **7. 10A NCAC 14J .1210 Other Areas**

The SA claims that proposed changes to 10A NCAC 14J .1210 exceed the authority of the DHHS, and they oppose the requirement that new and renovated jails include both

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<sup>5</sup> This is an antiquated term which is properly corrected to “developmental and intellectual disability” in the proposed rule. The term is used here to mirror language in the statute.

<sup>6</sup> N.C.G.S. §153A-221(a)(7), §153A-221 (a)

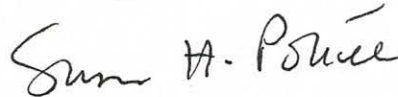
<sup>7</sup>See Wilson, Multiple Claimants, Medley

indoor and outdoor exercise areas. The SA objects on the ground that the provision of both types of spaces involves “safety, supervision, and staffing issues” and that the decision on whether to provide indoor and outdoor space be left to the Sheriff or regional jail administrator.

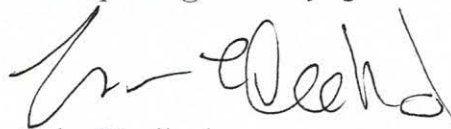
**Disability Rights NC requests that this proposed rule be approved as currently drafted with no further changes.** DHHS absolutely has the authority to require both indoor and outdoor exercise areas. Such authority exists both under DHHS’s authority to create minimum standards for providing secure custody of prisoners and protecting their welfare and ensuring humane treatment<sup>8</sup>, and their ability to set standards for jail design and construction<sup>9</sup>. The ability of prisoners to have adequate exercise area and access to an outdoor area is directly related to inmate well-being and the humane treatment of prisoners. Further, there is no statutory authority allowing a Sheriff or regional jail administrator to dictate that a jail be constructed which falls below the minimum standards set by DHHS.

For the above reasons, Disability Rights NC requests that all proposed jail rules (10A NCAC 14J) be approved as currently drafted with no further changes. Thank you for the opportunity to provide the Commission with these comments.

Sincerely,



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<sup>8</sup> See footnote 1

<sup>9</sup> See 153A-221, 220