AMERICAN CIVIL LIBERTIES UNION of NORTH CAROLINA

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October 15, 2014

Members of the Rules Review Commission
1711 New Hope Church Road
Raleigh, NC 27609

Re: Comments Regarding Proposed Temporary Rule 10A NCAC 71W .0905

Dear Members of the Commission,

As an organization that worked throughout the 2013 legislative session to address a number of issues presented by Session Law 2013-417 ("the law" or "HB 392"), the American Civil Liberties Union of North Carolina submits these comments urging the Rules Review Commission to object to the proposed temporary rule 10A NCAC 71W .0905 ("the proposed rule"). Rather than clarify many ambiguities in the law, the rules do not create clear and unambiguous regulation as required by N.C. Gen. Stat. §150B-21.9(2). The proposed rule also exceeds the authority of the enabling statute under N.C. Gen. Stat. §150B-21.9(1). The rule should be returned to the Social Services Commission to clarify its many ambiguities and properly regulate for the equal application of the law statewide.

The Proposed Rule Exceeds the Authority Delegated to the Social Services Commission

Subsection (a) of the proposed rule directs that "drug screening of **all** applicants" shall be required by the county director.[1] This language is both unclear and exceeds the authority delegated to the Social Services Commission. HB 392 clearly mandates a "screen[ing]" only of an applicant or recipient whom the Department "reasonably suspects is engaged in the illicit use of controlled substances."[2] The law does not authorize the drug screening of every applicant or recipient applying for Work First Program Assistance. Mandatory screening is clearly not within the authority of the authorizing statute and should be objected to pursuant to N.C. Gen. Stat. § 150B-21.9(1). To the extent that a "drug screening" may be different from a "drug test to screen," the rule does not make a distinction or clarify the nature of the drug screening and is therefore unclear, ambiguous and should be returned to the Social Services Commission pursuant to N.C. Gen. Stat. § 150B-21.9(2).

The Proposed Rule is Ambiguous

Even the "reasonable suspicion" standard included in the proposed rule is not clearly and unambiguously articulated. While the proposed rule clearly establishes which three criteria can be used to establish reasonable suspicion, language in 10A NCAC 71W .0905 (b) fails to clearly identify when an individual should be tested for the use of controlled or illicit substances. HB 392 does articulate that certain criteria ***"may"*** be used to establish reasonable suspicion, but the law does not establish how the criteria should be applied to result in drug testing.[3] Instead, how the criteria

[1] 10 NCAC 71W.0905(a).

should apply to applicants is clearly left to be determined by the rule-making process. However, the language of the proposed rule does nothing to clarify what criteria must be met before an applicant or recipient will be tested. This failure to clarify the application of the criteria to applicants will invite confusion and arbitrary enforcement at the local level. The rule is not clear and unambiguous as required by N.C. Gen. Stat. §150B-21.9 and should be returned to the Social Services Commission.

HB 392 contains a clear directive that the Social Services Commission develop "rules pertaining to the successful completion of, or the satisfactory participation in, a substance abuse treatment program . . . including rules regarding the timely reporting of completion of or participation in the substance abuse treatment programs."[4] The proposed rule clearly does not address this provision. It provides no clarity to local offices about what constitutes satisfactory participation in a program and it provides very little guidance about what information should be provided to applicants who test positive for controlled or illicit drug use or abuse. The proposed rule also fails to provide clear and unambiguous guidance on how an applicant may "timely report[]" on completion of a program.

N.C. Gen. Stat. § 108A-29(e) provides that "[a]rea mental health authorities organized pursuant to Article 4 of Chapter 122C of the General Statutes shall be responsible for administering the provisions of this section." The proposed rule provides no direction to mental health authorities, instead focusing on information that should be provided by county directors of social services. The rule does nothing to make clear how area mental health authorities should participate in this process or what their responsibilities may be.

The law directs the Social Services Commission to develop rules regulating the process for drug testing applicants for Work First Program Assistance. However, the proposed rule is not clear and unambiguous as required by N.C. Gen. Stat. § 150B-21.9(2), which will lead to county-level confusion and arbitrary application of the rule's criteria. The rule should be returned to the Social Services Commission.

Conclusion

House Bill 392 sprang from the baseless narrative that public assistance programs are rife with drug abusers. In reality, this is not the case, and this unclear and ambiguous proposed rule will invite arbitrary enforcement across the state. The Rules Review Commission should object to the proposed rule and return it to the Social Services Commission for further work.

Best regards,

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