

## 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: Child Care Commission

RULE CITATION: 10A NCAC 09 .2001

RECOMMENDED ACTION:

- ☐ Approve, but 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

COMMENT:

*Staff recommends objection to this Rule based upon a lack of statutory authority and lack of clarity.*

*Staff notes that this Rule purports to implement petitions for rulemaking pursuant to G.S. 150B-16. This Rule was adopted in 1989 under that authority. However, that statute was repealed in 1991 and replaced with G.S. 150B-20.*

*G.S. 150B-16 stated, in relevant part:*

*Petition for adoption of rules. Any person may petition an agency to promulgate, amend, or repeal a rule, and may accompany his petition with such data, views, and arguments as he thinks pertinent. Each agency shall prescribe by rule the form for petitions and the procedure for their submission, consideration, and disposition."*

*The current language in Paragraph (b) requiring a petitioner to submit a draft of the proposed rule or a summary of its contents does not comply with G.S. 150B-20, which requires a draft of the rule for amendments or adoptions. The agency may be requiring a summary of the contents for repeals only, but that is unclear from the text of the rule.*

*Staff is not aware of any current statutory authority for an agency to require a petition for rulemaking to include a reason for the proposal. G.S. 150B-20(a) requires the individual asking for an adoption*

*or amendment to submit the proposed text of the requested rule change and a statement of the effect of the requested rule change.*

*In addition, staff is not aware of any authority to require an individual include the items in Subparagraph (b)(1) through (5) in the petition for rulemaking. It may be that the agency intends them to be sent only if the petitioner wishes to include them, but that is not clear from the text of the Rule. Further, while these might be good things for the agency to have before it when making a decision whether or not to grant the petition, staff notes that G.S. 150B-19.1(a)(2) requires an agency to seek to reduce the burden upon the person or entities that must comply with a rule when drafting rules. Requiring individuals submitting rulemaking petitions to include data supporting the proposal or cost factors does not appear to comply with that statute.*

*Further, staff believes the language in Paragraph (c) is unclear regarding how the Division Director or designee will determine whether the additional information or recommendations will be deemed relevant. It is also unclear what the “public interest” standard is or entails, and it is the lodestar the agency will use for determining whether to engage in rulemaking. There is no guidance in the Rule on how this will be determined.*

**§ 150B-20. Petitioning an agency to adopt a rule.**

(a) **Petition.** – A person may petition an agency to adopt a rule by submitting to the agency a written rule-making petition requesting the adoption. A person may submit written comments with a rule-making petition. If a rule-making petition requests the agency to create or amend a rule, the person must submit the proposed text of the requested rule change and a statement of the effect of the requested rule change. Each agency must establish by rule the procedure for submitting a rule-making petition to it and the procedure the agency follows in considering a rule-making petition.

(b) **Time.** – An agency must grant or deny a rule-making petition submitted to it within 30 days after the date the rule-making petition is submitted, unless the agency is a board or commission. If the agency is a board or commission, it must grant or deny a rule-making petition within 120 days after the date the rule-making petition is submitted.

(c) **Action.** – If an agency denies a rule-making petition, it must send the person who submitted the petition a written statement of the reasons for denying the petition. If an agency grants a rule-making petition, it must inform the person who submitted the rule-making petition of its decision and must initiate rule-making proceedings. When an agency grants a rule-making petition, the notice of text it publishes in the North Carolina Register may state that the agency is initiating rule making as the result of a rule-making petition and state the name of the person who submitted the rule-making petition. If the rule-making petition requested the creation or amendment of a rule, the notice of text the agency publishes may set out the text of the requested rule change submitted with the rule-making petition and state whether the agency endorses the proposed text.

(d) **Review.** – Denial of a rule-making petition is a final agency decision and is subject to judicial review under Article 4 of this Chapter. Failure of an agency to grant or deny a rule-making petition within the time limits set in subsection (b) is a denial of the rule-making petition.

(e) Repealed by Session Laws 1996, Second Extra Session, c. 18, s. 7.10(b). (1973, c. 1331, s. 1; 1985, c. 746, s. 1; 1991, c. 418, s. 1; c. 477, s. 2; 1996, 2nd Ex. Sess., c. 18, s. 7.10(b); 1997-34, s. 2; 2003-229, s. 1.)

agency of the United States or by a generally recognized organization or association;

- (2) Any plan or material which is adopted to meet the requirements of any agency of the United States and approved by that agency;
- (3) Any plan, material, manual, guide or other document establishing job application or employment practices or procedures of any State agency other than the State Personnel Commission. The State Personnel Commission, however, shall incorporate by reference in its rules job classification standards, including but not limited to those relating to qualifications and salary levels; or
- (4) The hearings division rules promulgated by the Office of Administrative Hearings.

In adopting matter by reference, the agency shall specify in the rule and in the Register whether such adoption is in accordance with the provisions of subsection (b) or (c) of this section. The agency can change this election only by a subsequent rulemaking proceeding.

(b) If an agency adopts matter by reference in accordance with this subsection, such reference shall not cover any later amendments and editions of the adopted matter, but if the agency wishes to incorporate them in its rule it shall amend the rule or promulgate a new rule.

(c) If any agency adopts matter by reference in accordance with this subsection, such reference shall automatically include any later amendments and editions of the adopted matter.

(d) An agency may cross-reference its own rules in the North Carolina Administrative Code without violating the provisions of (a)(1) of this section.

§ 150B-15. Continuation of rules. -- When a law authorizing or directing an agency to promulgate rules is repealed, and (i) substantially the same rule-making power or duty is vested in the same or a successor agency by a new provision of law, or (ii) the function of the agency to which the rules are related is transferred to another agency by law or executive order, the existing rules of the original agency shall continue in effect until amended or repealed, and the agency or successor agency may repeal any rule relating to the transferred duty or function. When a law creating an agency or authorizing or directing it to promulgate rules is repealed or the agency is abolished and (i) substantially the same rule-making power or duty is not vested in the same or a successor agency by a new provision of law and (ii) the function of the agency to which the rules are related is not transferred to another agency, the existing applicable rules of the original agency are automatically repealed as of the effective date of the law repealing the

agency's rule-making power or abolishing the agency.

§ 150B-16. Petition for adoption of rules.

-- Any person may petition an agency to promulgate, amend, or repeal a rule, and may accompany his petition with such data, views, and arguments as he thinks pertinent. Each agency shall prescribe by rule the form for petitions and the procedure for their submission, consideration, and disposition. Within 30 days after submission of a petition, the agency shall either deny the petition in writing, stating its reasons for the denial, or initiate rule-making proceedings in accordance with G.S. 150B-12 and G.S. 150B-13; provided, however, commissions and boards shall act on a petition at their next regularly scheduled meeting, but in any case no later than 120 days after submission of a petition. Denial of the petition to initiate rule making under this section shall be considered a final agency decision for purposes of judicial review.

§ 150B-17. Declaratory rulings. -- On request of a person aggrieved, an agency shall issue a declaratory ruling as to the validity of a rule or as to the applicability to a given state of facts of a statute administered by the agency or of a rule or order of the agency, except when the agency for good cause finds issuance of a ruling undesirable. The agency shall prescribe in its rules the circumstances in which rulings shall or shall not be issued. A declaratory ruling is binding on the agency and the person requesting it unless it is altered or set aside by the court. An agency may not retroactively change a declaratory ruling, but nothing in this section prevents an agency from prospectively changing a declaratory ruling. A declaratory ruling is subject to judicial review in the same manner as an order in a contested case. Failure of the agency to issue a declaratory ruling on the merits within 60 days of the request for such ruling shall constitute a denial of the request as well as a denial of the merits of the request and shall be subject to judicial review.

### Article 3.

#### Administrative Hearings.

§ 150B-22. Settlement; contested case. -- It is the policy of this State that any dispute between an agency and another person that involves the person's rights, duties, or privileges, including licensing or the levy of a monetary penalty, should be settled through informal procedures. In trying to reach a settlement through informal procedures, the agency may not conduct a proceeding at which sworn testimony is taken and witnesses may be cross-examined. Notwithstanding any other provision of law, if the agency and the other person do not agree to a resolution of the dispute through informal procedures, either the agency or the person may commence an administrative proceeding to de-

## REQUEST FOR TECHNICAL CHANGE

AGENCY: Child Care Commission

RULE CITATION: 10A NCAC 09 .2001

**DEADLINE FOR RECEIPT: Tuesday, November 10, 2015**

**NOTE WELL:** *This request when viewed on computer extends several pages. Please be sure you have reached the end of the document.*

The Rules Review Commission staff has completed its review of this rule prior to the Commission's next meeting. The Commission has not yet reviewed this rule and therefore there has not been a determination as to whether the rule will be approved. You may call this office to inquire concerning the staff recommendation.

In reviewing these rules, the staff determined that the following technical changes need to be made:

*In Paragraph (a), line 9, does the agency use the term "Administrative Procedures Coordinator" rather than "Rulemaking Coordinator"?*

*In (b), G.S. 150B-20 requires that any petitions for an amendment or adoption include the proposed text of the requested rule change. So, is the "summary of its contents" applicable only to repeals? If so, state that. Otherwise, you need to state "Petitions for adoption or amendment of a rule shall include a draft of the proposed rule."*

*What is your authority to request "reasons for the proposal" on lines 14 and 15?*

*On line 15, change "shall" to "may." If you mean "shall", then what authority are you relying upon?*

*In (c), how will the individuals determine whether the information is "relevant"?*

*In (d), it will always be at the next regularly scheduled meeting? What if the petition is received a day before the meeting? Or do you mean within the timeframe of G.S. 150B-20(b)?*

*In (d), line 27, will you include appeal rights as set forth in G.S. 150B-20(d)?*

*In the History Note, G.S. 150B-16 was repealed in 1991. Please cite to G.S. 150B-20.*

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

Amanda J. Reeder  
Commission Counsel  
Date submitted to agency: October 27, 2015

10A NCAC 09 .2001 has been amended in accordance to G.S. 150B-21.5(4) as follows:

SECTION .2000 - RULEMAKING AND CONTESTED CASE PROCEDURES

10A NCAC 09 .2001 PETITIONS FOR RULEMAKING

(a) Any person wishing to request the adoption, amendment, or repeal of a rule made by the Child Care Commission (hereinafter referred to as the Commission) shall make the request in a written petition to:

Administrative Procedures Coordinator  
Division of Child Development and Early Education  
2201 Mail Service Center  
Raleigh, North Carolina ~~27699-2201~~ 27699-2200

(b) The petition shall contain either a draft of the proposed rule or a summary of its contents, the reasons for the proposal, and the name and address of the petitioner. The petition shall also include any of the following items known to the petitioner:

- (1) the statutory authority for the Commission to promulgate the rule;
- (2) the effect on existing rules;
- (3) any data supporting the proposal;
- (4) the effect of the proposed rule on existing practices in the area involved, including cost factors; and
- (5) the names and addresses of those most likely to be affected by the proposed rule.

(c) The Division Director or designee shall present the petition, plus any additional information or recommendations deemed relevant, to the Commission to determine whether the public interest will be served by granting the petition.

(d) The Commission shall render a decision as to whether to deny or approve the petition at its next scheduled meeting, which may be no later than 120 days after submission of the petition. If the decision is to deny the petition, the Division Director or designee shall notify the petitioner in writing, stating the reasons for the denial. If the decision is to approve the petition, the Commission shall initiate a rulemaking proceeding by issuing a rulemaking notice, as provided in these rules.

*History Note: Authority G.S. 143B-168.3; 150B-16;*  
*Eff. November 1, 1989;*  
*Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff.*  
*May 23, ~~2015~~ 2015;*  
*Amended Eff. December 1, 2015.*



## 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: Child Care Commission

RULE CITATION: 10A NCAC 09 .2002

RECOMMENDED ACTION:

- ☐ Approve, but 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

COMMENT:

*Staff recommends objecting to this Rule based upon a lack of clarity and ambiguity.*

*In this Rule, the Child Care Commission purports to adopt by reference the rulemaking procedures used by the Secretary of DHHS. This Rule does not specifically cite the rules to which is it referring. Staff believes that the agency intended to cite to Rules 10A NCAC 01 .0102 through .0107, but without a reference, staff believes the Rule is ambiguous as written.*

*When reading Rules 10A NCAC 01 .0102 through .0107, the modifications made to those Rules through this Rule create confusion. Rule 10A NCAC 01A .0103 states that the Secretary or a hearing officer designated by the Secretary shall serve as a hearing officer at a rulemaking hearing. Therefore, it appears that the Secretary of DHHS may serve as the hearing officer for rulemaking petitions made to the Child Care Commission. Staff notes that Subparagraph (a)(4) of this Rule defines "hearing officer" as the Chairman of the Child Care Commission or designee, and staff assumes that the intent is that the Chairman, rather than the Secretary, will preside over these hearings. However, that is not clear from the context of this Rule.*

## **CHAPTER 01 – OFFICE OF THE SECRETARY**

### **SUBCHAPTER 01A - PROCEDURE**

#### **SECTION .0100 - RULE MAKING PROCEDURES**

##### **10A NCAC 01A .0101 PETITIONS**

(a) Any person wishing to request the adoption, amendment, or repeal of a rule made by the Secretary of the Department of Human Resources (hereinafter referred to as the Secretary) shall make his request in a petition addressed to:

Staff Attorney for Administrative Procedures  
Department of Human Resources  
101 Blair Drive  
Raleigh, North Carolina 27603

(b) The petition shall contain the following information:

- (1) either a draft of the proposed rule or a summary of its contents;
- (2) the statutory authority for the agency to promulgate the rule;
- (3) the reasons for the proposal;
- (4) the effect on existing rules or orders;
- (5) any data supporting the proposal;
- (6) the effect of the proposed rule on existing practices in the area involved, including cost factors;
- (7) the names and addresses, if known, of those most likely to be affected by the proposed rule; and
- (8) the name and address of the petitioner.

(c) The Secretary or his designee shall determine, based on a study of the facts stated in the petition, whether the public interest will be served by granting the petition. The Secretary or his designee shall consider all the contents of the submitted petition, plus any additional information he deems relevant.

(d) Within 30 days of submission of the petition, the Secretary or his designee shall render a decision. To deny the petition, the Secretary or his designee shall notify the petitioner in writing, stating the reasons for the denial. If the decision is to approve the petition, the Secretary or his designee shall initiate a rule making proceeding by issuing a rule making notice, as provided in these rules.

*History Note: Authority G.S. 143B-10(j)(2); 150B-16;  
Eff. February 1, 1976;  
Amended Eff. November 1, 1989; April 1, 1985.*

##### **10A NCAC 01A .0102 NOTICE**

(a) Upon a determination to hold a rule making proceeding, either in response to a petition or otherwise, the Secretary or his designee shall give notice to all interested parties in accordance with G.S. 150A-12.

(b) Any person desiring information in addition to that provided in a particular rule making notice may contact:

Staff Attorney for Administrative Procedures  
Department of Human Resources  
101 Blair Drive  
Raleigh, North Carolina 27603

*History Note: Authority G.S. 143B-10; 150B-11; 150B-12;  
Eff. February 1, 1976;  
Amended Eff. November 1, 1989; January 1, 1986; April 1, 1985; July 1, 1977.*

##### **10A NCAC 01A .0103 HEARING OFFICER**

The Secretary, or one or more hearing officers designated and authorized by the Secretary, shall be hearing officers in a rule making hearing.

*History Note: Authority G.S. 143B-10(j)(3);*

Amanda J. Reeder  
Commission Counsel



*Eff. February 1, 1976.*

**10A NCAC 01A .0104 HEARINGS**

- (a) Any person desiring to make an oral presentation at a public hearing is encouraged to submit a written copy of the presentation to the hearing office prior to or at the public hearing.
- (b) Presentations may not exceed 10 minutes unless, upon request made either before or at the hearing, the hearing officer grants an extension of time for good cause.
- (c) Any person may file a written submission containing data, comments, or arguments after publication of a rule making notice up to and including the day of the hearing. A submission must clearly state the rule or proposed rule to which the comments are addressed and must also include the name and address of the person submitting it. Written submissions must be sent to:

Staff Attorney for Administrative Procedures  
Department of Human Resources  
325 North Salisbury Street  
Raleigh, North Carolina 27611

- (d) The hearing officer shall have complete control over the rulemaking hearing, including:
  - (1) the responsibility of having a record made of the hearing;
  - (2) extension of any time allotments,
  - (3) recognition of speakers,
  - (4) prevention of repetitious presentations, and
  - (5) general management of the hearing.

The hearing officer shall assure that each person attending the hearing is given a fair opportunity to present views, data, and comments.

*History Note: Authority G.S. 143B-10; 150B-11; 150B-12;  
Eff. February 1, 1976;  
Amended Eff. January 1, 1986; April 1, 1985; July 1, 1977.*

**10A NCAC 01A .0105 STATEMENT OF REASONS FOR AND AGAINST RULE MAKING DECISION**

- (a) Any interested person who desires from the Secretary a concise written statement of the principal reasons for and against the decision by the Secretary to adopt or reject a rule may, either prior to the decision or within 30 days thereafter, submit a request to:

Staff Attorney for Administrative Procedures  
Department of Human Resources  
101 Blair Drive  
Raleigh, North Carolina 27603

- (b) An "interested person" shall be any person, as defined in G.S. 150A-2(7), whose rights, duties, or privileges might be affected by the adoption of the rule.
- (c) The request must be made in writing, must contain a statement that the requesting person is an interested person, and must identify the rule or proposed rule involved.
- (d) The Secretary shall issue the statement of reasons for and against his decision within 45 days after receipt of the request.

*History Note: Authority G.S. 143B-10(j)(2); 150B-11; 150B-12;  
Eff. February 1, 1976;  
Amended Eff. November 1, 1989; April 1, 1985.*

**10A NCAC 01A .0106 RECORD OF RULE MAKING PROCEEDINGS**

A record of all rulemaking proceedings conducted by the Secretary's Office, including responses to petitions for rulemaking, shall be maintained in the Office of Legal Affairs and shall be available for public inspection during regular office hours. This record shall include:

- (1) the original petition, if any,
- (2) the notice,

Amanda J. Reeder  
Commission Counsel

- (3) written presentation or submission,
- (4) any written minutes or audio tape of the oral hearing, and
- (5) a final draft of the adopted rule.

*History Note:* Authority G.S. 143B-10; 150B-11;  
Eff. February 1, 1976;  
Amended Eff. November 1, 1989; January 1, 1986.

#### **10A NCAC 01A .0107 FEES**

A fee may be charged by the Office of Legal Affairs to persons requesting materials from hearing records. The fee will cover the cost of meeting the request.

*History Note:* Authority G.S. 12-3.1; 143B-10;  
Eff. February 1, 1976;  
Amended Eff. November 1, 1989; January 1, 1986; July 1, 1977.

## REQUEST FOR TECHNICAL CHANGE

AGENCY: Child Care Commission

RULE CITATION: 10A NCAC 09 .2002

### **DEADLINE FOR RECEIPT: Tuesday, November 10, 2015**

The Rules Review Commission staff has completed its review of this rule prior to the Commission's next meeting. The Commission has not yet reviewed this rule and therefore there has not been a determination as to whether the rule will be approved. You may call this office to inquire concerning the staff recommendation.

In reviewing these rules, the staff determined that the following technical changes need to be made:

*In (a), lines 4 and 5, please be specific about what rules you mean. Are you intending to reference 10A NCAC 01 .0102 - .0107?*

*In (a), line 5, G.S. 150B-14 was repealed in 1991. Please update the reference to G.S. 150B-21.6. And please refer to the final paragraph of that law in determining how to state the incorporation by reference.*

*In (a)(1), you've already stated this address. Would you prefer to refer to state "to the address stated in Rule .2001 of this Section." ?*

*Also in (a)(1), line 8, does your agency use the term "Administrative Procedures Coordinator" rather than "Rulemaking Coordinator"?*

*In (a)(2), you give a definition of "Secretary's designee" but Rules 10A NCAC 01 refer to the Secretary or designee. Does this mean the Secretary will retain the ability to conduct rulemaking hearings or send notice of this? Don't you intend for the Commission or its staff to be able to do this?*

*In (b), why not give the url for the Code, rather than a physical address of OAH? I suggest: <http://reports.oah.state.nc.us/ncac.asp>*

*In the History Note, remove the references to repealed laws 150B-11 and 150B-14. Insert G.S. 150B-20.*

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

Amanda J. Reeder  
Commission Counsel  
Date submitted to agency: October 27, 2015

1 **10A NCAC 09 .2002 has been amended in accordance to G.S. 150B-21.5(4) as follows:**

2  
3 **10A NCAC 09 .2002      RULEMAKING PROCEDURES**

4 (a) The rulemaking procedures for the Secretary of the Department of Health and Human Services codified in 10A  
5 NCAC 01 are hereby adopted by reference pursuant to G.S. 150B-14(c) to apply to the actions of the Commission,  
6 with the following modifications:

7       (1) Correspondence related to the Commission's rulemaking actions shall be submitted to:

8               Administrative Procedures Coordinator

9               Division of Child Development and Early Education

10              2201 Mail Service Center

11              Raleigh, North Carolina ~~27699-2201~~ 27699-2200

12       (2) The "Secretary's designee" shall mean the Director of the Division of Child Development  
13       (hereinafter referred to as the Division).

14       (3) "The Division" shall be substituted for the "Office of General Counsel" in 10A NCAC  
15       01.

16       (4) "Hearing officer" shall mean the Chairman of the Child Care Commission or designee.

17 (b) Copies of 10A NCAC 01 may be inspected in the Division at the address given in Subparagraph (a)(1) of this  
18 Rule. Copies may be obtained from the Office of Administrative Hearings, ~~424 North Blount Street,~~ 1711 New  
19 Hope Church Road, Raleigh, North Carolina, ~~27601.~~ 27609.

20  
21 *History Note: Authority G.S. 143B-168.3; 150B-11; 150B-14;*

22 *Eff. November 1, 1989;*

23 *Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff.*

24 *May 23, ~~2015.~~ 2015;*

25 *Amended Eff. December 1, 2015.*

## 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: Child Care Commission

RULE CITATION: 10A NCAC 09 .2003

RECOMMENDED ACTION:

- ☐ Approve, but 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

COMMENT:

*Staff recommends objecting to this Rule based upon a lack of clarity and ambiguity.*

*G.S. 150B-4(a) states:*

### **§ 150B-4. Declaratory rulings.**

(a) On request of a person aggrieved, an agency shall issue a declaratory ruling as to the validity of a rule or as to the applicability to a given state of facts of a statute administered by the agency or of a rule or order of the agency. Upon request, an agency shall also issue a declaratory ruling to resolve a conflict or inconsistency within the agency regarding an interpretation of the law or a rule adopted by the agency. **The agency shall prescribe in its rules the procedure for requesting a declaratory ruling and the circumstances in which rulings shall or shall not be issued.** A declaratory ruling is binding on the agency and the person requesting it unless it is altered or set aside by the court. An agency may not retroactively change a declaratory ruling, but nothing in this section prevents an agency from prospectively changing a declaratory ruling.

*The statute requires the agency to promulgate rules stating the procedure for requesting a declaratory ruling. Staff believes that the Rule addresses this requirement. However, rules promulgated under G.S. 150B-4 must also state circumstances in which the rulings shall or shall not be issued. Staff does not believe this requirement is satisfied by the Rule as it is currently written. The only circumstances addressed in this Rule are in Paragraph (c), wherein the Commission will grant the request if it is "deemed to be in the public interest." It is unclear what the "public interest" standard is or entails. There is no guidance in the Rule on how this will be determined. Further, while staff assumes that the Commission will determine whether the standard is met, that is not expressly stated in the Rule.*

*In Paragraph (d), it is unclear how the Commission will deem written submissions, oral hearings, or procedure "appropriate." In addition, it is unclear who will submit such things, or how notice of the inclusion will be sent.*

*In Paragraph (e), it is unclear when the Commission will determine to issue notice to individuals who might be affected by the ruling. Further, it is unclear to staff how the Commission will determine who "might" be affected by the ruling.*

## REQUEST FOR TECHNICAL CHANGE

AGENCY: Child Care Commission

RULE CITATION: 10A NCAC 09 .2003

**DEADLINE FOR RECEIPT: Tuesday, November 10, 2015**

The Rules Review Commission staff has completed its review of this rule prior to the Commission's next meeting. The Commission has not yet reviewed this rule and therefore there has not been a determination as to whether the rule will be approved. You may call this office to inquire concerning the staff recommendation.

In reviewing these rules, the staff determined that the following technical changes need to be made:

*In (a), line 4, why do you need the first sentence? G.S. 150B-4 makes it clear that the Commission has this authority.*

*In (a), line 5, I take it the contents of the "written petition" are what is required by Paragraph (b)?*

*In (a), line 7, does your agency use the term "Administrative Procedures Coordinator" rather than "Rulemaking Coordinator"?*

*In (b), line 12, replace "must" with "shall" assuming that is what you mean.*

*In (b)(2) and (3), you refer only to "rule or statute" but G.S. 150B-4 also refers to orders. Does the Commission not issue orders?*

*What does (b)(4) mean? What is its purpose?*

*How is the applicability of Paragraph (d) determined?*

*In (e), when will the Commission issue the notice? And who determines who "might" be affected determined?*

*Please replace the commas at the end of (f)(1) through (4) with semicolons.*

*In the History Note, G.S. 150B-11 and was repealed in 1991, and G.S. 150B-17 was recodified as G.S. 150B-4. I believe you mean to cite to G.S. 150B-4 now.*

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

Amanda J. Reeder  
Commission Counsel  
Date submitted to agency: October 27, 2015



1 **10A NCAC 09 .2003 has been amended in accordance to G.S. 150B-21.5(4) as follows:**

2  
3 **10A NCAC 09 .2003      DECLARATORY RULINGS**

4 (a) The Commission shall have the power to make declaratory rulings. All requests for declaratory rulings shall be  
5 by written petition and shall be submitted to:

6  
7       Administrative Procedures Coordinator  
8       Division of Child Development and Early Education  
9       2201 Mail Service Center  
10       Raleigh, North Carolina ~~27699-2201~~ 27699-2200

11  
12 (b) Every request for a declaratory ruling must include the following information:

- 13       (1)     the name and address of the petitioner;  
14       (2)     the statute or rule to which the petition relates;  
15       (3)     a concise statement of the manner in which the petitioner is aggrieved by the rule or  
16               statute or its potential application to him or her; and  
17       (4)     the consequences of a failure to issue a declaratory ruling.

18 (c) Where a declaratory ruling is deemed to be in the public interest, the Commission shall issue the ruling within ~~60~~  
19 30 days of the receipt of the petition.

20 (d) A declaratory ruling procedure may consist of written submissions, oral hearings, or such other procedure as may  
21 be deemed appropriate, in the discretion of the Commission, in the particular case.

22 (e) The Commission may issue notice to persons who might be affected by the ruling that written comments may be  
23 submitted or oral presentations received at a scheduled hearing.

24 (f) A record of all declaratory ruling proceedings shall be maintained by the Division and shall be available for  
25 public inspection during regular business hours. This record shall contain:

- 26       (1)     the original request,  
27       (2)     the reasons for refusing to issue a ruling,  
28       (3)     all written memoranda and information submitted,  
29       (4)     any written minutes or audio tape or other record of the oral hearing, and  
30       (5)     a statement of the ruling.

31  
32 *History Note: Authority G.S. 143B-168.3; 150B-11; 150B-17;*

33 *Eff. November 1, 1989;*

34 *Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff.*

35 *May 23, ~~2015~~ 2015;*

36 *Amended Eff. December 1, 2015.*

## REQUEST FOR TECHNICAL CHANGE

AGENCY: Child Care Commission

RULE CITATION: 10A NCAC 09 .2004

**DEADLINE FOR RECEIPT: Tuesday, November 10, 2015**

The Rules Review Commission staff has completed its review of this rule prior to the Commission's next meeting. The Commission has not yet reviewed this rule and therefore there has not been a determination as to whether the rule will be approved. You may call this office to inquire concerning the staff recommendation.

In reviewing these rules, the staff determined that the following technical changes need to be made:

*On line 4, are these terms applicable to all rules in Chapter 9, or just the rules governing contested cases? You may wish to clarify this in the Rule.*

*In Item (2), you define "Director." However, by repealing Rule 10A NCAC 09 .2007, you no longer use this term as it relates to contested cases. Do you need to retain it?*

*In the History Note, why are you citing to G.S. 143B-10?*

*Also in the History Note, G.S. 150B-11 was repealed in 1991. Please refer to current statutory authority.*

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

Amanda J. Reeder  
Commission Counsel  
Date submitted to agency: October 27, 2015

1 **10A NCAC 09 .2004 has been amended in accordance to G.S. 150B-21.5(4) as follows:**

2  
3 **10A NCAC 09 .2004      CONTESTED CASES: DEFINITIONS**

4 The following terms shall have the following meaning unless the context of the rule requires a different  
5 interpretation:

- 6           (1)     "Department" means the Department of Health and Human Services;  
7           (2)     "Director" means the Director of the Division of Child ~~Development~~; Development and  
8                 Early Education;  
9           (3)     "Hearing" means a contested case hearing as provided in G.S. 150B-2(2) and 150B-23;  
10          (4)     "OAH" means the Office of Administrative Hearings.

11  
12 *History Note:     Authority G.S. 143B-10; 150B-11;*

13 *Eff. November 1, 1989;*

14 *Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff.*

15 *May 23, ~~2015~~. 2015;*

16 *Amended Eff. December 1, 2015.*

## 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: Child Care Commission

RULE CITATION: 10A NCAC 09 .2005

RECOMMENDED ACTION:

- ☐ Approve, but 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

COMMENT:

*Staff recommends objecting to this Rule based upon a lack of clarity and ambiguity.*

*In Paragraphs (a) and (b), the Rule requires individuals to satisfy informal procedures before filing a contested case hearing under G.S. 150B-23. However, the Rule neither states nor references what those informal procedures are.*

*Also, the Rule requires sending the Department a request for determination of rights, privileges, or duties. The petitioner is directed to send a "statement of facts prompting the request sufficient to allow for appropriate processing." Staff notes that this is an ambiguous standard, and is unsure how an individual would know what to send in order to satisfy it.*

## REQUEST FOR TECHNICAL CHANGE

AGENCY: Child Care Commission

RULE CITATION: 10A NCAC 09 .2005

**DEADLINE FOR RECEIPT: Tuesday, November 10, 2015**

The Rules Review Commission staff has completed its review of this rule prior to the Commission's next meeting. The Commission has not yet reviewed this rule and therefore there has not been a determination as to whether the rule will be approved. You may call this office to inquire concerning the staff recommendation.

In reviewing these rules, the staff determined that the following technical changes need to be made:

*In (a), line 4, why are you referring to G.S. 150B-2(2)? That states:*

### **§ 150B-2. Definitions.**

As used in this Chapter,

(2) "Contested case" means an administrative proceeding pursuant to this Chapter to resolve a dispute between an agency and another person that involves the person's rights, duties, or privileges, including licensing or the levy of a monetary penalty. "Contested case" does not include rulemaking, declaratory rulings, or the award or denial of a scholarship, a grant, or a loan.

*As you are now amending the rules to reflect that contested cases are filed with OAH and determined by OAH, should the citation now be G.S. 150B-22?*

*In addition, given that the contested cases are filed at OAH and determined by Administrative Law Judges, should Paragraph (a) be amended regarding sending notice the Department?*

*On line 4, please replace "his" with "his or her"*

*On line 5, replace "must" with "shall"*

*On line 6, define "sufficient" and "appropriate processing"*

*In (b), line 7, I suggest deleting "such." If you are concerned this will be vague, you might consider "a determination pursuant to this Rule..."*

*On line 7, replace "must" with "shall"*

*In (b), what informal procedures are you referring to? The ones in G.S. 150B-22?*

Amanda J. Reeder  
Commission Counsel  
Date submitted to agency: October 27, 2015

**§ 150B-22. Settlement; contested case.**

It is the policy of this State that any dispute between an agency and another person that involves the person's rights, duties, or privileges, including licensing or the levy of a monetary penalty, should be settled through informal procedures. In trying to reach a settlement through informal procedures, the agency may not conduct a proceeding at which sworn testimony is taken and witnesses may be cross-examined. If the agency and the other person do not agree to a resolution of the dispute through informal procedures, either the agency or the person may commence an administrative proceeding to determine the person's rights, duties, or privileges, at which time the dispute becomes a "contested case." (1985 (Reg. Sess., 1986), c. 1022, s. 1(11); 1991, c. 418, s. 16.)

*Does your regulated public know what these are and how to use them?*

*In Paragraph (c), line 9, do you mean "Department" or did you mean to reference the Commission? If you meant the Department, why is this located in the Child Care Commission rules and not the Department rules? Is it for ease of the regulated public?*

*In Paragraph (c), line 10, there is no Rule 26 NCAC 03 .0003. Did you mean 26 NCAC 03 .0103?*

*In Paragraph (c), is this list not available on a website that you can also reference?*

*In the History Note, why are you citing to G.S. 143B-10?*

*Also in the History Note, G.S. 150B-11 was repealed in 1991. Please refer to current statutory authority.*

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

1 **10A NCAC 09 .2005 has been amended in accordance to G.S. 150B-21.5(4) as follows:**

2  
3 **10A NCAC 09 .2005      CONTESTED CASES: REQUEST FOR DETERMINATION**

4 (a) In accordance with G.S. 150B-2(2), any person may request a determination of his legal rights, privileges, or  
5 duties as they relate to laws or rules administered by the Department. All requests must be in writing and contain a  
6 statement of the facts prompting the request sufficient to allow for appropriate processing by the Department.

7 (b) Any person seeking such a determination must exhaust all informal procedures available before requesting a  
8 hearing under G.S. 150B-23.

9 (c) All petitions for hearings regarding matters under the control of the Department shall be filed with the OAH in  
10 accordance with G.S. 150B-23 and 26 NCAC 03 .0003. In accordance with G.S. 1A-1, Rule 4(j)4, the petition shall  
11 be served on a registered agent for service of process for the Department. A list of registered agents may be obtained  
12 from the Office of General Counsel, ~~2005~~ 2001 Mail Service Center, Raleigh, NC ~~27699-2005~~. 27699-2001.

13  
14 *History Note:      Authority G.S. 143B-10; 150B-11; 150B-22; 150B-23;*

15 *Eff. November 1, 1989;*

16 *Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff.*

17 *May 23, ~~2015~~. 2015;*

18 *Amended Eff. December 1, 2015.*



1 **10A NCAC 09 .2006 - .2007 are proposed to be repealed in accordance to G.S. 150B-21.5(b) as follows:**

2  
3 **10A NCAC 09 .2006      CONTESTED CASES: RECORD**

4 **10A NCAC 09 .2007      CONTESTED CASES: EXCEPTIONS TO RECOMMENDED DECISION**

5  
6 *History Note:      Authority G.S. 143B-10; 143B-10(j)(3); 150B-11; 150B-23(e); 150B-29(b); 150B-36; 150B-37;*  
7 *Eff. November 1, 1989;*

8 *Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff.*

9 *May 23, ~~2015~~, 2015;*

10 *Repealed Eff. December 1, 2015.*