

RRC STAFF OPINION

PERIODIC REVIEW AND EXPIRATION OF EXISTING RULES REPORT

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: N.C. Medical Care Commission

REPORT: 10A NCAC Subchapter 13J

RECOMMENDED ACTION:

- X Note staff's comment
- X Find the comments have merit for Rules 10A NCAC 13J .1107 and .1502 and designate those Rules as "Necessary with Substantive Public Interest."

COMMENT:

In its submission, the Medical Care Commission sent a report and two separate documents containing comments and the agency response (attached hereto). Staff relied upon G.S. 150B-21.3A and 21.9 in making the recommendations set forth below. The relevant portions of the statutes used in the review are highlighted on the next two pages of this Staff Opinion.

A public comment must be an objection to the rule. Assuming such an objection, the Commission must then determine whether the public comment has merit. Pursuant to G.S. 15B-21.3A(c)(2), a comment has merit if it addresses the specific substance of the rule and relates to any of the Commission's standards of review pursuant to G.S. 150B-21.9: whether the rule is reasonably necessary to implement a law, is clear and unambiguous, is within the agency's statutory authority, and was promulgated in compliance with the Administrative Procedure Act.

As set forth in this Staff Opinion, staff believes that the comments for Rules 10A NCAC 13J .1107 and .1502 have merit, and the Commission should designate those Rules as "Necessary with Substantive Public Interest."

§ 150B-21.3A. Periodic review and expiration of existing rules.

- (a) Definitions. – For purposes of this section, the following definitions apply:
- (3) Necessary with substantive public interest. – Means any rule for which the agency has received public comments within the past two years. A rule is also "necessary with substantive public interest" if the rule affects the property interest of the regulated public and the agency knows or suspects that any person may object to the rule.
 - (4) Necessary without substantive public interest. – Means a rule for which the agency has not received a public comment concerning the rule within the past two years. A "necessary without substantive public interest" rule includes a rule that merely identifies information that is readily available to the public, such as an address or a telephone number.
 - (5) Public comment. – Means written comments objecting to the rule, in whole or in part, received by an agency from any member of the public, including an association or other organization representing the regulated community or other members of the public.
 - (6) Unnecessary rule. – Means a rule that the agency determines to be obsolete, redundant, or otherwise not needed.
- ...
- (c) Review Process. – Each agency subject to this Article shall conduct a review of the agency's existing rules at least once every 10 years in accordance with the following process:
- (1) Step 1: The agency shall conduct an analysis of each existing rule and make an initial determination as to whether the rule is (i) necessary with substantive public interest, (ii) necessary without substantive public interest, or (iii) unnecessary. The agency shall then post the results of the initial determination on its Web site and invite the public to comment on the rules and the agency's initial determination. The agency shall also submit the results of the initial determination to the Office of Administrative Hearings for posting on its Web site. The agency shall accept public comment for no less than 60 days following the posting. The agency shall review the public comments and prepare a brief response addressing the merits of each comment. After completing this process, the agency shall submit a report to the Commission. The report shall include the following items:
 - a. The agency's initial determination.
 - b. All public comments received in response to the agency's initial determination.
 - c. The agency's response to the public comments.
 - (2) Step 2: The Commission shall review the reports received from the agencies pursuant to subdivision (1) of this subsection. If a public comment relates to a rule that the agency determined to be necessary and without substantive public interest or unnecessary, the Commission shall determine whether the public comment has merit and, if so, designate the rule as necessary with substantive public interest. For purposes of this subsection, a public comment has merit if it addresses the specific substance of the rule and relates to any of the standards for review by the Commission set forth in G.S. 150B-21.9(a). The Commission shall prepare a final determination report and submit the report to the Committee for consultation in accordance with subdivision (3) of this subsection. The report shall include the following items:
 - a. The agency's initial determination.
 - b. All public comments received in response to the agency's initial determination.
 - c. The agency's response to the public comments.
 - d. A summary of the Commission's determinations regarding public comments.
 - e. A determination that all rules that the agency determined to be necessary and without substantive public interest and for which no public comment was received or for which the Commission determined that the public comment was without merit be allowed to remain in effect without further action.
 - f. A determination that all rules that the agency determined to be unnecessary and for which no public comment was received or for which the Commission determined that the public comment was without merit shall expire on the first day of the month following the date the report becomes effective in accordance with this section.

Jason Thomas
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Page 2 of 5

- g. A determination that all rules that the agency determined to be necessary with substantive public interest or that the Commission designated as necessary with public interest as provided in this subdivision shall be readopted as though the rules were new rules in accordance with this Article.

...

§ 150B-21.9. Standards and timetable for review by Commission.

(a) Standards. – The Commission must determine whether a rule meets all of the following criteria:

- (1) It is within the authority delegated to the agency by the General Assembly.
- (2) It is clear and unambiguous.
- (3) It is reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency. The Commission shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed.
- (4) It was adopted in accordance with Part 2 of this Article.

The Commission shall not consider questions relating to the quality or efficacy of the rule but shall restrict its review to determination of the standards set forth in this subsection.

Rule 10A NCAC 13J .1107

10A NCAC 13J .1107 IN-HOME AIDE SERVICES

(a) If an agency provides in-home aide services, the services shall be provided in accordance with the client's plan of care. Agencies participating in the Home and Community Care Block Grant or Social Services Block Grant through the Division of Aging and Adult Services shall comply, for those clients, with the in-home aide service level rules contained in 10A NCAC 06A and 10A NCAC 06X which are hereby incorporated by reference with all subsequent amendments. All other agencies providing in-home aide services shall comply with the provisions in Paragraphs (b) and (c) of this Rule.

(b) If the client's plan of care requires the in-home aide to provide extensive assistance as defined in Rule .0901(9) of this Subchapter the in-home aide shall be listed on the Nurse Aide Registry pursuant to G.S. 131E-255. However, if the client's plan of care requires the in-home aide to provide only limited assistance as defined in Rule .0901(18) of this Subchapter the in-home aide is not required to be listed on the Nurse Aide Registry.

(c) In-home aides shall follow instructions for client care written by the health care practitioner required for the services provided. In-home aide duties may include the following:

- (1) help with prescribed exercises which the client and in-home aides have been taught by a health care practitioner licensed pursuant to G.S. 90;
- (2) provide or assist with personal care (i.e., bathing, care of mouth, skin and hair);
- (3) assist with ambulation;
- (4) assist client with self-administration of medications which are ordered by a physician or other person authorized by state law to prescribe;
- (5) perform incidental household services which are essential to the client's care at home; and
- (6) record and report changes in the client's condition, family situation or needs to an appropriate health care practitioner.

History Note: Authority G.S. 131E-140;

Eff. July 1, 1992;

Amended Eff. January 1, 2010; October 1, 2007; October 1, 2006; February 1, 1996.

Public Comment from Mary Troutman, Stanly County Senior Services Department:

The disclaimer that agencies that operate under HCCBG or SSBG rules should comply with those standards and ALL OTHER AGENCIES shall comply with the following rules is confusing. The way it reads is that this section does not apply to HCCBG/SSBG agencies, but the interpretation is that it means those agencies follow this rule and ALSO their rules if more stringent than licensure rules. If this is what it means it needs to be reworded to say that.

Agency Response:

The Agency determined this rule was necessary without substantive public interest. Based on the comment, we will not change the categorization. We don't see any need for changing this rule. The standard of practice is always that the home care agency would follow the more stringent of any rules that were contemplated.

Staff Recommendation:

Staff recommends finding that the public comment has merit and moving the designation of this Rule to "Necessary with Substantive Public Interest." The comment objects to the rule and specifically highlights ambiguity regarding whether HCCBG/SSBG agencies must comply only with 10A NCAC 06A and 10A NCAC 06X, or must also comply with Paragraphs (b) and (c) of the Rule.

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Page 4 of 5

Rule 10A NCAC 13J .1502

10A NCAC 13J .1502 SCOPE OF SERVICES

(a) If an agency provides In-home companion, sitter, or respite services, the services shall be provided in accordance with the client's plan of care. Agencies participating in the Home and Community Care Block Grant or Social Services Block Grant through the Division of Aging and Adult Services shall comply, for those clients, with the companion or sitter service level rules contained in 10A NCAC 06A and 10A NCAC 06X which are hereby incorporated by reference with all subsequent amendments. All other agencies providing companion and sitter services shall comply with the provisions of the rules in this Section unless exempt from these rules.

(b) Companion, sitter, or respite services personnel shall follow the service plan written by personnel required by agency policy for the services provided.

*History Note: Authority G.S. 131E-140;
Eff. January 1, 2010.*

Public Comment from Mary Troutman, Stanly County Senior Services Department:

As with section .1107 there seems to be confusion over whether or not this section applies to HCCBG/SSBG agencies. Perhaps the wording needs to be changed to clarify this.

Agency Response:

The Agency determined this rule was necessary without substantive public interest. Based on the comment, we will not change the categorization. We are unclear about what the concern would be. We only regulate agencies that have Home Care Licenses.

Staff Recommendation:

Staff recommends finding that the public comment has merit and moving the designation of this Rule to "Necessary with Substantive Public Interest." The comment objects to the rule and specifically highlights ambiguity regarding whether HCCBG/SSBG agencies must comply only with 10A NCAC 06A and 10A NCAC 06X, or must also comply with "provisions of the rules in this Section unless exempt from these rules."