

**Commission for MH/DD/SAS  
Response to RRC Staff Opinion**

S.L. 2013-18, S.B. 45, Incapacity to proceed amendments, amended G.S. 143B-147 to grant the Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services (Commission) authority to adopt rules, “by December 1, 2013, to require forensic evaluators appointed pursuant to G.S. 15A-1002(b) to meet the following requirements:

- a. Complete all training requirements necessary to be credentialed as a certified forensic evaluator.
- b. Attend annual continuing education seminars that provide continuing education and training in conducting forensic evaluations and screening examinations of defendants to determine capacity to proceed and in preparing written reports required by law.” [S.L. 2013-18, S.B. 45, Sec. 9]

The Commission amended existing Rules 10A NCAC 27G .6702 and 10A NCAC 27H Section .0200 intending to adopt them as temporary rules to meet the requirements of the session law. At its meeting January 31, 2014, the Rules Review Commission (RRC) objected to the proposed amendments as noted in the RRC Commission Counsel’s Staff Opinion.

The Commission believes it has authority to adopt the proposed amendments and submits this response to the Staff Opinion regarding the Commission’s statutory authority as provided below:

**Rulemaking Authority**

1. G.S. 143B-147(a)(10) grants express authority for the Commission to adopt rules requiring forensic evaluators appointed pursuant to G.S. 15A-1002(b) to complete training requirements to be credentialed as a certified forensic evaluator and to attend annual continuing education and training requirements as indicated above. The proposed amendments to the rules provide for those certification and continuing education requirements.
2. G.S. 15A-1002(b) states “in the case of a defendant charged with a misdemeanor or felony, the court may appoint one or more impartial medical experts, *including forensic evaluators approved under rules of the Commission*, to examine the defendant and return a written report describing the present state of the defendant’s mental health.” [G.S. 15A-1002(b)(1a) Emphasis added]

**Content of the Reports**

The following statutes make clear that the evaluations and screenings are completed for purposes of determining capacity to proceed as well as in preparing reports describing the present state of the defendant’s mental health and that the reports shall also address the likelihood that the defendant will gain the capacity to proceed.

3. G.S. 143B-147(a)(10) also requires that the annual continuing education seminars provide training in conducting forensic evaluations and screening examinations of defendants to determine capacity to proceed and in *preparing written reports required by law*. [Emphasis added]
4. In addition, G.S. 15A-1002(b)(1a) states “in the case of a defendant charged with a misdemeanor or felony, the court may appoint one or more impartial medical experts, including forensic evaluators approved under rules of the Commission, to examine the defendant and *return a written report describing the present state of the defendant’s mental health*.” [Emphasis added]
5. G.S. 122C-54(b) states “If an individual is a defendant in a criminal case and a mental examination of the defendant has been ordered by the court as provided in G.S. 15A-1002, the facility shall send the results or the report of the mental examination to the clerk of court, to the district attorney or prosecuting officer, and to the attorney of record for the defendant as provided in G.S. 15A-1002(d). *The report shall contain a treatment recommendation, if any, and an*

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*opinion as to whether there is a likelihood that the defendant will gain the capacity to proceed.*  
[Emphasis added]

**Licensure, Certification, and Employment Requirements**

The Commission anticipates that the existing mental health, developmental disabilities, and substance abuse services delivery system complies with relevant mandates regarding the delivery of quality services, contracting for services within the LME-MCO's catchment area, and monitoring of services provided. The area authority and the Secretary are jointly responsible for assuring that services provided to consumers are of the highest possible quality within available resources. [122C-191(a)] Each area authority and State facility shall comply with the rules of the Commission regarding quality assurance activities, including: program evaluation; utilization and peer review; and staff qualifications, privileging, supervision, education, and training. [G.S. 122C-191(b)] Each area authority is required to develop internal processes to monitor and evaluate the level of quality obtained by all its programs and services including the activities prescribed in the rules of the Commission. [122C-191(c)]

6. Per State policy, the area authority or county program is the locus of coordination among public services for clients of its catchment area. [G.S. 122C-101] Ultimately, the LME-MCO is responsible for the management and oversight of the public system of mental health, developmental disabilities, and substance abuse services at the community level and is mandated to plan, develop, implement, and monitor services within a specified geographic area to ensure expected outcomes for consumers within available resources. [G.S. 122C-115.4(a)]
7. The area authority or county program shall contract with other qualified public or private providers, agencies, institutions, or resources for the provision of services, and, subject to the approval of the Secretary, is authorized to provide services directly. [G.S. 122C-141(a)]
8. All area authority or county program services provided directly or under contract shall meet the requirements of applicable State statutes and the rules of the Commission and the Secretary. [G.S. 122C-141(b)]
9. When the area authority contracts with persons for the provision of services, it shall use the standard contract adopted by the Secretary and shall assure that these contracted services meet the requirements of applicable State statutes and the rules of both the Commission and the Secretary; monitor the contract to assure that rules and State statutes are met; and require that the provider agency with whom it contracts provide timely data to the LME-MCO regarding the clients being served, the services provided, and the client outcomes. [G.S. 122C-142(a)]
10. Similar obligations are likewise noted in G.S. 122C-117 which requires the area authority to monitor community-based mental health, developmental disabilities, and substance abuse services; ensure the provision of services to clients in its catchment area; and assure that services provided by the county through the area authority meet the rules of the Commission and the Secretary. [G.S. 122C-117(a)(1), (a)(2), (a)(5)]
11. G.S. 143B-147(a)(1)f grants the Commission authority to adopt rules regarding standards of public services for mental health, developmental disabilities, and substance abuse services. The requirements that the forensic evaluators be licensed clinicians participate in annual continuing education training reflect the Commission's efforts to set forth standards for individuals who conduct forensic evaluations pursuant to rules adopted by the Commission.
12. G.S. 122C-111 states "The Secretary shall administer and enforce the provisions of this Chapter and the rules of the Commission and shall operate State facilities. An area director or program director shall (i) manage the public mental health, developmental disabilities, and substance abuse system for the area authority or county program according to the local business plan, and (ii)

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enforce applicable State laws, rules of the Commission, and rules of the Secretary. The Secretary in cooperation with area and county program directors and State facility directors shall provide for the coordination of public services between area authorities, county programs, and State facilities. The area authority or county program shall monitor the provision of mental health, developmental disabilities, and substance abuse services for compliance with the law, which monitoring and management shall not supersede or duplicate the regulatory authority or functions of agencies of the Department.”

13. In addition, G.S. 122C-139.1 grants the Secretary of DHHS authority to adopt and enforce rules regarding the monitoring of mental health, developmental disability, and substance abuse services. [122C-139.1(2)]
14. The rules proposed for amendment were adopted pursuant to the Commission’s authority granted in G.S. 143B-147. These rules address the standards of public services for mental health, developmental disabilities, and substance abuse services.

The Commission submits the following in response to the Staff Opinion of unclear or ambiguous rules.

1. Rule 10A NCAC 27H .0202 – the rule has been further amended to provide the location of the Pre-Trial Evaluation Center
2. Rule 10A NCAC 27H .0203 – the rule has been further amended to address this concern.
3. Rule 10A NCAC 27H .0205 – the rule has been further amended to address this concern
4. Rule 10A NCAC 27H .0206 – the rule has been further amended to address this concern.