



June 9, 2017

Ms. Amber May
Commission Counsel
Rules Review Commission
Office of Administrative Hearings
6714 Mail Service Center
Raleigh, NC 27699-6700

Re: Forensic Evaluator Proposed Rules

Dear Ms. May:

I am General Counsel for Trillium Health Resources ("Trillium"), the Local Management Entity/Managed Care Organization managing the provision of State and Medicaid reimbursable MH/DD/SAS services in a 24 county catchment in Eastern North Carolina. As I am sure you are aware, on February 27, 2017, the NC Commission for MH/DD/SAS ("Commission") called an emergency meeting for March 1 "to resolve outstanding issues regarding the proposed amendment of the Forensic Evaluator Rules, [and] to issue a final vote regarding the proposed amendments to the same..." Trillium learned of the meeting on February 28, 2017 and, for the first time reviewed the proposed amendments to 10A NCAC 27G.6702 and 10 NCAC 27H, Section 200. Due to an apparent communication breakdown, the LME/MCOs did not review the proposed rules when they were posted for public comment in July, 2016. On Friday, March 1, 2017, Trillium submitted objections to the proposed rules, which are attached hereto as Exhibit "A."

I am informed the Rules Review Commission ("RCC") approved proposed rules 10A NCAC 27G.6702 and 10 NCAC 27H.201, which became "final" on or about March 17, 2017, but the remaining proposed rules in 10A NCAC 27H Section 200 are still the subject of RCC objections. I have reviewed the RCC's objections dated March 27, 2017, the Commission's proposed revisions dated May 26, 2017, the Commission's letter dated June 5, 2017 and hereby submit the following objections on behalf of Trillium.

Pursuant to G.S. §150B-21.9, the RCC must determine whether a rule meets all of the following criteria:

- (1) The rule 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 Article 2A of Chapter 150B of the General Statutes of North Carolina.

Trillium submits to the RCC that the revisions made by the Commission to the proposed rules 10A NCAC 27H.0202-.0207, since posting them for public comment in July, 2016, constitute a substantial change pursuant to G.S. §150B-21.12(c) and §150B-21.2(g) and so must be republished and subjected to additional public comment. Additionally, Trillium does not believe the proposed rules, as drafted, are reasonably necessary to implement or interpret an enactment of the General Assembly - in this case Session Law 2013-18, Section 9, which states in pertinent part:

The Commission for [MH/DD/SAS] shall develop and adopt rules **by December 1, 2013**, to require forensic evaluators appointed pursuant to G.S. 15A-1002(b) to meet the following requirements: (1) Complete all training requirements necessary to be credentialed as a certified forensic evaluator [and] (2) 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.¹

The Commission did not submit the current proposed rules for public comment until July, 2016, approximately 30 months after the deadline imposed by the General Assembly. Moreover, as is more clearly articulated below, the proposed rules go well beyond the mandate of the Session Law 2013-18, Section 9. In particular, the proposed 10A NCAC 27H.0205, 0206 and 0207 have little to no bearing on the training and continuing education requirements for court appointed forensic evaluators.

Trillium objects to 10A NCAC 27H.0202 on the grounds that the revisions made in response to the RCC's March 17 objections still do not demonstrate that the Commission has the authority to require that forensic evaluators be employed with the LME/MCO. Of the authority cited:

- (a) The relevant section of G.S. 122C-54 refers to the release of confidential information by a facility; the LME/MCOs are not facilities (see G.S. §122C-

¹ This language has also been incorporated into GS 143B-147(a)(10)

- 3(14)), they are area authorities and Local Management Entities and do not provide direct services.
- (b) G.S. 122C-115.4(a) explicitly states “an LME shall plan, develop, implement, and monitor services.” It does not state the LME/MCO provides services.
 - (c) G.S. 122C-191 pertains to the monitoring of facilities and providers with whom the LME/MCO contracts and does not speak to the provision of services by an LME/MCO.
 - (d) By Session Law 2001-437, the General Assembly required LME/MCOs participating in the 1915b/c Waiver to divest themselves of direct services and contract with public and private providers for service delivery. Trillium participates in the 1915 b/c Medicaid Waiver, as is conceded in the Commission’s letter of June 5, 2017. See also State of North Carolina NC MHD/IDD/SAS Health Plan Renewal, April 1, 2013, p. 10-12 (available at: https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/Downloads/NC_Cardinal-Innovations_NC-02.pdf)

Furthermore, the Commission has not adequately addressed the RCC’s concern regarding the “Pre-Trial Evaluation Center.” Moreover, the addition of the phrase “through the Local Management Entity-Managed Care Organization,” while well-intentioned, appears to unnecessarily subject the LMEs to the subpoena and contempt powers of the courts when the LME/MCO is unable to arrange for a forensic evaluation due to budgetary constraints or other matters outside of the LME/MCO’s control. This clearly was not the mandate of Session Law 2013-18, Section 9 and is outside the purview of the Commission’s authority.

Trillium objects to 10A NCAC 27H.0203, on the following grounds. The phrase “local certified forensic evaluator” is vague and ambiguous; while Trillium believes a local certified forensic evaluator is one that is eligible to provide evaluations because he or she has a contract with the specific LME/MCO through which an evaluation is ordered, this is not clear in the rule as drafted. The continued reference to the forensic evaluator possibly being an employee of the LME/MCO is objectionable for the reasons set forth hereinabove. It appears the Commission addressed the RCC’s objection to the term “applicant” by replacing it with “individual.” Trillium does not believe this addresses the objection. Likewise, the Commission did not address the RCC’s finding concerning Paragraph (b).

Trillium objects to 10A NCAC 27H.0204, as follows. The phrase “local certified forensic evaluator” is vague and ambiguous. The citations to 122C-54 and 122C-115.4 do not address the RCC’s concerns about statutory authority. As set forth above, those two statutes pertain to disclosures of confidential information and obligations of the LME/MCOs, neither of which is germane to .0204.

Trillium objects to 10A NCAC 27H.0205. Currently, the LME/MCO is required in its contract with the Division of MH/DD/SAS, to contract with a network of providers (that would presumably include forensic evaluators) but only within available resources, as

stated in 122C-2. .0205(a) puts an affirmative obligation on the LME/MCOs to “*ensure* there are local certified forensic evaluators to conduct forensic evaluations *to meet the demand* for forensic evaluations in its catchment area,” regardless of available resources. Additionally, the provision “to meet the demand” is even more ambiguous than “sufficient” and there is nothing in the rule to suggest the LME/MCOs’ performance is contingent on funding from the Division for maintaining a network of forensic evaluators. At its heart, .0205 attempts to set network adequacy standards for forensic evaluators that simply do not exist anywhere in contract, statute, rule or regulation and that are more stringent than standards applied to providers of other types of services. Implementing .0205 is going to require an amendment to the contracts between the Division and the LME/MCOs and appropriate funding. Trillium renews its objection to any reference that a forensic evaluator may be an employee of an LME-MCO. Trillium also does not believe the revisions to .0205 adequately address the RCC’s objections of March 27, 2017.

Trillium objects to NCAC 27H.0206, as follows. The Commission revised .0206(2) to reference .0203(a); however, .0203(a) sets forth the criteria a forensic evaluator must be to be eligible for training. To the extent such criteria exist at all, .0204, and not .0203, sets forth the criteria a forensic evaluator must meet to perform evaluations pursuant to a court order.

Trillium objects to 10A NCAC 27H.0207, as follows. Trillium is uncertain why “court” was deleted from the first sentence. Furthermore, the phrase “further evaluation at the Pre-Trial Evaluation Center” is vague and ambiguous. The rules simply do not provide any detail about the evaluations that may or shall be performed at a Pre-Trial Evaluation Center.

Thank you for your time and attention to this matter. You may contact me via telephone (866-998-2597) or via email (richard.leissner@trilliumnc.org) with any questions you may have.

Sincerely,

Richard P. Leissner, Jr.

Richard P. Leissner, Jr.
General Counsel
Trillium Health Resources

Richard Leissner

From: Richard Leissner
Sent: Wednesday, March 1, 2017 3:14 PM
To: Baker, Denise
Subject: RE: Proposed Amendments re Forensic Evaluations/Evaluators

On your last question, in my experience the judge holds evaluator responsible to do evaluation. We do help line them up when orders are received. I'm not aware that Trillium or its predecessors have been threatened with contempt in connection with a forensic evaluation order. On first question, I'd have ask our network folks about the number we have. On second question, that goes to my concern. Could the court take the position that evaluation didn't get done because we didn't, in the courts opinion, develop a sufficient network of evaluators.

Richard P. Leissner, Jr.
General Counsel
Trillium Health Resources

On Mar 1, 2017 2:40 PM, "Baker, Denise" <Denise.Baker@dhhs.nc.gov> wrote:

Follow-up questions – has Trillium had difficulty meeting the demand for forensic evaluators in its catchment area? If there were a contempt order, would it not stem from failure to complete an evaluation ordered by the court not from the number of evaluators available? Since the court issues the order to the LME-MCO, is the LME-MCO not already responsible for making sure the evaluation gets done?

W. Denise Baker, M.A., L.P.A., Esq.

Team Leader, Division Affairs Team

Division of MH/DD/SAS

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From: Richard Leissner [mailto:Richard.Leissner@trilliumnc.org]
Sent: Wednesday, March 01, 2017 2:37 PM
To: Baker, Denise <Denise.Baker@dhhs.nc.gov>
Subject: RE: Proposed Amendments re Forensic Evaluations/Evaluators

Please do. Thank you!

Richard P. Leissner, Jr.
General Counsel
Trillium Health Resources

On Mar 1, 2017 2:19 PM, "Baker, Denise" <Denise.Baker@dhhs.nc.gov> wrote:

Hi Mr. Leissner –

Thank you for your comments; I will not only read your comments during the meeting but will also provide the Commission members a copy thereof. In addition, the language about “through the LME-MCO” stems from the language of this form: <http://www.nccourts.org/Forms/Documents/1411.pdf>

I’ll let you know the outcome of the meeting if you’d like.

W. Denise Baker, M.A., L.P.A., Esq.

Team Leader, Division Affairs Team

Division of MH/DD/SAS

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From: Richard Leissner [<mailto:Richard.Leissner@trilliumnc.org>]
Sent: Wednesday, March 01, 2017 1:45 PM
To: Baker, Denise <Denise.Baker@dhhs.nc.gov>
Subject: Proposed Amendments re Forensic Evaluations/Evaluators
Importance: High

Dear Ms. Baker:

Thank you for the opportunity to express the concerns of Trillium Health Resources, an LME/MCO serving twenty-four counties in eastern North Carolina.

Broadly, Trillium is concerned that the rules are adding significant responsibilities to the LME/MCO that are not contemplated in GS 122C-1 et seq, the set of statutes that governs LME/MCOs, or in the LME/MCO contracts with DMH (the Division of Mental Health). That such a burden would fall to the LME/MCOs was in no way apparent from Session Law 2013-18. Trillium is also concerned that these additional responsibilities will not be funded through the LME/MCO contracts with DMH and may conflict with Trillium's existing statutory and contractual functions. This is particularly the case with the proposed 10A NCAC 27H.0205, which essentially requires the LME/MCOs to stand up and credential a network of forensic evaluators, all of which will require significant staff resources, as well as additional funding from the General Assembly. It may also require revisions to GS 122C-1 et seq.

Trillium is concerned that the proposed addition of "through the LME-MCO" in 10A NCAC 27H.0202 and other places will subject the LME/MCOs to the contempt power of the court ordering the evaluation and I do not believe that to be the intention of GS 15A-1002.

As to the proposed 10A NCAC 27H.0204, Trillium is concerned because, in previous years, the LME/MCOs have not been able to get a sufficient number of participants trained due to limited training availability and slots, and yet, the onus is now being placed upon the LME/MCO to ensure we have an adequate supply of evaluators that have received such training.

As to the proposed 10A NCAC 27H.0205, it will require, in addition to significant staff resources, additional funding from DMH and potential revisions to 122C-1 et seq., that the LME/MCO create a new quality management process for oversight of forensic evaluators, which will take significant time develop. Yet the implementation date for the rule appears to be February 1, 2017. Trillium is concerned that a court may interpret the proposed rule as allowing the court to hold Trillium in contempt for failing to implement the requirements of 10A NCAC 27H.0205. Trillium also believes the proposed rule will require an amendment of the LME/MCO contract with DMH and that DMH will also need to develop a system to evaluation the LME/MCOs' adherence to the proposed rules. For instance, what standards will be used to determine if the LME/MCO's forensic evaluation network is sufficient? Trillium believes these standards would have to come from DMH.

Trillium is concerned that there does not appear to be a grandfather period for implementing the proposed rules. It is unclear that the LME/MCOs will have sufficient time in which to implement these rules and get forensic evaluators certified. In addition, Trillium has significant concerns that the rules may be in conflict with the terms of the existing contracts LME/MCOs have with forensic evaluators.

Again, thank you for the opportunity to submit these comments; I regret that I did not have more time to devote to this very important matter. As I indicated to you on the telephone, these proposed rules simply were not on our radar until the evening of February 28, 2017. I have consulted other LME/MCOs today and they were not aware of the proposed rules either. I do not state this to make an excuse, but merely to state the facts. As you know, Trillium has taken steps to ensure proposed rules affecting our operations do not slip through the cracks in the future.

Sincerely,

Richard P. Leissner, Jr.

Richard P. Leissner, Jr., Esq.

General Counsel

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