



**STATE OF NORTH CAROLINA
OFFICE OF ADMINISTRATIVE HEARINGS**

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June 19, 2017

Ms. Denise Baker
3004 Mail Service Center
Raleigh, NC 27699-3004

Sent via electronic mail to: denise.baker@dhhs.nc.gov

Re: Rules 10A NCAC 27H .0202, .0203, .0204, .0205, and .0206

Dear Ms. Baker:

At its meeting on March 16, 2017, the Rules Review Commission objected to Rules 10A NCAC 27H .0202, .0203, .0204, .0205, .0206, and .0207. At its meeting on June 15, 2017, the Rules Review Commission reviewed the rewritten Rules submitted by the Commission for MH/DD/SAS in response to the March 16, 2017 objections. At that time, they continued their objections to the above-referenced rules in accordance with G.S. 150B-21.9.

Please note that the Rules Review Commission approved Rule 10A NCAC 27H .0207 at the June 15, 2017 meeting.

The Rules Review Commission found that the Commission for MH/DD/SAS lacked the statutory authority to require that forensic evaluators be employed by an LME-MCO and objected to any such reference contained within Rules 10A NCAC 27H .0202 through .0206.

The Rules Review Commission objected to 10A NCAC 27H .0203, finding that the Commission for MH/DD/SAS lacked the statutory authority to require LME-MCOs to submit and verify information required by this Rule, nor delegate this responsibility to the LME-MCOs. Further, the Rules Review Commission found that it was unclear how the LME-MCO will determine whether the evaluator has expertise as set forth in Paragraph (b).

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The Rules Review Commission objected to 10A NCAC 27H .0204, specifically Subparagraph (a)(3), finding that it was unclear because it does not state what is meant by “required by law.”

The Rules Review Commission objected to 10A NCAC 27H .0205, finding that the Commission for MH/DD/SAS lacked the statutory authority to promulgate rules regarding LME-MCO oversight of forensic evaluators. Further, the Rules Review Commission found that it was unclear how the expertise of an evaluator is to be conveyed to the LME-MCO, as Rule .0205 indicates that it will be self-reporting by the evaluator, while .0203 indicates that the LME-MCO is required to determine the expertise of the evaluator. The Rules Review Commission found that as written, the Rules were unclear whether these provisions conflict with each other or whether they are different processes.

The Rules Review Commission found that while the Commission for MH/DD/SAS has shifted the actual termination of the certification to the Division in the rewritten version of Rule .0206, much of the termination responsibilities remain with the LME-MCO. As such, the Rules Review Commission objected to .0206, finding that the Commission for MH/DD/SAS lacked the authority to delegate the responsibilities related to the termination of certifications to LME-MCOs. Further, the Rules Review Commission found that it was unclear as to how the LME-MCO will know whether an individual is no longer a “licensed clinician” and whether a forensic evaluator has completed the required training.

Please respond to this letter in accordance with the provisions of G.S. 150B-21.12. If you have any questions regarding the Rule Review Commission's action, please let me know.

Sincerely,

Amber C. May

Amber C. May
Commission Counsel



**North Carolina Department of Health and Human Services
Division of Mental Health, Developmental Disabilities and Substance Abuse Services**

ROY COOPER
GOVERNOR

MANDY COHEN, MD, MPH
SECRETARY

JASON E. VOGLER, PH.D., CSSBB
INTERIM SENIOR DIRECTOR

June 5, 2017

Ms. Amber C. May
6700 Mail Service Center
Raleigh, NC 27699-6714

Sent via electronic mail to: amber.may@oah.nc.gov; oah.rules@oah.nc.gov

Re: Rules 10A NCAC 27H .0202, .0203, .0204, .0205, .0206, .0207

Dear Ms. May:

The Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services (Commission) has reviewed the Rule Review Commission's (RRC's) objections, adopted during its March 16, 2017 meeting, to the aforementioned rules. As noted below, and as reflected in the attached rules, the rules have been further amended in response to the objections raised. However, the Commission believes it has authority to adopt the proposed amendments and submits this response to the RRC's objections.

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 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.

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". G.S. 15A-1002(b)(1a) does not require the Commission to approve forensic evaluators directly. Rather, the Commission is granted authority to write rules under which forensic evaluators may be approved.

G.S. 143B-147(a)(1)f grants the Commission authority to adopt rules "regarding the Standards of public services for mental health, developmental disabilities, and substance abuse services". Forensic evaluators are providing public services regarding mental health, developmental disability, and substance abuse (mh/dd/sa) services. G.S. 122C-3(30b) defines "public services" as "publicly funded mental health, developmental disabilities, and substance abuse services, whether provided by public or private providers". Therefore, whether the mh/dd/sa services are rendered by public or private providers, the Commission's authority is limited to those provided with public funds. Consequently, 15A-1002(b)(1a)

does not expand the authority granted the Commission in G.S. 143B-147 or authorize the Commission to write rules under which forensic evaluators conducting evaluations paid with private funds may be certified.

Rule 10A NCAC 27H .0202

The Commission relies upon the existing mental health, developmental disabilities, and substance abuse (mh/dd/sa) services delivery system to serve as the vehicle through which these proposed rule amendments are implemented. The mh/dd/sa service system must comply with relevant mandates regarding the delivery of quality services, contracting for services within the Local Management Entity-Managed Care Organization's (LME-MCO) catchment area, and monitoring of services provided. Per G.S. 122C-191(a), 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. G.S.122C-191(b) states 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. Per G.S. 122C-3(20b), "Local management entity" or "LME" means an area authority, county program, or consolidated human services agency. It is a collective term that refers to functional responsibilities rather than governance structure". G.S. 122C-3(20c) fines LME-MCO as an LME "that is under contract with the Department to operate the combined Medicaid Waiver program authorized under Section 1915(b) and Section 1915(c) of the Social Security Act".

The law requires the area authority or county program to contract with provider agencies for the provision of public mh/dd/sa services as reflected below. The Commission is simply providing in rule what is required by law.

1. 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)]
2. 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)]
3. 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)]

As it relates to the issue of ambiguity, the rule has been further amended to reflect that these rules govern those evaluations ordered via the Local Management Entity-Managed Care Organization (LME-MCO) and are paid for using public funds. The rule also makes clear the location of the Pre-Trial Evaluation Center. The statutory authority has also been further clarified.

Rule 10A NCAC 27H .0203

The Commission for MH/DD/SAS is not responsible for approving forensic evaluators. Rather, the Commission is granted authority to write rules under which forensic evaluators must be approved. For example, G.S. 15A-1002(b)(1a) references forensic evaluators approved under rules of the Commission. The law requires the area authority or county program to contract with provider agencies for the provision of public mh/dd/sa services. Please see the explanation for Rule .0202 as it relates to employment and contract requirements.

As it relates to ambiguity, the term "applicant" has been replaced with "individual" to make clear this does not involve an application process per se; the rule already notes the eligibility criteria for an individual seeking training and certification as a forensic evaluator. In addition, 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)] Verification of the contractor's ability to perform under the terms of the contract is a mechanism through which quality of services delivered can be assured.

Rule 10A NCAC 27H .0204

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. G.S. 143B-147(a)(10) 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. The laws below make clear what the written report is to include.

1. 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."
2. 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 opinion as to whether there is a likelihood that the defendant will gain the capacity to proceed."

Additional questions raised by RRC counsel have been addressed via further amendments to the rules.

Rule 10A NCAC 27H .0205

Existing laws govern the LME-MCO oversight of public mh/dd/sa services. Forensic evaluations are a public service.

1. 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]
2. 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)]
3. 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)]
4. G.S. 122C-111 states "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) enforce applicable State laws, rules of the Commission, and rules of the Secretary". It further states "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.”

5. 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)]

The rule has been further amended to address the issues raised regarding ambiguity. Please see the explanation for Rule .0202 as it relates to employment and contract requirements.

Rule 10A NCAC 27H .0206

As noted above, the Commission is granted authority to write rules under which forensic evaluators may be approved. It is not mandated to approve the evaluators itself. As such, the rule has been further amended to make clear the Division is responsible for declaring the certification void. Because the law, as noted above, requires the LME-MCO to contract with providers for the delivery of public mh/dd/sa services, the LME-MCO is better positioned to know when the forensic evaluator with whom it contracts no longer complies with the terms of the standard contract each is required to use.

Rule 10A NCAC 27H .0207

G.S. 143B-147(a)(10) 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. The laws below make clear what the written report is to include.

1. 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.”
2. 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 opinion as to whether there is a likelihood that the defendant will gain the capacity to proceed.

Please let me know if you have questions regarding this response and the additional amendments reflected in the attached rules.

Sincerely,



W. Denise Baker
Rulemaking Coordinator
Commission for MH/DD/SAS

Attachments

c: Scott Stroud
Lisa Corbett

10A NCAC 27H .0202 is amended with changes as published in 31:01 NCR 11 as follows:

10A NCAC 27H .0202 DEFINITIONS

For the purposes of Rules .0201 through .0207 of this ~~Section~~ Section, when a capacity evaluation is ordered by a Court to be conducted through the Local Management Entity-Managed Care Organization LME-MCO, the following terms shall have the meanings indicated:

- (1) "Forensic Evaluation" means an ~~a local~~ examination ordered by the court through the LME-MCO to determine ~~if the defendant's current mental state and whether the~~ defendant has the capacity to proceed to ~~trial, trial. [does not have the capacity to proceed to trial, or] needs further treatment at an inpatient facility or further evaluation at the Pre-Trial Evaluation Center.~~
- (2) ~~"Pre-Trial Evaluation Center" means the forensic unit at Dorothea Dix Hospital.~~ "Licensed Clinician" means the same as defined in Rule 10A NCAC 27G .0104.
- (3) ~~"Qualified Mental Health Professional" means the same as defined in 10A NCAC 27G .0104(e) contained in Division publication, Rules for Mental Health, Developmental Disabilities and Substance Abuse Facilities and Services, APSM 40-2.~~ "Local Certified Forensic Evaluator" means a Licensed Clinician who:
 - (a) has completed the training for certification and annual training seminars described in Rule .0204 of this Section; [and]
 - (b) is employed by, or under contract with, an LME-MCO as a [Certified] Forensic [Evaluator.] Evaluator; and
 - (c) is paid by the LME-MCO with public funds.
- (4) ~~"Qualified Substance Abuse Professional" means the same as defined in 10A NCAC 27G .0104(e) contained in Division publication, Rules for Mental Health, Developmental Disabilities and Substance Abuse Facilities and Services, APSM 40-2.~~ "Pre-Trial Evaluation Center" means the Forensic Services Unit located at Central Regional Hospital. [so designated by the Secretary of the North Carolina Department of Health and Human Services.]

History Note: Authority G.S. 15A-1002; ~~143B-147;~~ 122C-54; 122C-115.4(a); 122C-191(b); 143B-147;
Eff. July 1, 1982;
Amended Eff. July 1, 2017; January 1, 1996; May 1, 1990

1 **10A NCAC 27H .0203 is amended with changes as published in 31:01 NCR 11 as follows:**

2
3 **10A NCAC 27H .0203 ELIGIBILITY FOR TRAINING**

4 (a) To be eligible for training as a local certified forensic evaluator the applicant individual shall:

- 5 (1) be a qualified mental health professional or a qualified substance abuse professional; Licensed
6 Clinician;
7 (2) be an employee of, or work under contract with, an area program; LME-MCO; and
8 (3) have his or her name submitted as an applicant for the training and registration certification
9 program by the area LME-MCO director.

10 (b) The area program LME-MCO shall verify that the applicant individual is a Licensed Clinician [Clinician, or
11 meets the requirements of Rule .0201(e) of this Section,] and has expertise with the mental health, developmental
12 disabilities, or substance abuse (mh/dd/sa) diagnostic categories that may occur within the population for whom [the
13 applicant] he or she will provide forensic evaluations. meets the appropriate standards for a qualified mental health
14 professional that are referenced in Rule .0202 of this Section.

15
16 *History Note: Authority G.S. 15A-1002; 143B-147; 122C-115.4(a); 122C-141; 122C-191(b); 143B-147;*

17 *Eff. July 1, 1982;*

18 *Amended Eff. July 1, 2017; January 1, 1996; May 1, 1990.*

10A NCAC 27H .0204 is amended with changes as published in 31:01 NCR 11 as follows:

10A NCAC 27H .0204 TRAINING AND REGISTRATION CERTIFICATION

(a) The ~~applicant individual seeking certification as a forensic evaluator~~ shall ~~successfully~~ complete ~~[a minimum of]~~ six hours of initial training ~~covering procedure, techniques, and reporting that is provided by the Mental Health Section of the Division in order to be registered~~ certified as a local certified forensic evaluator. The initial training shall include:

- (1) current laws and practices including the role of the local certified forensic evaluator in the capacity to proceed evaluation process;
- (2) procedures for conducting interviews including evaluation for the presence of mh/dd/sa disorders, or other relevant conditions;
- (3) ~~[components of reports to be submitted to the court;]~~ procedures for completing reports required by law;
- (4) process for reporting findings to the court; and
- (5) an examination at the conclusion of the training which assesses comprehension of the training material and an understanding of the duties of a local certified forensic evaluator.

(b) Each local certified forensic evaluator ~~[is required to]~~ shall complete ~~[a minimum of]~~ four hours of ~~[required annual]~~ continuing education ~~[modules]~~ seminars provided by the ~~[Pre-Trial]~~ Pre-Trial Evaluation Center by December 31 of each calendar year.

~~(c) [Local certified forensic evaluators shall be exempt from the continuing education requirement in the calendar year in which they are first certified and shall complete the annual continuing education requirement by December 31 of the following year and each calendar year thereafter.]~~ Continuing education seminar topics may include:

- (1) evaluation skills training to enhance skills acquired through the initial local certified forensic evaluator training;
- (2) changes in existing laws and current practices; and
- (3) evaluation of mh/dd/sa populations.

~~(d) Local certified forensic evaluators shall be exempt from the continuing education requirement in the calendar year in which they are first certified. [Continuing education module topics may include:~~

- ~~(1) — evaluation skills training to enhance skills acquired through the initial local certified forensic evaluator training;~~
- ~~(2) — changes in existing laws and current practices; and~~
- ~~(3) — evaluation of mh/dd/sa populations.]~~

History Note: Authority G.S. 15A-1002; 143B-147; 122C-54; 122C-115.4(a); 122C-191; 143B-147;
Eff. July 1, 1982;
Amended Eff. July 1, 2017; May 1, 1990.

10A NCAC 27H .0205 is amended with changes as published in 31:01 NCR 11 as follow:

10A NCAC 27H .0205 ~~PERIOD OF REGISTRATION~~ LME-MCO OVERSIGHT OF FORENSIC EVALUATOR PROGRAM

Registration shall continue to be valid unless registration is terminated as specified in Rule .0206 of this Section.

(a) The LME-MCO shall ensure there ~~[is a sufficient number of]~~ are local certified forensic evaluators to conduct forensic evaluations to meet the demand for forensic evaluations in its catchment area.

(b) Each LME-MCO shall maintain a list of local certified forensic evaluators who are ~~[currently]~~ employed or contracted by the LME-MCO that includes the mh/dd/sa populations for which each evaluator has reported having ~~[expertise]~~ expertise, based upon their knowledge, skills, and abilities, to conduct forensic evaluations.

(c) The LME-MCO shall verify that each local certified forensic evaluator meets the requirements set forth in Rules .0203 and ~~[-.0204]~~ .0204(b) of this Section.

(d) The LME-MCO shall notify the Pre-Trial Evaluation Center of any changes ~~[which]~~ that would result in termination of certification per Rule .0206 of this Section.

(e) The LME-MCO shall maintain a ~~[log]~~ list, including the number of local forensic evaluations done in each county within its catchment area, the forensic evaluator's name and capacity opinion, the date of the evaluation, the defendant's name, gender, and criminal charge, and provide that ~~[log]~~ list to the Pre-Trial Evaluation Center on a monthly basis.

(f) The LME-MCO shall identify ~~[potentially]~~ qualified individuals to enroll in training for certification to replace any evaluator whose certification has been terminated or to increase the number of evaluators due to increased numbers of evaluations ~~[logged]~~ ordered by the court.

(g) The LME-MCO shall establish a mechanism to ensure a quality management process is included in the LME-MCO's Quality Improvement System for oversight of the local certified forensic evaluators in its catchment area that includes:

(1) identifying an individual who is a local certified forensic evaluator who will monitor the overall quality and outcomes of the reports of forensic evaluations completed by other local forensic evaluators; and

(2) establishing a procedure for responding to questions or concerns related to the quality of reports of forensic evaluations completed by local certified forensic evaluators in its catchment area.

History Note: Authority G.S. 15A-1002; ~~143B-147; 122C-115.4(a); 122C-141; 122C-191(b); 143B-147;~~
Eff. July 1, 1982;
Amended Eff. July 1, 2017; May 1, 1990.

10A NCAC 27H .0206 is amended with changes as published in 31:01 NCR 11 as follows:

10A NCAC 27H .0206 ~~TERMINATION OF REGISTRATION~~ CERTIFICATION

A Forensic Evaluator Registration will be declared ~~The [LME-MCO] Division~~ shall declare a forensic evaluator certification void ~~when:~~ when the LME-MCO notifies the Division of the following:

- (1) the evaluator notifies the LME-MCO in writing that he or she no longer desires wishes to be registered certified; and perform the duties required by an evaluator;
- ~~(2) the evaluator is no longer employed by, or under contract with, an area program; or [LME-MCO];~~
- ~~(3)~~(2) the evaluator no longer meets the ~~registration requirements.~~ eligibility requirements set forth in Rule [.0203] .0203(a) of this Section;
- ~~[(4)]~~(3) the evaluator fails to complete annual continuing education ~~[modules] seminars~~ as set forth in Rule .0204 of this Section; or
- ~~[(5)]~~(4) the evaluator fails to perform any of the duties described in Rule .0207 of this Section.

History Note: Authority G.S. 15A-1002; ~~143B-147; 122C-115.4(a); 122C-141; 122C-191(b); 143B-147;~~
Eff. July 1, 1982;
Amended Eff. July 1, 2017; May 1, 1990.

10A NCAC 27H .0207 is amended with changes as published in 31:01 NCR 11 as follows:

10A NCAC 27H .0207 DUTIES OF ~~REGISTERED~~ A CERTIFIED FORENSIC EVALUATOR

When a capacity evaluation is ordered by the court, to be conducted through the LME-MCO, the local certified forensic evaluator shall conduct a forensic evaluation or a ~~screening~~ examination of the defendant and ~~report to the court in accordance with G.S. 15A-1002 whether:~~ shall submit a report to the court that addresses the following:

- (1) the defendant's current mental state, his or her capacity to proceed to trial, a treatment recommendation, if any, and if the defendant lacks capacity to proceed, the likelihood that the defendant will gain the capacity to proceed; or
- (2) the need for further evaluation of the defendant at the Pre-Trial Evaluation Center if the certified forensic evaluator is unable to reach a conclusion as to the defendant's capacity to proceed to trial.
- ~~(1) — there is sufficient question of mental or emotional disorder to recommend inpatient evaluation or treatment; or [is limited to evaluation of capacity to proceed to trial and does not address criminal responsibility, legal insanity, or diminished capacity:]~~
- ~~(2) — there is sufficient information to recommend that the defendant does have capacity to proceed and further evaluation is not indicated. [indicates the opinion of the evaluator that the defendant clearly has the capacity to proceed, that the defendant clearly lacks the capacity to proceed, or that the evaluator is unable to form a clear opinion;]~~
- ~~[(3) — addresses the likelihood that the defendant will gain capacity if, in the opinion of the evaluator, the defendant clearly lacks the capacity to proceed; and~~
- ~~(4) — recommends a full evaluation at the Pre Trial Evaluation Center if the evaluator is unable to form a clear opinion and the defendant is charged with a felony.]~~

History Note: Authority G.S. 15A-1002; ~~143B-147; 122C-54; 122C-115.4(a); 143B-147;~~
Eff. July 1, 1982;
Amended Eff. July 1, 2017; May 1, 1990.



**STATE OF NORTH CAROLINA
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March 17, 2017

Ms. Denise Baker
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Sent via electronic mail to: denise.baker@dhhs.nc.gov

Re: Rules 10A NCAC 27H .0202, .0203, .0204, .0205, .0206, and .0207

Dear Ms. Baker:

At its meeting on March 16, 2017, the Rules Review Commission objected to the above-captioned rules in accordance with G.S. 150B-21.9. Please note that the Rules Review Commission did approve Rules 10A NCAC 27G .6702 and 27H .0201.

The Rules Review Commission objected to 10A NCAC 27H .0202 finding that the Commission for MH/DD/SAS lacks the authority to set the employment requirements for individuals in requiring that forensic evaluators be employed or under contract with an LME-MCO. The Rules Review Commission also objected to this Rule as being unclear or ambiguous as it is unclear what the "Pre-Trial Evaluation Center" is, how the Secretary is to make the determination, and how the public will be made aware of what this is.

The Rules Review Commission objected to 10A NCAC 27H.0203 finding that the Commission for MH/DD/SAS lacks the authority to set the employment requirements for individuals in requiring that forensic evaluators be employed by or under contract with an LME-MCO. The Rules Review Commission also objected to this Rule finding that it is unclear or ambiguous. Specifically, the Rules Review Commission objected as Paragraph (a) contains a reference to an "applicant," but there is no information contained within the Rule as submitted to say what the "applicant" will need to do to apply to be certified as a forensic evaluator, to whom the applicant will apply, what the application process is, and the timing of the training requirements. The Rules Review Commission further found that it is unclear how the LME-MCO will determine whether the evaluator has expertise as set forth in Paragraph (b).

The Rules Review Commission objected to 10A NCAC 27H .0204 finding that the Commission for MH/DD/SAS lacks the statutory authority to promulgate rules regarding the contents of the report.

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The Rules Review Commission objected to 10A NCAC 27H .0205 for lack of statutory authority and as being unclear or ambiguous. In objecting to this Rule, the Rules Review Commission found that the Commission for MH/DD/SAS lacks the statutory authority to promulgate rules regarding LME-MCOs oversight of forensic evaluators. The Rules Review Commission also found the following were unclear or ambiguous:

- In (a), it is unclear what is meant by “sufficient.”
- In (b), it is unclear as to how expertise of an evaluator is to be conveyed to the LME-MCO. Rule .0205 indicates that it will be self-reporting by the evaluator; however, Rule .0203 indicates that the LME-MCO is required to determine the expertise of the evaluator. It is unclear whether these two provisions conflict with each other or whether they are different processes.
- In (e), it is unclear as to what information is required to be maintained in the log.


It is noted that there is a specific reference to a forensic evaluator being employed by an LME-MCO in (b) of this Rule. Please note that this provision was specifically objected to as indicated above with regard to .0202 and .0203.

The Rules Review Commission objected to 10A NCAC 27H .0206 for lack of statutory authority and as being unclear or ambiguous. In objecting to this Rule, the Rules Review Commission found that the Commission for MH/DD/SAS lacks the authority to delegate the termination of certifications to LME-MCOs. The Rules Review Commission further found that it is unclear what the responsibilities and duties of the LME-MCOs would be in accordance with this Rule.

The Rules Review Commission also objected to 10A NCAC 27H .0207 finding that the Commission for MH/DD/SAS lacks the statutory authority to specify the requirements of the evaluation report. The Rules Review Commission also found that the Commission for MH/DD/SAS lacks the statutory authority to limit a recommendation by a forensic evaluator for a full evaluation at the Pre-Trial Evaluation Center only if the defendant is charged with a felony.

Please respond to this letter in accordance with the provisions of G.S. 150B-21.12. If you have any questions regarding the Rule Review Commission's action, please let me know.

Sincerely,



Amber C. May
Commission Counsel



STATE OF NORTH CAROLINA
OFFICE OF ADMINISTRATIVE HEARINGS

Mailing address:
6714 Mail Service Center
Raleigh, NC 27699-6714

Street address:
1711 New Hope Church Rd
Raleigh, NC 27609-6285

January 19, 2017

Via Email Only: Denise.Baker@dhhs.nc.gov
Denise Baker, Rulemaking Coordinator
State Human Resources Commission
3004 Mail Service Center
Raleigh, NC 27608

Re: 10A NCAC 27G .670 2 and 27H .0201, .0202, .0203, .0204, .0205, .0206, and .0207

Dear Ms. Baker:

At its meeting this morning, the Rules Review Commission extended the period of review for the above-captioned rules in accordance with G.S. 150B-21.10. They did so in response to a request from the rulemaking coordinator to extend the period in order to allow the agency an opportunity to review and approve the technical changes, as well as address potential objections regarding the proposed rules.

Pursuant to G.S. 150B-21.13, when the Commission extends the period of review, it is required to approve or object to rules or call a public hearing on the same within 70 days after the date of the extension - in this case, within 70 days after January 19, 2017.

If you have any questions regarding the Commission's action, please let me know.

Sincerely,

Amber May
Commission Counsel

Administration
919/431-3000
fax: 919/431-3100

Rules Division
919/431-3000
fax: 919/431-3104

Judges and
Assistants
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Rules Review
Commission
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Civil Rights
Division
919/431-3036
fax: 919/431-3103

Burgos, Alexander N

To: May, Amber Cronk
Subject: RE: Request for Extension of Review

From: Baker, Denise
Sent: Friday, January 13, 2017 4:47 PM
To: May, Amber Cronk <amber.may@oah.nc.gov>
Subject: Request for Extension of Review

Hi Amber –

We are requesting an extension for the period of review regarding the following rules: 10A NCAC 27G .6702 and 10A NCAC 27H Section .0200 filed December 16, 2016 for review at the January 19, 2017 RRC meeting. This will allow the Commission for MH/DD/SAS opportunity to review and approve the technical changes as well as address potential objections regarding the proposed rules. The next regularly scheduled meeting of the Commission for MH/DD/SAS is February 23, 2017.

Thank you for your consideration of this request.

Denise

W. Denise Baker, M.A., L.P.A., Esq.
Team Leader, Division Affairs Team
Division of MH/DD/SAS
North Carolina Department of Health and Human Services

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REQUEST FOR TECHNICAL CHANGE

AGENCY: Commission for Mental Health, Developmental Disabilities and Substance Abuse Services

RULE CITATION: All Rules

DEADLINE FOR RECEIPT: Friday, January 13, 2017

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:

On the individual forms for all of the Rules, please include the typed name and title in Box 11.

Please format all Rules in accordance with 26 NCAC 02C .0108, specifically, please ensure that the Rules have 1.5 line spacing.

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

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: Commission for MH/DD/SAS

RULE CITATION: Rules 10A NCAC 27H .0202, .0203, .0204 and .0207

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:

In January of 2014, the Commission for Mental Health, Developmental Disabilities and Substance Abuse Services (Commission for MH/DD/SAS) submitted eight temporary Rules pursuant to Session Law 2013-18. This Session Law amended N.C.G.S. 15A-1002 and gave the Commission for MH/DD/SAS the authority to require completion of training requirements necessary to be certified as a forensic evaluator and also require completion of continuing education.

On January 31, 2014, the RRC reviewed the filed temporary Rules at a special meeting. At that time, the RRC “objected to Rules 10A NCAC 27H .0202, .0203, .0204, and .0207, finding the Commission for MH/DD/SAS lacks the authority to set employment requirements for individuals and set the requirements of the evaluation report.”¹ The RRC also objected to Rule .0204 as ambiguous.

On December 16, 2016, the Commission for MH/DD/SAS submitted the same eight Rules for review by the RRC at their January 2017 meeting. These Rules contain similar, if not identical language to that objected to in 2014. The statutory authority cited has not changed and the specific statutes cited have not been changed since 2013. As such, Staff is recommending objection to Rules 10A NCAC .0202, .0203, .0204 and .0207 for lack of statutory authority.

¹ Amanda Reeder to Dr. Greg Olley, January 31, 2014

In addition to objecting for the above reasons, the RRC also objected to all eight of the Rules submitted as they “did not meet the requirements for temporary rules set forth in G.S. 150B-21.1(a2).” As the Rules currently submitted for review are permanent Rules, this is not at issue. Staff has provided this history solely for informational purposes.

Provided below is a side by side comparison of the Rules that were previously objected to in 2014 and the Rules submitted for RRC review at their January 2017 meeting. Specifically, the highlighted language is the language at issue.

Rule 10A NCAC 27H .0202

Rule 10A NCAC 27H .0202 was objected to in 2014 as the RRC found that the Commission for MH/DD/SAS lacked the statutory authority to set employment requirements for individuals. It is Staff’s opinion that this is a continuing issue as no additional authority has been cited to require that forensic evaluators be employed by or under contract with an LME-MCO.

2014	2017
For the purposes of Rules .0201 through .0207 of this Section the following terms shall have the meanings indicated:	For the purposes of Rules .0201 through .0207 of this Section <u>Section</u> , the following terms shall have the meanings indicated:
(1) "Forensic Evaluation" means as a local examination ordered by the court to determine if the defendant has the capacity to proceed to trial, does not have the capacity to proceed to trial, or needs further treatment at an inpatient facility or further evaluation at the Pre-Trial Evaluation Center.	(1) "Forensic Evaluation" means as a local examination ordered by the court to determine if the defendant has the capacity to proceed to trial, does not have the capacity to proceed to trial, or needs further treatment at an inpatient facility or further evaluation at the Pre-Trial Evaluation Center.
(2) "Pre-Trial Evaluation Center" means the forensic unit at Dorothea Dix Hospital.	(2) "Pre-Trial Evaluation Center" means the forensic unit at Dorothea Dix Hospital.
(3) "Licensed Clinician" means the same as defined in Rule 10A NCAC 27G .0104.	(3) "Licensed Clinician" means the same as defined in Rule 10A NCAC 27G .0104.
(3) "Qualified Mental Health Professional" means the same as defined in 10A NCAC 27G .0104(e) contained in Division publication, Rules for Mental Health, Developmental Disabilities and Substance Abuse Facilities and Services, APSM 40-2. "Local Certified Forensic Evaluator" means a Licensed Clinician who:	(3) "Qualified Mental Health Professional" means the same as defined in 10A NCAC 27G .0104(e) contained in Division publication, Rules for Mental Health, Developmental Disabilities and Substance Abuse Facilities and Services, APSM 40-2. "Local Certified Forensic Evaluator" means a Licensed Clinician who:
(a) has completed the training for certification and annual training seminars described in Rule .0204 of this Section; and	(a) has completed the training for certification and annual training seminars described in Rule .0204 of this Section; and
(b) is employed by, or under contract with a Local Management Entity-Managed Care Organization as a Certified Forensic Evaluator.	(b) is employed by, or under contract with, an LME-MCO as a Certified Forensic Evaluator.
(c) Individuals who were certified	(4) "Qualified Substance Abuse

<p>under these rules and procedures prior to December 1, 2013 but who do not meet the requirements in Rule.0203(a)(1) of this Section continue to be eligible for certification provided they meet all other requirements.</p> <p>(4) “Qualified Substance Abuse Professional” means the same as defined in 10A NCAC 27G .0104(c) contained in Division publication, Rules for Mental Health, Developmental Disabilities and Substance Abuse Facilities and Services, APSM 40 2. “Pre-Trial Evaluation Center” means the Forensic Services Unit so designated by the Secretary of the North Carolina Department of Health and Human Services.</p>	<p>Professional” means the same as defined in 10A NCAC 27G .0104(c) contained in Division publication, Rules for Mental Health, Developmental Disabilities and Substance Abuse Facilities and Services, APSM 40 2. “Pre-Trial Evaluation Center” means the Forensic Services Unit so designated by the Secretary of the North Carolina Department of Health and Human Services.</p>
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Rule 10A NCAC 27H .0203

Rule 10A NCAC 27H .0203 was objected to in 2014 as the RRC found that the Commission for MH/DD/SAS lacked the statutory authority to set employment requirements for individuals. It is Staff’s opinion that this is a continuing issue as no additional authority has been cited to require that forensic evaluators to be an employee of, or work under contract with, an LME-MCO.

2014	2017
<p>(a) To be eligible for training as a <u>certified</u> forensic evaluator the applicant shall:</p> <p>(1) be a qualified mental health professional or a qualified substance abuse professional; be a licensed clinician pursuant to 10A NACA 27G .0104</p> <p>(2) be an employee of, or work under contract with, an area program; LME-MCO; and</p> <p>(3) have his name submitted as an applicant for the training and <u>certification</u> registration program by the area LME-MCO director.</p> <p>(b) The area program LME-MCO shall verify that the applicant <u>is licensed and has expertise with the population for whom the applicant will provide Forensic Evaluations.</u> meets the appropriate standards for a qualified mental health professional that are referenced in Rule .0202 of this Section.</p> <p>(c) Individuals who were certified under these Rules and</p>	<p>(a) To be eligible for training as a <u>local certified</u> forensic evaluator the applicant shall:</p> <p>(1) be a qualified mental health professional or a qualified substance abuse professional; <u>Licensed Clinician;</u></p> <p>(2) <u>be an employee of, or work under contract with, an area program; LME-MCO; and</u></p> <p>(3) have his name submitted as an applicant for the training and <u>registration</u> certification program by the area LME-MCO director.</p> <p>(b) The area program LME-MCO shall verify that the applicant <u>is a Licensed Clinician, or meets the requirements of Rule .0201(c) of this Section, and has expertise with the mental health, developmental disabilities, or substance abuse (mh/dd/sa) population for whom the applicant will provide forensic evaluations.</u> meets the appropriate standards for a qualified mental health professional that are referenced in Rule .0202 of this Section.</p>

<u>procedures prior to December 1, 2013 but who do not meet the requirements in Subparagraph (a)(1) of this Rule continue to be eligible for certification provided they meet all other requirements.</u>	
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Rule 10A NCAC 27H .0204

Rule 10A NCAC 27H .0204 was objected to in 2014 as the RRC found that the Commission for MH/DD/SAS lacked the statutory authority to set requirements of a forensic evaluator's report. The 2017 version of the Rule references "components of reports to be submitted" as a training topic in (a)(3). While Staff does believe that they have the statutory authority to promulgate rules regarding the preparation of written reports, Staff does not believe, and the RRC has previously found, that they have the authority to promulgate rules regarding the contents of the report. It is Staff's opinion that it is not clear that the training topic contained within (a)(3) will be limited to the preparation and not the contents of the report; therefore, it is Staff's opinion that the Commission for MH/DD/SAS continues to lack the statutory authority regarding this topic.

The RRC also objected for ambiguity as the Rule did not give any guidance as to "what body grants the certification, the initial training topics, that an examination will be required for the certification, and the hours required for both initial certification and the continuing education requirements."

Staff does believe the ambiguity issues that were previously objected to have been addressed; therefore, Staff is not recommending objection to 10A NCAC 27H .0204 based upon ambiguity.

2014	2017
<p>(a) The applicant shall successfully complete training covering procedure, techniques, and reporting that is provided by the Mental Health Section of the Division in order to be registered <u>certified</u> as a forensic evaluator; and</p> <p>(b) The applicant shall successfully complete annual continuing education module(s) provided by the Pre-Trial Evaluation Center designated by the Secretary of the North Carolina Department of Health and Human Services.</p> <p>(c) Continuing Education Module topics may include:</p> <ol style="list-style-type: none"> (1) <u>evaluation skills training to enhance the skills acquired through the initial Basic Forensic Evaluator Training;</u> (2) <u>changes in current laws and current practices; and</u> (3) <u>evaluation of mh/dd/sa populations.</u> 	<p>(a) The applicant shall successfully complete <u>a minimum of six hours of initial training covering procedure, techniques, and reporting that is provided by the Mental Health Section of the</u> Division in order to be registered <u>certified</u> as a <u>local</u> forensic evaluator. <u>The initial training shall include:</u></p> <ol style="list-style-type: none"> (1) <u>current laws and practices including the role of the local forensic evaluator in the capacity to proceed evaluation process;</u> (2) <u>procedures for conducting interviews including evaluation for the presence of mh/dd/sa disorders, or other relevant conditions;</u> (3) <u>components of reports to be submitted to the court;</u> (4) <u>process for reporting findings to the court; and</u> (5) <u>an examination at the conclusion of the training which assesses comprehension of the training material and an understanding of the duties of a local forensic evaluator.</u>

	<p>(b) <u>Each local forensic evaluator is required to complete a minimum of four hours of required annual continuing education modules provided by the Pre-Trial Evaluation Center by December 31 of each calendar year.</u></p> <p>(c) <u>Local forensic evaluators shall be exempt from the continuing education requirement in the calendar year in which they are first certified and shall complete the annual continuing education requirement by December 31 of the following year and each calendar year thereafter.</u></p> <p>(d) <u>Continuing education module topics may include:</u></p> <p style="padding-left: 40px;">(1) <u>evaluation skills training to enhance skills acquired through the initial local forensic evaluator training;</u></p> <p style="padding-left: 40px;">(2) <u>changes in existing laws and current practices; and</u></p> <p style="padding-left: 40px;">(3) <u>evaluation of mh/dd/sa populations.</u></p>
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Rule 10A NCAC 27H .0207

Rule 10A NCAC 27H .0207 was objected to in 2014 as the RRC found that the Commission for MH/DD/SAS lacked the statutory authority to set requirements of a forensic evaluator's report to the Court. It is Staff's opinion that this is a continuing issue as 15A-1002 sets forth the parameters of the report. Specifically, 15A-1002(b)(1a) states that the report will describe "the present state of the defendant's mental health." Also, 15A-1002(d) states that the report is to include a statement regarding "any conclusion as to whether the defendant has or lacks capacity to proceed."

Further, other than allowing the Commission for MH/DD/SAS to require forensic evaluators to attend continuing education seminars on preparing written reports, there is no mention of "reports" in 143B-147. As there is no additional authority cited, it is Staff's continuing opinion that the Commission for MH/DD/SAS lacks the statutory authority to specify the requirements of the evaluation report.

2014	2017
<p>When ordered by the court, the <u>Certified Forensic Evaluator</u> shall conduct a forensic evaluation or examination of the defendant and <u>report to the court</u> in accordance with G.S. 15A-1002, whether: <u>shall submit a report that:</u></p> <p style="padding-left: 40px;">(1) there is sufficient question of mental or emotional disorder to recommend inpatient evaluation or treatment; or</p> <p style="padding-left: 40px;">(2) there is sufficient information to recommend that the defendant does have capacity to proceed and further evaluation is not indicated.</p> <p>(1) <u>is limited to evaluation of capacity to proceed to trial and does not address criminal responsibility, legal insanity, or diminished capacity;</u></p> <p>(2) <u>indicates the opinion of the evaluator either that the</u></p>	<p>When ordered by the court, the <u>local certified forensic evaluator</u> shall conduct a forensic evaluation or a screening examination of the defendant and report to the court in accordance with G.S. 15A-1002 whether: <u>shall submit a report that:</u></p> <p style="padding-left: 40px;">(1) there is sufficient question of mental or emotional disorder to recommend inpatient evaluation or treatment; or is limited to evaluation of capacity to proceed to trial and does not address criminal responsibility, legal insanity, or diminished capacity;</p> <p style="padding-left: 40px;">(2) there is sufficient information to recommend that the defendant does have capacity to proceed and further evaluation is not indicated. <u>indicates the</u></p>

<p>defendant clearly has the capacity to proceed, or that the defendant clearly lacks the capacity to proceed, or that the evaluator is unable to form a clear opinion;</p> <p>(3) recommends a full evaluation at the Pre-Trial Evaluation Center if the evaluator is unable to form a clear opinion and the defendant is charged with any felony; and</p> <p>(4) addresses the likelihood that the defendant will gain capacity if in the opinion of the evaluator the defendant clearly lacks the capacity to proceed.</p>	<p>opinion of the evaluator that the defendant clearly has the capacity to proceed, that the defendant clearly lacks the capacity to proceed, or that the evaluator is unable to form a clear opinion;</p> <p>(3) addresses the likelihood that the defendant will gain capacity if, in the opinion of the evaluator, the defendant clearly lacks the capacity to proceed; and</p> <p>(4) recommends a full evaluation at the Pre-Trial Evaluation Center if the evaluator is unable to form a clear opinion and the defendant is charged with a felony.</p>
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In accordance with the RRC's previous decision in 2014, Staff is recommending objection to 10A NCAC .0202, .0203, .0204, and .0207 as lacking statutory authority for the Commission for MH/DD/SAS to set employment requirements for individuals and set the requirements of the evaluation report.

§ 15A-1002. Determination of incapacity to proceed; evidence; temporary commitment; temporary orders.

(a) The question of the capacity of the defendant to proceed may be raised at any time on motion by the prosecutor, the defendant, the defense counsel, or the court. The motion shall detail the specific conduct that leads the moving party to question the defendant's capacity to proceed.

(b) (1) When the capacity of the defendant to proceed is questioned, the court shall hold a hearing to determine the defendant's capacity to proceed. If an examination is ordered pursuant to subdivision (1a) or (2) of this subsection, the hearing shall be held after the examination. Reasonable notice shall be given to the defendant and prosecutor, and the State and the defendant may introduce evidence.

(1a) 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 for Mental Health, Developmental Disabilities, and Substance Abuse Services,** to examine the defendant and return a written report describing the present state of the defendant's mental health. Reports so prepared are admissible at the hearing. The court may call any expert so appointed to testify at the hearing with or without the request of either party.

(2) At any time in the case of a defendant charged with a felony, the court may order the defendant to a State facility for the mentally ill for observation and treatment for the period, not to exceed 60 days, necessary to determine the defendant's capacity to proceed. If a defendant is ordered to a State facility without first having an examination pursuant to subsection (b)(1a) of this section, the judge shall make a finding that an examination pursuant to this subsection would be more appropriate to determine the defendant's capacity. The sheriff shall return the defendant to the county when notified that the evaluation has been completed. The director of the facility shall direct his report on defendant's condition to the defense attorney and to the clerk of superior court, who shall bring it to the attention of the court. The report is admissible at the hearing.

(3) Repealed by Session Laws 1989, c. 486, s. 1.

(4) A presiding district or superior court judge of this State who orders an examination pursuant to subdivision (1a) or (2) of this subsection shall order the release of relevant confidential information to the examiner, including, but not limited to, the warrant or indictment, arrest records, the law enforcement incident report, the defendant's criminal record, jail records, any prior medical and mental health records of the defendant, and any school records of the defendant after providing the defendant with reasonable notice and an opportunity to be heard and then determining that the information is relevant and necessary to the hearing of the matter before the court and unavailable from any other source. This subdivision shall not be construed to relieve any court of its duty to conduct hearings and make findings required under relevant federal law before ordering the release of any private medical or mental health information or records related to substance abuse or HIV status or treatment. The records may be surrendered to the court for in camera review if surrender is necessary to make the required determinations. The records shall be withheld from public inspection and, except as provided in this subdivision, may be examined only by order of the court.

(b1) The order of the court shall contain findings of fact to support its determination of the defendant's capacity to proceed. The parties may stipulate that the defendant is capable of proceeding but shall not be allowed to stipulate that the defendant lacks capacity to proceed. If the court concludes that the defendant lacks capacity to proceed, proceedings for involuntary civil commitment under Chapter 122C of the General Statutes may be instituted on the basis of the report in either the county where the criminal proceedings are pending or, if the defendant is hospitalized, in the county in which the defendant is hospitalized.

(b2) Reports made to the court pursuant to this section shall be completed and provided to the court as follows:

- (1) The report in a case of a defendant charged with a misdemeanor shall be completed and provided to the court no later than 10 days following the completion of the examination for a defendant who was in custody at the time the examination order was entered and no later than 20 days following the completion of the examination for a defendant who was not in custody at the time the examination order was entered.
- (2) The report in the case of a defendant charged with a felony shall be completed and provided to the court no later than 30 days following the completion of the examination.
- (3) In cases where the defendant challenges the determination made by the court-ordered examiner or the State facility and the court orders an independent psychiatric examination, that examination and report to the court must be completed within 60 days of the entry of the order by the court.

The court may, for good cause shown, extend the time for the provision of the report to the court for up to 30 additional days. The court may renew an extension of time for an additional 30 days upon request of the State or the defendant prior to the expiration of the previous extension. In no case shall the court grant extensions totaling more than 120 days beyond the time periods otherwise provided in this subsection.

(c) The court may make appropriate temporary orders for the confinement or security of the defendant pending the hearing or ruling of the court on the question of the capacity of the defendant to proceed.

(d) Any report made to the court pursuant to this section shall be forwarded to the clerk of superior court in a sealed envelope addressed to the attention of a presiding judge, with a covering statement to the clerk of the fact of the examination of the defendant and any conclusion as to whether the defendant has or lacks capacity to proceed. If the defendant is being held in the custody of the sheriff, the clerk shall send a copy of the covering statement to the sheriff. The sheriff and any persons employed by the sheriff shall maintain the copy of the covering statement as a confidential record. A copy of the full report shall be forwarded to defense counsel, or to the defendant if he is not represented by counsel. If the question of the defendant's capacity to proceed is raised at any time, a copy of the full report must be forwarded to the district attorney, as provided in G.S. 122C-54(b). Until such report becomes a public record, the full report to the court shall be kept under such conditions as are directed by the court, and its contents shall not be revealed except as directed by the court. Any report made to the court pursuant to this section shall not be a public record unless introduced into evidence. (1973, c. 1286, s. 1; 1975, c. 166, ss. 20, 27; 1977, cc. 25, 860; 1979, 2nd Sess., c. 1313; 1985, c. 588; c. 589, s. 9; 1989, c. 486, s. 1; 1991, c. 636, s. 19(b); 1995, c. 299, s. 1; 1995 (Reg. Sess., 1996), c. 742, ss. 13, 14; 2013-18, s. 1.)

Part 4. Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services.

§ 143B-147. Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services – creation, powers and duties.

(a) There is hereby created the Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services of the Department of Health and Human Services with the power and duty to adopt, amend and repeal rules to be followed in the conduct of State and local mental health, developmental disabilities, substance abuse programs including education, prevention, intervention, screening, assessment, referral, detoxification, treatment, rehabilitation, continuing care, emergency services, case management, and other related services. Such rules shall be designed to promote the amelioration or elimination of the mental illness, developmental disabilities, or substance abuse problems of the citizens of this State. Rules establishing standards for certification of child care centers providing Developmental Day programs are excluded from this section and shall be adopted by the Child Care Commission under G.S. 110-88. The Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services shall have the authority:

(1) To adopt rules regarding the

- a. Admission, including the designation of regions, treatment, and professional care of individuals admitted to a facility operated under the authority of G.S. 122C-181(a), that is now or may be established;
- b. Operation of education, prevention, intervention, treatment, rehabilitation and other related services as provided by area mental health, developmental disabilities, and substance abuse authorities, county programs, and all providers of public services under Part 4 of Article 4 of Chapter 122C of the General Statutes;
- c. Hearings and appeals of area mental health, developmental disabilities, and substance abuse authorities as provided for in Part 4 of Article 4 of Chapter 122C of the General Statutes; and
- d and e. Repealed by Session Laws 2001-437, s. 1.21(a), effective July 1, 2002.
- f. Standards of public services for mental health, developmental disabilities, and substance abuse services.

(2) To adopt rules for the licensing of facilities for the mentally ill, developmentally disabled, and substance abusers, under Article 2 of Chapter 122C of the General Statutes. These rules shall include all of the following:

- a. Standards for the use of electronic supervision devices during client sleep hours for facilities licensed under 10A NCAC 27G. 1700 or any related or subsequent regulations setting licensing standards for such facilities.
- b. Personnel requirements for facilities licensed under 10A NCAC 27G. 1700, or any related or subsequent regulations setting licensing standards for such facilities, when continuous electronic supervision that meets the standards established under sub-subdivision a. of this of this subdivision is present.

(3) To advise the Secretary of the Department of Health and Human Services regarding the need for, provision and coordination of education, prevention, intervention, treatment, rehabilitation and other related services in the areas of:

- a. Mental illness and mental health,

- b. Developmental disabilities,
 - c. Substance abuse.
 - d. Repealed by Session Laws 2001-437, s. 1.21(a), effective July 1, 2002.
- (4) To review and advise the Secretary of the Department of Health and Human Services regarding all State plans required by federal or State law and to recommend to the Secretary any changes it thinks necessary in those plans; provided, however, for the purposes of meeting State plan requirements under federal or State law, the Department of Health and Human Services is designated as the single State agency responsible for administration of plans involving mental health, developmental disabilities, and substance abuse services.
- (5) To adopt rules relating to the registration and control of the manufacture, distribution, security, and dispensing of controlled substances as provided by G.S. 90-100.
- (6) To adopt rules to establish the professional requirements for staff of licensed facilities for the mentally ill, developmentally disabled, and substance abusers. Such rules may require that one or more, but not all staff of a facility be either licensed or certified. If a facility has only one professional staff, such rules may require that that individual be licensed or certified. Such rules may include the recognition of professional certification boards for those professions not licensed or certified under other provisions of the General Statutes provided that the professional certification board evaluates applicants on a basis which protects the public health, safety or welfare.
- (7) Except where rule making authority is assigned under that Article to the Secretary of the Department of Health and Human Services, to adopt rules to implement Article 3 of Chapter 122C of the General Statutes.
- (8) To adopt rules specifying procedures for waiver of rules adopted by the Commission.
- (9) To adopt rules establishing a process for non-Medicaid eligible clients to appeal to the Division of Mental Health, Developmental Disabilities, and Substance Abuse Services of the Department of Health and Human Services decisions made by an area authority or county program affecting the client. The purpose of the appeal process is to ensure that mental health, developmental disabilities, and substance abuse services are delivered within available resources, to provide an additional level of review independent of the area authority or county program to ensure appropriate application of and compliance with applicable statutes and rules, and to provide additional opportunities for the area authority or county program to resolve the underlying complaint. Upon receipt of a written request by the non-Medicaid eligible client, the Division shall review the decision of the area authority or county program and shall advise the requesting client and the area authority or county program as to the Division's findings and the bases therefor. Notwithstanding Chapter 150B of the General Statutes, the Division's findings are not a final agency decision for purposes of that Chapter. Upon receipt of the Division's findings, the area authority or county program shall issue a final decision based on those findings. Nothing in this subdivision shall be construed to create an entitlement to mental health, developmental disabilities, and substance abuse services.

(10) The Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services 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:

- 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.

(b) All rules hereby adopted shall be consistent with the laws of this State and not inconsistent with the management responsibilities of the Secretary of the Department of Health and Human Services provided by this Chapter and the Executive Organization Act of 1973.

(c) All rules and regulations pertaining to the delivery of services and licensing of facilities heretofore adopted by the Commission for Mental Health and Mental Retardation Services, controlled substances rules and regulations adopted by the North Carolina Drug Commission, and all rules and regulations adopted by the Commission for Mental Health, Mental Retardation and Substance Abuse Services shall remain in full force and effect unless and until repealed or superseded by action of the Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services.

(d) All rules adopted by the Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services shall be enforced by the Department of Health and Human Services.

(e) The Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services shall by December 1, 2013, adopt guidelines for treatment of individuals who are involuntarily committed following a determination of incapacity to proceed and a referral pursuant to G.S. 15A-1003. The guidelines shall require a treatment plan that uses best practices in an effort to restore the individual's capacity to proceed in the criminal matter. (1973, ch. 476, s. 129; 1977, c. 568, ss. 2, 3; c. 679, s. 1; 1981, c. 51, s. 1; 1983, c. 718, s. 5; 1983 (Reg. Sess., 1984), c. 1110, s. 6; 1985, c. 589, ss. 47-54; 1985 (Reg. Sess., 1986), c. 863, s. 33; 1989, c. 625, s. 23; 1991, c. 309, s. 1; 1993, c. 396, s. 6; 1997-443, s. 11A.118(a); 2001-437, s. 1.21(a); 2005-276, s. 10.35(a); 2009-187, s. 1; 2009-490, s. 6; 2013-18, ss. 9, 10.)

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: Commission for MH/DD/SAS

RULE CITATION: 10A NCAC 27H .0202

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 is recommending objection to Item (4), as it is unclear what the "Pre-Trial Evaluation Center" is, how the Secretary is to make the determination, and how the public will be made aware of what this is. It is important to note that pursuant to 10A NCAC 27H .0204, this center will be responsible for providing continuing education and maintaining records pursuant to 10A NCAC 27H .0205. Also of importance, pursuant to 10A NCAC 27H .0207, this center will be where individuals are referred if the forensic evaluator is unable to form an opinion as to an individual's capacity to proceed to trial. As such, it appears as though the pre-trial evaluation center serves an essential role to both the certified forensic evaluators and to the public, but it is not clear in the Rule what this Center is.

REQUEST FOR TECHNICAL CHANGE

AGENCY: Commission for Mental Health, Developmental Disabilities and Substance Abuse Services

RULE CITATION: 10A NCAC 27H .0202

DEADLINE FOR RECEIPT: Friday, January 13, 2017

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 5, what is a "local" examination? Please delete or define.

In Item (1), what is meant by "needs further evaluation at the Pre-Trial Evaluation Center"? Is this a recommendation by the evaluator that the court order this?

In (3)(b), as this is the first time that you have used "LME-MCO" in this Section, please say "Local Management Entity-Managed Care Organization (LME-MCO)" to indicate what the LME-MCO stands for.

In Item 4, how will people know which unit has been designated? Is this information available on your website? What is the process? Is there a cross-reference available?

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

Amber Cronk May
Commission Counsel

Date submitted to agency: January 5, 2017

1 **10A NCAC 27H .0202 is amended with changes as published in 31:01 NCR 11 as follows:**

2
3 **10A NCAC 27H .0202 DEFINITIONS**

4 For the purposes of Rules .0201 through .0207 of this ~~Section~~ Section, the following terms shall have the meanings

5 indicated:

- 6 (1) "Forensic Evaluation" means ~~an a local~~ an a local examination ordered by the court to determine if the defendant
- 7 has the capacity to proceed to trial, ~~does not have the capacity to proceed to trial, or needs further~~
- 8 ~~treatment at an inpatient facility or~~ further evaluation at the Pre-Trial Evaluation Center.
- 9 (2) ~~"Pre-Trial Evaluation Center" means the forensic unit at Dorothea Dix Hospital.~~ "Licensed Clinician"
- 10 means the same as defined in Rule 10A NCAC 27G .0104.
- 11 (3) ~~"Qualified Mental Health Professional" means the same as defined in 10A NCAC 27G .0104(e)~~
- 12 ~~contained in Division publication, Rules for Mental Health, Developmental Disabilities and Substance~~
- 13 ~~Abuse Facilities and Services, APSM 40-2.~~ "Local Certified Forensic Evaluator" means a Licensed
- 14 Clinician who:
- 15 (a) has completed the training for certification and annual training seminars described
- 16 in
- 17 Rule .0204 of this Section; and
- 18 (b) is employed by, or under contract with, an LME-MCO as a Certified Forensic
- 19 Evaluator.
- 20 (4) ~~"Qualified Substance Abuse Professional" means the same as defined in 10A NCAC 27G .0104(e)~~
- 21 ~~contained in Division publication, Rules for Mental Health, Developmental Disabilities and Substance~~
- 22 ~~Abuse Facilities and Services, APSM 40-2.~~ "Pre-Trial Evaluation Center" means the Forensic
- 23 Services Unit so designated by the Secretary of the North Carolina Department of Health and Human
- 24 Services.

25
26 *History Note:* *Authority G.S. 15A-1002; 143B-147;*

27 *Eff. July 1, 1982;*

28 *Amended Eff. [] February 1, 2017; January 1, 1996; May 1, 1990.*

29

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: Commission for MH/DD/SAS

RULE CITATION: 10A NCAC 27H .0203

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 is recommending objection to Paragraph (a) of this Rule, as it contains a reference to an “applicant,” but there is no information contained within the Rules submitted to say what the “applicant” will need to do to apply to be certified as a forensic evaluator. It is unclear to whom the applicant will apply, what the application process is, and what exactly the timing of the training requirements is.

Further, staff is recommending objection to Paragraph (b) of this Rule as it is unclear how the LME-MCO is to determine whether the evaluator has expertise.

REQUEST FOR TECHNICAL CHANGE

AGENCY: Commission for Mental Health, Developmental Disabilities and Substance Abuse Services

RULE CITATION: 10A NCAC 27H .0203

DEADLINE FOR RECEIPT: Friday, January 13, 2017

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 (b), what is the population? Individuals facing criminal charges or is this based upon diagnosis?

In (b), is this really requiring that the LME-MCO verify that the applicant is a licensed clinician or otherwise meets the requirements, or is the intent actually that the applicant provide some proof that meets these qualifications?

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

1 **10A NCAC 27H .0203 is amended with changes as published in 31:01 NCR 11 as follows:**

2
3 **10A NCAC 27H .0203 ELIGIBILITY FOR TRAINING**

4 (a) To be eligible for training as a local certified forensic evaluator the applicant shall:

- 5 (1) be a ~~qualified mental health professional or a qualified substance abuse professional;~~ Licensed
6 Clinician;
7 (2) be an employee of, or work under contract with, an ~~area program;~~ LME-MCO; and
8 (3) have his name submitted as an applicant for the training and ~~registration~~ certification program by the
9 ~~area~~ LME-MCO director.

10 (b) The ~~area program~~ LME-MCO shall verify that the applicant is a Licensed Clinician, or meets the requirements of
11 Rule .0201(c) of this Section, and has expertise with the mental health, developmental disabilities, or substance abuse
12 (mh/dd/sa) population for whom the applicant will provide forensic evaluations. meets the appropriate standards for a
13 qualified mental health professional that are referenced in Rule .0202 of this Section.

14
15 *History Note:* Authority G.S. 15A-1002; 143B-147;
16 Eff. July 1, 1982;
17 Amended Eff. [] February 1, 2017; January 1, 1996; May 1, 1990.
18
19

REQUEST FOR TECHNICAL CHANGE

AGENCY: Commission for Mental Health, Developmental Disabilities and Substance Abuse Services

RULE CITATION: 10A NCAC 27H .0204

DEADLINE FOR RECEIPT: Friday, January 13, 2017

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) and (b), please delete "at a minimum."

In (b), please delete the second "required"

In (b), please track the language of the statute and say "annual continuing education seminars", rather than "annual continuing education modules" for purposes of clarity.

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

10A NCAC 27H .0204 is amended with changes as published in 31:01 NCR 11 as follows:

10A NCAC 27H .0204 TRAINING AND REGISTRATION CERTIFICATION

(a) The applicant shall ~~successfully~~ complete a minimum of six hours of initial training ~~covering procedure, techniques, and reporting that is provided by the Mental Health Section of the Division in order to be registered~~ certified as a local forensic evaluator. The initial training shall include:

- (1) current laws and practices including the role of the local forensic evaluator in the capacity to proceed evaluation process;
- (2) procedures for conducting interviews including evaluation for the presence of mh/dd/sa disorders, or other relevant conditions;
- (3) components of reports to be submitted to the court;
- (4) process for reporting findings to the court; and
- (5) an examination at the conclusion of the training which assesses comprehension of the training material and an understanding of the duties of a local forensic evaluator.

(b) Each local forensic evaluator is required to complete a minimum of four hours of required annual continuing education modules provided by the Pre-Trial Evaluation Center by December 31 of each calendar year.

(c) Local forensic evaluators shall be exempt from the continuing education requirement in the calendar year in which they are first certified and shall complete the annual continuing education requirement by December 31 of the following year and each calendar year thereafter.

(d) Continuing education module topics may include:

- (1) evaluation skills training to enhance skills acquired through the initial local forensic evaluator training;
- (2) changes in existing laws and current practices; and
- (3) evaluation of mh/dd/sa populations.

History Note: Authority G.S. 15A-1002; 143B-147;
Eff. July 1, 1982;
Amended Eff. [] February 1, 2017; May 1, 1990.

RRC Staff Opinion

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AGENCY: Commission for MH/DD/SAS

RULE CITATION: 10A NCAC 27H .0205

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:

As the RRC has previously determined that the Commission for MH/DD/SAS lacks the statutory authority to set employment requirements, specifically a requirement that evaluators be employed by or contract with an LME-MCO, and Staff is recommending continued objection to this provision, it is Staff's opinion that it is also beyond their statutory authority to promulgate Rules regarding LME-MCOs oversight of forensic evaluators. It is noted that there is a specific reference to a forensic evaluator being employed by an LME-MCO in (b) of this Rule.

Further, Staff is recommending objection as being unclear or ambiguous in the following instances:

- In (a), it is unclear what is meant by "sufficient."
- In (b), it is unclear as to how expertise of an evaluator is to be conveyed to the LME-MCO. Rule .0205 indicates that it will be self-reporting by the evaluator; however, Rule .0203 indicates that the LME-MCO is required to determine the expertise of the evaluator. It is unclear whether these two provisions conflict with each other or whether they are different processes.
- In (e), it is unclear as to what information is required to be maintained in the log.

REQUEST FOR TECHNICAL CHANGE

AGENCY: Commission for Mental Health, Developmental Disabilities and Substance Abuse Services

RULE CITATION: 10A NCAC 27H .0205

DEADLINE FOR RECEIPT: Friday, January 13, 2017

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:

Please delete or define "local" throughout the Rule.

In (d), please change "which" to "that"

In (f), please delete or define "potentially"

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

Amber Cronk May
Commission Counsel

Date submitted to agency: January 5, 2017

10A NCAC 27H .0205 is amended with changes as published in 31:01 NCR 11 as follow:

10A NCAC 27H .0205 ~~PERIOD OF REGISTRATION~~ LME-MCO OVERSIGHT OF FORENSIC EVALUATOR PROGRAM

Registration shall continue to be valid unless registration is terminated as specified in Rule .0206 of this Section.

(a) The LME-MCO shall ensure there is a sufficient number of local certified forensic evaluators to conduct forensic evaluations in its catchment area.

(b) Each LME-MCO shall maintain a list of local certified forensic evaluators who are currently employed or contracted by the LME-MCO that includes the mh/dd/sa populations for which each evaluator has reported having expertise to conduct forensic evaluations.

(c) The LME-MCO shall verify that each local forensic evaluator meets the requirements set forth in Rules .0203 and .0204 of this Section.

(d) The LME-MCO shall notify the Pre-Trial Evaluation Center of any changes which would result in termination of certification per Rule .0206 of this Section.

(e) The LME-MCO shall maintain a log of local forensic evaluations done in each county within its catchment area and provide that log to the Pre-Trial Evaluation Center on a monthly basis.

(f) The LME-MCO shall identify potentially qualified individuals to enroll in training for certification to replace any evaluator whose certification has been terminated or to increase the number of evaluators due to increased numbers of evaluations logged.

(g) The LME-MCO shall establish a mechanism to ensure a quality management process is included in the LME-MCO's Quality Improvement System for oversight of the local certified forensic evaluators in its catchment area that includes:

(1) identifying an individual who is a local certified forensic evaluator who will monitor the overall quality and outcomes of the reports of forensic evaluations completed by other local forensic evaluators; and

(2) establishing a procedure for responding to questions or concerns related to the quality of reports of forensic evaluations completed by local certified forensic evaluators in its catchment area.

*History Note: Authority G.S. 15A-1002; 143B-147;
Eff. July 1, 1982;
Amended Eff. [] February 1, 2017; May 1, 1990.*

RRC Staff Opinion

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AGENCY: Commission for MH/DD/SAS

RULE CITATION: 10A NCAC 27H .0206

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 is recommending objection to this Rule as lacking statutory authority to delegate the termination of certifications to the LME-MCOs.

As the RRC has previously determined that the Commission for MH/DD/SAS lacks the statutory authority to set employment requirements, specifically a requirement that evaluators be employed by or contract with an LME-MCO, and Staff is recommending continued objection to this provision, it is Staff's opinion that it is also beyond their statutory authority to give termination responsibilities to the LME/MCOs.

Further, if the Commission for MH/DD/SAS does have authority to allow a LME-MCO to essentially overtake responsibility of certifications, it is unclear what the responsibilities and duties of the LME-MCO will be in terminating the certifications.

REQUEST FOR TECHNICAL CHANGE

AGENCY: Commission for Mental Health, Developmental Disabilities and Substance Abuse Services

RULE CITATION: 10A NCAC 27H .0206

DEADLINE FOR RECEIPT: Friday, January 13, 2017

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 Item (1), please change "he" to "he or she"

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

1 **10A NCAC 27H .0206 is amended with changes as published in 31:01 NCR 11 as follows:**

2
3 **10A NCAC 27H .0206 TERMINATION OF REGISTRATION CERTIFICATION**

4 ~~A Forensic Evaluator Registration will be declared~~ The LME-MCO shall declare a forensic evaluator certification void
5 when:

- 6 (1) the evaluator notifies the LME-MCO in writing that he no longer ~~desires~~ wishes to be ~~registered~~
7 certified; and perform the duties required by an evaluator;
8 (2) the evaluator is no longer employed by, or under contract with, an ~~area program;~~ LME-MCO;
9 (3) the evaluator no longer meets the ~~registration requirements.~~ eligibility requirements set forth in Rule
10 .0203 of this Section;
11 (4) the evaluator fails to complete annual continuing education modules as set forth in Rule .0204 of this
12 Section; or
13 (5) the evaluator fails to perform any of the duties described in Rule .0207 of this Section.
14

15 *History Note:* *Authority G.S. 15A-1002; 143B-147;*
16 *Eff. July 1, 1982;*
17 *Amended Eff. [] February 1, 2017; May 1, 1990.*
18

RRC Staff Opinion

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AGENCY: Commission for MH/DD/SAS

RULE CITATION: 10A NCAC 27H .0207

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 is recommending objection to this Rule as it is Staff's opinion that the Commission for MH/DD/SAS lacks the statutory authority to limit a recommendation by a forensic evaluator for a full evaluation at the Pre-Trial Evaluation Center *only* if the defendant is charged with a felony.

REQUEST FOR TECHNICAL CHANGE

AGENCY: Commission for Mental Health, Developmental Disabilities and Substance Abuse Services

RULE CITATION: 10A NCAC 27H .0207

DEADLINE FOR RECEIPT: Friday, January 13, 2017

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 Items (2), (3), and (4), please delete or define "clearly" and "clear"

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

Amber Cronk May
Commission Counsel

Date submitted to agency: January 5, 2017

1 **10A NCAC 27H .0207 is amended with changes as published in 31:01 NCR 11 as follows:**

2
3 **10A NCAC 27H .0207 DUTIES OF ~~REGISTERED~~ CERTIFIED FORENSIC EVALUATOR**

4 When ordered by the court, the local certified forensic evaluator shall conduct a forensic evaluation or a ~~screening~~
5 examination of the defendant and ~~report to the court~~ in accordance with G.S. 15A-1002 ~~whether:~~ shall submit a report
6 that:

- 7 (1) ~~there is sufficient question of mental or emotional disorder to recommend inpatient evaluation or~~
8 ~~treatment; or is limited to evaluation of capacity to proceed to trial and does not address criminal~~
9 ~~responsibility, legal insanity, or diminished capacity;~~
10 (2) ~~there is sufficient information to recommend that the defendant does have capacity to proceed and~~
11 ~~further evaluation is not indicated, indicates the opinion of the evaluator that the defendant clearly has~~
12 ~~the capacity to proceed, that the defendant clearly lacks the capacity to proceed, or that the evaluator is~~
13 ~~unable to form a clear opinion;~~
14 (3) ~~addresses the likelihood that the defendant will gain capacity if, in the opinion of the evaluator, the~~
15 ~~defendant clearly lacks the capacity to proceed; and~~
16 (4) ~~recommends a full evaluation at the Pre-Trial Evaluation Center if the evaluator is unable to form a~~
17 ~~clear opinion and the defendant is charged with a felony.~~

18
19 *History Note:* Authority G.S. 15A-1002; 143B-147;
20 Eff. July 1, 1982;
21 Amended Eff. [] February 1, 2017; May 1, 1990.
22