



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

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September 12, 2017

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

Sent via electronic mail to: [amber.may@oah.nc.gov](mailto:amber.may@oah.nc.gov)

Re: September 11, 2017 Letter from Richard P. Leissner, Jr., General Counsel, Trillium Health Resources

Dear Ms. May:

I have reviewed the letter, dated September 11, 2017, submitted by Mr. Richard P. Leissner, Jr., General Counsel, Trillium Health Resources, objecting to Rules 10A NCAC 27H Section .0200 as proposed for adoption by the Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services (Commission).

With few exceptions, Mr. Leissner restates the opinions expressed in his June 9, 2017 letter regarding Rules 10A NCAC 27H Section .0200. Concerns previously raised by Mr. Leissner (June 2017) and addressed by the Commission (June 2017) are listed below. As such, the Commission reiterates its response to the following.

1. Whether the proposed rules, as drafted, are reasonably necessary to implement or interpret an enactment of the General Assembly (i.e., S.L. 2013-18, Section 9);
2. Whether the LME-MCO is permitted to provide services directly or employ forensic evaluators;
3. The reference to the Pre-Trial Evaluation Center in Rule .0202;
4. The use of the term "local certified forensic evaluator";
5. Whether the requirements in Rule .0205 place an affirmative obligation on the LME-MCOs to provide forensic evaluators despite the limitation imposed by G.S. 122C-2 (i.e., within available resources);
6. The use of the phrase "to meet the demand"; and
7. The fact that Rule .0206 speaks to both eligibility requirements for training as a forensic evaluator as well as the initial and continuing education requirements.

In addition to the Commission's June 2017 letter, a copy of which is attached, please consider the following response to Mr. Leissner's September 11, 2017 letter.

As previously noted, all Directors of the Local Management Entities-Managed Care Organizations (LME-MCOs) in North Carolina, including Ms. Leza Wainwright, CEO, Trillium Health Resources, received notice of the proposed amendment to Rules 10A NCAC 27G .6702, *Operations*, and 10A NCAC 27H Sec. .0200, *Training and Registration of Forensic Evaluators*, (referred to collectively below as forensic evaluator rules) via

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email notification July 1, 2016. Despite this notice, no representative of Trillium organization, including its attorney and CEO, submitted comments on the forensic evaluator rules. Instead, Mr. Leissner is now attempting to object to rules to which his organization provided no objection, or comment, when notice of their adoption was provided. In addition, his primary communication has been, and remains, with the RRC Counsel.

Mr. Leissner again asserts the revisions made by the Commission to Rules 10A NCAC 27H Section .0200 constitute a substantial change requiring republication. The Commission reiterates its response to this assertion. Namely, G.S. 150B-21.12(c) requires that “when an agency changes a rule in response to an objection by the [Rules Review] Commission, the Commission must determine whether the change satisfies the Commission's objection. If it does, the Commission must approve the rule. If it does not, the Commission must send the agency a written statement of the Commission's continued objection and the reason for the continued objection. The Commission must also determine whether the change is substantial. In making this determination, the Commission shall use the standards set forth in G.S. 150B-21.2(g). If the change is substantial, the revised rule shall be published and reviewed in accordance with the procedure set forth in G.S. 150B-21.1(a3) and (b).

G.S. 150B-21.2(g) states “an adopted rule differs substantially from a proposed rule if it does one or more of the following:

- (1) Affects the interests of persons who, based on the proposed text of the rule published in the North Carolina Register, could not reasonably have determined that the rule would affect their interests.
- (2) Addresses a subject matter or an issue that is not addressed in the proposed text of the rule.
- (3) Produces an effect that could not reasonably have been expected based on the proposed text of the rule”.

The adopted rules do not differ substantially from the rules as proposed for adoption. Rather, the language of the rules has been refined in response to requests for technical corrections made by the RRC’s Counsel and the statutory authority has been further clarified in response to the objections raised by the RRC. Despite those changes, the rules as adopted do not differ substantially from those published for the reasons set forth below.

1. The scope of persons affected by the rules as adopted remains the same as that provided in the rules as published. Specifically, the rules as published and as adopted deal with licensed clinicians who conduct capacity evaluations pursuant to a contract, or employment, with the LME-MCO and submit written reports to the court regarding the evaluated individual’s capacity to proceed to trial. Both the published and adopted rules identify the duties of the forensic evaluators and those of the LME-MCO. Therefore, the interests of those persons impacted by the rules as published and as adopted remains unchanged. As such, the impact to those persons (i.e., forensic evaluators) and entities (i.e., LME-MCO) could not only be reasonably determined during publication but also remains constant.
2. The subject matter of the rules as published and as adopted remains unchanged. Both deal with capacity evaluations, submission of written reports regarding capacity to the court, eligibility criteria, training and certification requirements, LME-MCO oversight of the forensic evaluator process, criteria for terminating an evaluator’s certification, the duties of the forensic evaluator, and report requirements. No new subject matter has been introduced.
3. The effect of the adopted rules is identical to that provided in the rules as published. The only difference in the rules is that the language of the rules has been refined in response to requests for technical corrections made by the RRC’s Counsel and the statutory authority for the language of the rules has been further clarified. Otherwise, the overall requirements of the rules remain unchanged.

Given that there are no substantial differences between the published and adopted rules, republication is not required.

The proposed rules are consistent with the Commission's authority to write rule as cited in the history note provided for each rule. Mr. Leissner again challenges the Commission's authority to require that the forensic evaluators be employees or contractors of the LME-MCO as set forth in Rule 27H .0202. His previous challenge appeared based upon the mistaken belief that the Commission was attempting to define the LME-MCO as a facility. He also cited S.L. 2001-437 and provided a link to another LME-MCO's website as a source of support for his objection. However, Mr. Leissner acknowledges that, even under the Medicaid Waiver, the LME-MCO is still required to "contract with public and private providers for service delivery". While he challenges the option of the LME-MCO providing services directly, he fails to acknowledge that despite S.L. 2001-437, the LME-MCOs retains several functions as an area authority and G.S. 122C-141 is still the law. In his September 2017 letter, Mr. Leissner inadvertently provides support for the oversight and monitoring responsibilities of the LME-MCO the rules require. Specifically, while Mr. Leissner expresses concern about the "impact of a forensic evaluator's withdrawal from an LME-MCO's catchment area", he also states that "all forensic evaluations are ordered through an LME-MCO". This is consistent with the Commission's previous assertions as well as its statutory authority as it relates to the LME-MCO's monitoring and oversight of forensic evaluator with whom it contracts.

As it relates to Rule .0206, the Commission did not consider that "withdrawal from an LME-MCO's catchment area" would automatically render the forensic evaluator's certification void as Mr. Leissner opines. Rather, across the State, there are instances of multiple providers who contract with more than one LME-MCO within and outside of the catchment area where the provider is specifically located. Furthermore, the Commission does not intend that self-reporting alone suffices in documenting the forensic evaluator's credentials. Instead, as per Rule .0205(c), the LME-MCO must verify that the evaluator meets the requirements set forth in Rule.

Finally, the Commission believes it has acted within its statutory authority in adopting the forensic evaluator rules and is working diligently to address the objections raised by the RRC. Please do not hesitate to contact me should you have questions regarding this correspondence.

Sincerely,



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

Attachment

c: Scott Stroud  
Lisa Corbett  
William Walton  
Richard P. Leissner, Jr.  
Commission for MH/DD/SAS  
Jason E. Vogler