



September 11, 2017

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

Re: Forensic Evaluator Proposed Rules

Dear Ms. May:

I am General Counsel for Trillium Health Resources ("Trillium"), the Local Management Entity/Managed Care Organization managing the provision of State and Medicaid reimbursable MH/DD/SAS services in a 25 county catchment in Eastern North Carolina. On behalf of Trillium, I previously submitted objections to the proposed forensic evaluator rules, 10A NCAC 27H.0202-.0207, by letter dated June 9, 2017. On June 19, 2017, the Rules Review Commission ("RRC") notified the Commission for MH/DD/SAS ("Commission") of the RRC's objections to the proposed forensic evaluator rules, as amended in response to the RRC's March, 2017 objections. The RRC did not object to .0207 in its June 19, 2017 letter. Trillium hereby submits its objections to the proposed forensic evaluator rules, 10A NCAC 27H.0202-.0206, which proposed rules were submitted to the RRC on or about September 1, 2017.

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

- (1) The rule is within the authority delegated to the agency by the General Assembly.
- (2) It is clear and unambiguous
- (3) It is reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency. The Commission shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed.
- (4) It was adopted in accordance with Part 2 of Article 2A of Chapter 150B of the General Statutes of North Carolina.

Trillium submits to the RRC that the revisions made by the Commission to the proposed rules 10A NCAC 27H.0202-.0206, since posting them for public comment in July, 2016, constitute a substantial change pursuant to G.S. §150B-21.12(c) and §150B-21.2(g) and so must be republished and subjected to additional public comment. Additionally, Trillium does not believe the proposed rules, as drafted, are reasonably necessary to implement or interpret an enactment of the General Assembly - in this case Session Law 2013-18, Section 9, which states in pertinent part:

The Commission for [MH/DD/SAS] shall develop and adopt rules **by December 1, 2013**, to require forensic evaluators appointed pursuant to G.S. 15A-1002(b) to meet the following requirements: (1) Complete all training requirements necessary to be credentialed as a certified forensic evaluator [and] (2) Attend annual continuing education seminars that provide continuing education and training in conducting forensic evaluations and screening examinations of defendants to determine capacity to proceed and in preparing written reports required by law.¹

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

Trillium objects to 10A NCAC 27H.0202 on the grounds that the revisions made in response to the RRC's June 19, 2017 objections still do not adequately address that forensic evaluators be employed with the LME/MCO. Trillium objects to the very reference that a forensic evaluator may be employed by an LME/MCO and is at a loss as to why the Commission insists on retaining the language. Though the Commission did insert a reference to N.C.G.S. §122C-141(a), which does state that an LME/MCO may provide direct service if permitted by the Secretary, the insertion still does not account for Session Law 2001-437. Pursuant to Session Law 2001-437, the General Assembly required LME/MCOs participating in the 1915b/c Waiver to divest themselves of direct services and contract with public and private providers for service delivery. Trillium participates in the 1915 b/c Medicaid Waiver, as is conceded in the Commission's letter of June 5, 2017. See also State of North Carolina NC MHD/IDD/SAS Health Plan Renewal, April 1, 2013, p. 10-12 (available at: https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/Downloads/NC_Cardinal-Innovations_NC-02.pdf)

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

Furthermore, the Commission has not adequately addressed the RRC's March 2017 concern regarding the "Pre-Trial Evaluation Center," though the RRC did not renew said objection in its June 19 response. Moreover, Trillium renews its objection to the addition of the phrase "through the Local Management Entity-Managed Care Organization." While the phrase may be well-intentioned, it appears to unnecessarily subject the LMEs to the subpoena and contempt powers of the courts when the LME/MCO is unable to arrange for a forensic evaluation due to budgetary constraints or other matters outside of the LME/MCO's control. This clearly was not the mandate of Session Law 2013-18, Section 9 and is outside the purview of the Commission's authority.

Trillium objects to 10A NCAC 27H.0203, on the following grounds. As Trillium objected previously, the phrase "local certified forensic evaluator" is vague and ambiguous; while Trillium believes a local certified forensic evaluator is one that is eligible to provide evaluations because he or she has a contract with the specific LME/MCO through which an evaluation is ordered, this is not clear in the rule as drafted. The continued reference to the forensic evaluator possibly being an employee of the LME/MCO is objectionable for the reasons set forth hereinabove. Furthermore, the Commission did not address the RRC's objection that the Commission lacked statutory authority to require LME-MCOs to submit and verify information; nor did the Commission address how the LME-MCO will determine whether the evaluator has experience as set forth in Paragraph (b).

Trillium objects to 10A NCAC 27H.0204, as follows. The phrase "local certified forensic evaluator" is vague and ambiguous.

Trillium objects to 10A NCAC 27H.0205 by first reiterating its prior objections, to wit: Currently, the LME/MCO is required in its contract with the Division of MH/DD/SAS, to contract with a network of providers (that would presumably include forensic evaluators) but only within available resources, as stated in 122C-2. .0205(a) puts an affirmative obligation on the LME/MCOs to "ensure there are local certified forensic evaluators to conduct forensic evaluations to meet the demand for forensic evaluations ... in its catchment area," regardless of available resources. Additionally, the provision "to meet the demand" remains ambiguous and there is nothing in the rule to suggest the LME/MCOs' performance is contingent on funding from the Division for maintaining a network of forensic evaluators. At its heart, .0205 attempts to set network adequacy standards for forensic evaluators that simply do not exist anywhere in contract, statute, rule or regulation and that are more stringent than standards applied to providers of other types of services. Trillium renews its objection to any reference that a forensic evaluator may be an employee of an LME-MCO. In addition, the Commission simply did not address the RRC's June objections that the Commission lacked statutory authority to promulgate rules regarding LME-MCO oversight of forensic evaluators and the conflict in language between .0205 and .0203. Moreover, the Rule in no way accounts for the contingency that the Division may not be able to certify a sufficient number of forensic evaluators; all of the accountability improperly falls to the LME-MCO.

Trillium objects to 10A NCAC 27H.0206, as follows. Previously, Trillium objected because the Commission revised .0206(2) to reference .0203(a); however, .0203(a) sets forth the criteria a forensic evaluator must be to be eligible for training. To the extent such criteria exist at all, .0204, and not .0203, sets forth the criteria a forensic evaluator must meet to perform evaluations pursuant to a court order. The Rule also does not address the impact of a forensic evaluator's withdrawal from an LME-MCO's catchment area, which presumably would require the voiding of a forensic evaluator's certification, as all forensic evaluations are ordered through an LME-MCO. And while the Commission did insert a provision to address when an LME-MCO will know whether an individual is no longer a licensed clinician, Trillium objects because self-reporting is not an adequate way to ensure all certified forensic evaluators are licensed.

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

Sincerely,

Richard P. Leissner, Jr.

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