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December 13, 2017

Via Email Only

Members of the Rules Review Commission and
Ms. Abigail M. Hammond, Commission Counsel

Re: Comments to 10A NCAC 13J

Dear Commissioners and Ms. Hammond:

My name is Bethany Burgon and I am counsel to the North Carolina Department of Health and Human Services, Division of Health Service Regulation (“DHSR”) and the Medical Care Commission (“MCC”). I am writing in response to the written comments to the proposed 10A NCAC 13J Home Care Rules. The MCC believes that it has not exceeded the authority delegated by the General Assembly and that the proposed rules comply with the requirements of N.C.G.S. § 150B. The MCC believes that the proposed rules are clear and unambiguous; however, the written comments in relation to 10A NCAC 13J .1110 and part of the comments in relation to 10A NCAC 13J .0901(7) are not opposed, so long as the Rules Review Commission (“RRC”) is in agreement. The MCC opposes the written comments objecting to 10A NCAC 13J .0901(7), 10A NCAC 13J .1107(a) and 10A NCAC 13J .1110(g), and believes the proposed language for these rules should not be changed.

Comment from Pentec Health, Inc.

10A NCAC 13J .1110(c)

Kate Spencer on behalf of Pentec Health, Inc. (“Pentec”), has submitted a comment in relation to the wording used in 10A NCAC 13J .1110(c). Pentec expressed concern that the proposed change to the rule would unfairly cause a trained and licensed Registered Nurse (“R.N.”) to make five supervisory visits a year to supervise another R.N. providing care. The MCC took the concern under consideration, and changed 10A NCAC 13 J. 1110(c) to: “In-home caregivers subject to Paragraph (a) of this Rule shall be subject to the method and frequency of supervision defined in the agency’s policy. The health care practitioner shall supervise an in-home caregiver subject to Paragraph (b) of this Rule by making a supervisory visit to each client’s place of residence every ninety days.” The MCC does not oppose this comment and the change has addressed Pentec’s concern, and

supervisory visits will only be required for in home caregivers “who are not subject to occupational licensing laws [...]” Pentec has communicated that the above revision has satisfied its concern.

Comments from SembraCare, Inc.

Richard Rutherford representing SembraCare, Inc (“Sembra”), submitted comments in relation to 10A NCAC 13J .0901, 10A NCAC 13J .1107(a), and 10A NCAC 13J .1110(g).

The MCC notes that these comments were not submitted in accordance with 26 NCAC 05 .0103, which requires that all comments be submitted by 5pm on the fifth business day prior to the meeting of the RRC. Mr. Rutherford also failed to send a copy of his comments to the rulemaking coordinator for the MCC.

10 NCAC 13J .0901(7)

Notwithstanding the above, Sembra first objects to the removal of the word “totally” before “dependent” within the definition of “extensive assistance,” found in 10 NCAC 13J .0901(7). The MCC does not oppose this comment and has addressed this concern in a technical change to the rule by placing the word “totally” back into the definition of extensive assistance.

Sembra next objects, to the replacement of the phrase “weight bearing support” with the phrase “hands on assistance,” along with the removal of the example “such as guiding or maneuvering of limbs” from 10 NCAC 13J .0901(7). The MCC opposes the changes suggested by Sembra in this Paragraph. The decision to make these changes to 10 NCAC 13J .0901(7) were based in part on DHSR staff communications with the Division of Medical Assistance (“DMA”). DHSR staff worked with staff from DMA to bring the language of 10 NCAC 13J .0901(7) in line with the terminology in the DMA Rules in an effort to comply with N.C.G.S. 150B-19.1(d) by creating consistent rules between the overlapping agencies. The replacement of the phrase “weight bearing support” with the phrase “hands on assistance,” along with the removal of the example “such as guiding or maneuvering of limbs” from 10 NCAC 13J .0901(7) broadens the scope of the definition.

The MCC uses the term “hands on assistance” to more accurately describe individuals who could qualify for extensive assistance. Many individuals who require extensive assistance with two or more of their activities of daily living (“ADLs”) are not weight bearing. Likewise, the example “such as guiding or maneuvering of limbs” has been removed from 10 NCAC 13J .0901(7) because it does not encompass individuals who are para or quadriplegic, or have otherwise lost the use of their limbs through paralysis. If an individual requires extensive assistance with two or more ADLs, the general practice within home care agencies is to employ an individual listed on the Nurse Aide Registry for their care. If an individual meets the requirements found in 10 NCAC 13J .0901 Paragraph (a), (b), or (c), they would need the assistance of an individual listed on the Nurse Aide

Registry who has received some level of formal education in providing the care, rather than a personal care aide.

10A NCAC 13J .1107(a)

Sembra's second comment involves 10 NCAC 13J .1107(a) and states that the term "designee" is too vague, within the requirement stating that "a care plan must be signed by and dated by a registered nurse and the client or designee." The MCC does not oppose this comment and has addressed this concern by changing the word "designee" to "client's responsible party." This terminology clarifies who, besides the patient, can sign the care plan. The client's responsible party may sign the care plan whether or not the client is deemed incompetent.

10A NCAC 13J .1110(g)

Sembra's third comment objects to the removal of the words "continuously" and "on-site" from 10A NCAC 13J .1110(g). The MCC opposes the changes suggested in this comment. The MCC removed the word "continuously" from 10A NCAC 13J .1110(g), because the term "continuously" was vague and could not be defined. The MCC made the change based on the suggestion of the staff attorneys for the RRC. The MCC removed the word "on-site" because there is no need for the supervising R.N. to be on-site at the nursing agency during the hours care is being provided. The supervising R.N.'s are required to be available to respond and supervise during the hours that care is being provided by the personal care aide, but that does not require that the supervising R.N. be physically located on-site.

Fiscal Note

Sembra's fourth comment alleges that the MCC failed to obtain a fiscal note regarding the 10A NCAC 13J proposed rule changes. Pursuant to N.C.G.S. § 150B 21.2, the MCC obtained a fiscal note to accompany the proposed rule changes to 10A NCAC 13J. The fiscal note was posted on the DHSR website on June 14, 2017. On February 7, 2017, the Office of State Budget Management ("OSBM"), found that there would be little to no impact and no substantial impact from the proposed rule changes to 10A NCAC 13J .0901, .1004, .1007, .1107, .1110, .1202, .1402 and .1502. The MCC made minor revisions to the proposed revised rule language in 10A NCAC 13J, and OSBM again determined there would be no substantial fiscal impact on April 26, 2017. Sembra has failed to offer any data or evidence to support its claim that the proposed rule changes would result in costing the State of North Carolina millions of dollars.

Authority

Sembra's last comment states that, "The proposed regulation changes are beyond the scope of the power granted by the General Assembly to review regulations and determine their being necessary or not. These are substantive new regulatory terms, not

technical changes.” In response, the MCC notes that N.C.G.S. § 150B-21.3A mandates periodic review of rules and dictates the review process. N.C.G.S. § 131-140 gives the MCC the authority to adopt and amend the Home Care Rules.

The MCC requests that you approve the proposed 10A NCAC 13J Home Care Rules. I will be attending the December 14, 2017 RRC Meeting, along with DHSR staff, to answer any questions. Do not hesitate to contact me if you have questions before the RRC Meeting.

Thank you for your consideration in the matter.

Sincerely,

A handwritten signature in black ink, reading "Bethany A. Burgon", followed by a long horizontal line extending to the right.

Bethany A. Burgon
Assistant Attorney General

cc via email only: rutherford@sembracare.com, susan.barrett@saul.com
Dr. John Fagg, Chair, N.C. Medical Care Commission
Mark Payne, Director, Division of Health Service Regulation