

REQUEST FOR TECHNICAL CHANGE

AGENCY: Social Services Commission

RULE CITATION: 10A NCAC 10 .0308

DEADLINE FOR RECEIPT: Thursday, February 8, 2018

PLEASE NOTE: This request may extend to 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 our office to inquire concerning the staff recommendation.

In reviewing this Rule, the staff recommends the following technical changes be made:

Just so I understand, when would a recipient of a subsidy not be the owner or the operator?

What is an "operator"? Do you mean an "operator" as defined by 10ANCAC 09 .0102(32)? If so, has this definition been incorporated by reference elsewhere in your Rules?

In (a)(1), by "with intent to deceive", do you mean "knowingly"? I know that "knowingly" has been used in companion rules. Are you using this phrase to track G.S. 110-107?

In (a)(1), lines 7-8 speak to false statements or representations and failure to disclose material facts, but lines 9-11 speak to "representation, omission, or submission." Should lines 7-8 include submission in some fashion? I do think that these should be consistent with each other. This language strays from 110-107. Was that intentional?

Given 110-107, what is your authority to essentially expand the definition of "fraudulent misrepresentation" in (a)(2)? I don't necessarily question your authority to implement (a)(2) as you seem to have extremely broad authority for this, but (a)(2) doesn't seem as though it would fall into the "fraudulent misrepresentation" bucket of 110-107. Perhaps some different formatting would address this issue.

Regarding (c), I don't see that there is a "presumption" to rebut set forth in (a)(1). What is the overall intent of (c)? I assume that it is to say that an operator can submit evidence to show that a false statement was not provided or a material fact was not omitted, but how is this decision made to begin with? Is this something that is done solely based upon the records presented by the Operator? Does this provision go with Paragraph (n)?

Amber May
Commission Counsel
Date submitted to agency: January 25, 2018

In (d), all of the text here appears to have been deleted. Please correct the lettering throughout the Rule. Please note that this will affect some cross-references.

As a general question, (a) includes “or someone claiming to be an operator or recipient”, but (e), which I think should be (d) after renumbering, doesn’t contemplate that scenario. I understand this is language picked up from G.S. 110-107, but since this Rule goes to sanctions, and I don’t see any sanctions for these folks, is it necessary?

In (e), please add an introductory phrase “shall be as follows:” at the end.

Just so I understand, are the methods of repayment as referenced in (e)(1) through (3) the same as contained in Rule .0309 (d)?

In (e)(1), I assume that this is speaking to an operator who is also an owner? If so, please make that clear within the Rule as lines 22 and 23 refer to an “operator”, but line 24 refers to an “owner.”

I think that the directive is (e)(1) is actually intended to be to the operator, not the LPA or Division. As such, please consider revising as follows:

“Upon the first instance of fraudulent misrepresentation by an [owner,] operator, [the local purchasing agency or the Division shall require the [owner to] he or she shall repay the amount of child care subsidy for which he or she was ineligible to receive, and the owner shall be permanently ineligible to participate in the Subsidized Child Care Assistance Program.

Please note the same for (e)(2) and (e)(3).

In (e)(2), why have you added lines 33-35? This appears to be a substantial change as I don’t see that provision provided previously in the Rule either before or at the time of publication. If it is not a substantial change, I have some ambiguity concerns here – how is “gross negligence” determined”? If there is no gross negligence on the part of the owner, would a facility still be eligible under a different operator (assuming that the definition in 10A NCAC 09 .0102 applies)?

What is the intent of (f)? Please verify your cross-references.

Is (i) necessary? If it is necessary, when will this occur? An all-inclusive list is not necessary, but some guidance as to when this will happen would be helpful.

In (k), please check your cross-reference after any necessary renumbering.

What is the intent of (l)? Given (f), and the “notwithstanding” language, is this necessary? Also, by “guilty of misrepresentation pursuant to Subparagraph (d) of this Rule”, do you mean “guilty of misrepresentation

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under G.S. 110-107? If you determine this to be necessary, please consider combining (f) and (l) since they deal with the same issue.

In (n), what is meant by “notwithstanding the foregoing”? Is (n) intended to accompany (c)? They seem to say the same thing in very different ways. I will note that I find (n) to be more clear, notwithstanding the “notwithstanding” language.

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

Amber May
Commission Counsel
Date submitted to agency: January 25, 2018

1 10A NCAC 10 .0308 is readopted with changes as published in 32:02 NCR 57-58 as follows:

2
3 **10A NCAC 10 .0308 SANCTIONS AND APPEALS FOR FRAUDULENT MISREPRESENTATION**

4 (a) The local purchasing agency or the Division shall impose sanctions for fraudulent misrepresentation when a
5 person, whether an operator [~~operator, as defined in G.S. 110-86(7)~~] ~~provider~~ or recipient of child care subsidies, or
6 someone claiming to be a ~~provider~~ [an operator] an operator or recipient of child care subsidies, does the following:

7 (1) ~~With the~~ intent to deceive, makes a false statement or representation regarding a material fact, or
8 fails to disclose a material fact; [~~and~~] as

9 ~~(2) [(3)] As a result of the false statement or representation or the omission, representation, omission, or~~
10 ~~submission of inaccurate records, obtains, attempts to obtain, or continues to receive a child care~~
11 ~~subsidy for himself or herself or for another person. person; or~~

12 ~~[(2)] [With reckless disregard as to the accuracy of records, submits inaccurate records to the Department,~~
13 ~~Division, or local purchasing agency; and]~~

14 ~~(2) Has an error rate in excess of 10 percent.~~

15 (b) For purposes of this Rule, the following definitions shall apply:

16 (1) "Error rate" shall mean the correct monthly payment divided by the monthly payment paid. The
17 "correct monthly payment" shall mean the amount that should have been paid if the records
18 submitted had not contained any errors.

19 (2) "Error" shall mean that for each child the operator marks as present for a particular day on
20 attendance entered into the automated provider portal for purposes of payment from the Subsidized
21 Child Care Assistance Program:

22 (A) Neither the daily attendance records required to be kept in accordance with 10A NCAC 09
23 .0302(d)(3) and .1721(e)(6) nor the records of arrival and departure times required to be
24 kept in accordance with 10A NCAC 09 .0302(d)(4) and .1721(e)(6) show the child marked
25 present; or

26 (B) Either the daily attendance records required to be kept in accordance with 10A NCAC 09
27 .0302(d)(3) and .1721(e)(6) or the records of arrival and departure times required to be kept
28 in accordance with 10A NCAC 09 .0302(d)(4) and .1721(e)(6) show the child marked
29 absent.

30 (c) An operator may offer evidence to rebut the presumption of intent in accordance with Subparagraph (a)(1) of this
31 Rule or during the local appeal, if applicable.

32 (b) (d) [Upon the first instance of fraudulent misrepresentation by a recipient, the] The local purchasing agency [or
33 the Division] shall impose the following sanctions for fraudulent misrepresentation in addition to requiring [require]
34 the recipient to repay the amount of child care subsidy for which he or she [was] is ineligible to receive: [receive, and
35 the recipient shall be permanently ineligible to participate in the Subsidized Child Care Assistance Program.]

36 ~~(1) After the first incidence of fraudulent misrepresentation by a recipient, the recipient shall be~~
37 ~~ineligible to receive subsidized child care services until overpayment is recouped in full or the local~~

1 purchasing agency shall enter into a repayment agreement with the recipient if the recipient so
2 desires;

3 (2) After the second incidence of fraudulent misrepresentation by a recipient, the recipient shall be
4 ineligible to participate in the subsidized child care program for three months; and

5 (A) shall repay the overpayment in full; or

6 (B) the local purchasing agency shall enter into a new repayment agreement with the recipient
7 if the recipient so desires;

8 (3) After the third incidence of fraudulent misrepresentation by a recipient, the recipient shall be
9 permanently ineligible to participate in the subsidized child care program and shall repay the
10 overpayment in full.

11 (4) After the first incidence of fraudulent misrepresentation by a provider the provider shall not be paid
12 with subsidized child care funds for any new children who enroll in the provider's program for 12
13 months; and

14 (A) the provider shall repay the overpayment in full; or

15 (B) the local purchasing agency shall enter into a repayment agreement with the provider if the
16 provider so desires; and

17 (5) After the second incidence of fraudulent misrepresentation by a provider, the provider shall repay
18 the overpayment in full, shall be permanently ineligible to participate in the subsidized child care
19 program, and shall not be reimbursed for any services provided to children enrolled in the provider's
20 program from the date of notification of sanction in accordance with G.S. 150B-23(e).

21 **(e) (c) Sanctions for fraudulent misrepresentation:**

22 (1) Upon the first instance of fraudulent misrepresentation by an **owner, operator,** the local purchasing
23 agency or the Division shall require the **owner, operator** to repay the amount of child care subsidy
24 for which he or she was ineligible to receive, and the owner shall be permanently ineligible to
25 participate in the Subsidized Child Care Assistance Program. If a recipient or provider enters into
26 a repayment agreement and fails to comply with terms of that agreement: eligibility to participate in
27 the subsidized child care program shall cease until repayment is made in full or the recipient or
28 provider and the local purchasing agency agree to modify the repayment agreement.

29 (2) Upon the first instance of fraudulent misrepresentation by an operator who is not an owner, the local
30 purchasing agency or the Division shall require the owner to repay the amount of child care subsidy
31 for which he or she was ineligible to receive, and the operator who is not an owner shall be
32 permanently ineligible to participate in the Subsidized Child Care Assistance Program in the
33 capacity of an operator. If gross negligence on the part of an owner contributed to the fraudulent
34 misrepresentation of the operator who is not an owner, other facilities owned by the owner shall also
35 be ineligible to participate in the Subsidized Child Care Assistance Program.

36 (3) Upon the first instance of fraudulent misrepresentation by a recipient, the local purchasing agency
37 or the Division shall require the recipient to repay the amount of child care subsidy for which he or

1 she was ineligible to receive, and the recipient shall be permanently ineligible to participate in the
2 Subsidized Child Care Assistance Program.

3 ~~(d)~~ (f) Notwithstanding Paragraphs (b) and (c) Subparagraphs ~~(b)(4), (5), and (6)~~ of this Rule, the recipient or ~~provider~~
4 ~~operator~~ shall also be permanently ineligible to participate in the ~~subsidized child care program if:~~ Subsidized Child
5 Care Assistance Program if convicted of fraudulent misrepresentation pursuant to G.S. 110-107.

6 (1) ~~the total dollar amount of the fraudulent misrepresentation exceeds ten thousand dollars (\$10,000);~~
7 ~~or~~

8 (2) ~~the recipient or provider is convicted of fraudulent misrepresentation pursuant to G.S. 110-107.~~

9 ~~(e)~~ (g) Sanctions pursuant to this Rule shall be effective 10 days from the date of notice of the sanction. ~~Appeal of a~~
10 ~~sanction shall not stay the termination of payments under this Rule.~~

11 ~~[(f)]~~ (h) If an operator subject to a sanction under this Rule sells or transfers ownership of a child care facility, the
12 new owner, as defined in 10A NCAC 10 .0102(5), shall be prohibited from receiving funds through the Subsidy Child
13 Care Assistance Program for six months after the sale or transfer.] If an operator subject to a sanction purchases an
14 existing [a new] child care facility or opens [another] a new facility, the sanction in effect against the operator shall
15 attach to the new or existing child care facility.

16 ~~[(g)]~~ (i) The Division may require the local purchasing agency to investigate instances of suspected fraudulent
17 misrepresentation or suspected falsification by a recipient, or to assist the Division in investigating instances of
18 suspected fraudulent misrepresentation or falsification by an operator.

19 ~~[(h)]~~ (j) The local purchasing agency shall notify the Division in writing within five days of issuing any sanction.
20 Nothing in this Rule shall be construed as limiting child care services pursuant to 10A NCAC 10 .0906.

21 ~~(f)~~ ~~[(i)]~~ (k) A child care provider An operator may appeal any sanction imposed in Paragraph ~~(b)~~ (c) of this Rule
22 pursuant to 10A NCAC 10 .0311 and 10A NCAC ~~10 .0312,~~ 10 .0312; however, if the Division issues any sanction
23 pursuant to this Rule, the operator may appeal directly to the Division pursuant to 10A NCAC 10 .0312. A recipient
24 may appeal any sanction imposed in Paragraph ~~(b)~~ (c) of this Rule by following the appeals procedures pursuant to
25 G.S. 108A-79.

26 ~~(g)~~ ~~[(j)]~~ (l) When a court of competent jurisdiction finds a recipient or ~~provider~~ operator guilty of fraudulent
27 misrepresentation pursuant to Subparagraph ~~(d)(2)~~ (d) of this Rule, the sanction imposed is not subject to appeal under
28 this Section.

29 ~~[(k)]~~ ~~[(j)]~~ (m) Nothing in this Rule shall prevent the Division from initiating its own investigation of suspected
30 falsification, inaccurate records, or fraudulent misrepresentation related child care subsidy, and taking administrative
31 action as a result of its findings and conclusions.

32 (n) Notwithstanding the foregoing, if the Division issues a sanction in accordance with Paragraph (e) of this Rule,
33 prior to taking any action, the Division will notify the operator of the proposed action and the operator will have 15
34 days to provide information to the Division as to why the action should not be taken. This provision shall not apply to
35 sanctions issued by the local purchasing agency.

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37 *History Note: Authority G.S. 143B-153;*

- 1 *Eff. April 1, 2001;*
- 2 *Amended Eff. December 1, 2011;*
- 3 *Readopted Eff. February 1, 2018.*