

Burgos, Alexander N

From: Peaslee, William W
Sent: Wednesday, May 18, 2022 1:55 PM
To: Burgos, Alexander N
Cc: Piekaar, Misty L
Subject: DHHS SSC 10A NCAC 06T .0201 (Temporary) Staff Opinion
Attachments: Staff Opinion DHHS Social Services Commission 10A NCAC 06T .0201.doc

Good afternoon,

Attached please find the staff opinion recommending the RRC object to the above captioned rule.

William W. Peaslee
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1 10A NCAC 06T .0201 is amended under temporary procedures with changes as follows:

2
3 **SUBCHAPTER 06T – STATE ADULT DAY CARE FUNDING**

4
5 **SECTION .0200 - STATE ADULT DAY CARE FUND**

6
7 **10A NCAC 06T .0201 NATURE AND PURPOSE OF STATE ADULT DAY CARE FUND**

8 (a) The State adult day care fund shall be used for adult day care and adult day health services provided through
9 county departments of social services for the purpose of enabling people to remain in or return to their own homes.

10 (b) The fund shall be used to increase ~~state~~ State financial participation in the costs of this service.

11 (c) The ~~maximum~~ rate for the purchase of adult day care services ~~under contract~~ shall be set [by] at the local [entity
12 or county lead agency for planning and coordination] level ~~not exceed thirty three dollars and seven cents (\$33.07)~~
13 per day, per client. The rates shall reflect the factors as set forth in section 9A.3B.(b) in Session Law 2021-180,
14 amended-amending G.S. 143B-153(2a). The ~~maximum~~ rate for the purchase of adult day health services ~~under contract~~
15 shall be set [by] at the local [entity or county lead agency for planning and coordination] level ~~not exceed forty dollars~~
16 ~~(\$40.00)~~ per day, per client. The rates shall reflect the factors as set forth in section 9A.3B.(b) in Session Law 2021-
17 180, amended-amending G.S. 143B-153(2a). Adult day health services may only be purchased for an individual
18 following a preadmission health assessment as specified in 10A NCAC 06S .0204(c)(2)(A) and a determination that
19 the individual needs one or more services as set forth in 10A NCAC 06S .0402(a).

20 (d) The ~~maximum~~ reimbursement rate for transporting an adult day care client to an adult day care program or adult
21 day health program shall be set [by] at the local [entity or county lead agency for planning and coordination] level ~~not~~
22 ~~exceed one dollar and fifty cents (\$1.50)~~ for a one-way trip. The rates shall reflect the factors as set forth in section
23 9A.3B.(b) in Session Law 2021-180, amended-amending G.S. 143B-153(2a).

24 (e) For the purpose of this Rule, local level is defined as a county or its designee. County shall have the same meaning
25 as stated in G.S. 153A-1(3).

26
27 *History Note:* Authority G.S. 143B-153(2a); 143B-153(6); S.L. 1981, c. 4048; 1048; S.L. 2021-180; S.L. 2021-180
28 9A.3B.(b) and (c);

29 *Eff. January 1, 1982;*

30 *Temporary Amendment Eff. July 27, 1994 for a period of 180 days or until the permanent rule*
31 *becomes effective, whichever is sooner;*

32 *Amended Eff. December 1, 1994; July 1, 1990;*

33 *Temporary Amendment Eff. December 8, 1997;*

34 *Amended Eff. March 1, 2007; April 1, 2005; April 1, 1999;*

35 *Readopted Eff. November 1, 2019;*

36 *Temporary Amendment Eff. July 1, 2022.*

Burgos, Alexander N

From: Peaslee, William W
Sent: Monday, May 16, 2022 1:58 PM
To: Piekaar, Misty L
Cc: Burgos, Alexander N
Subject: RE: Temporary Rules 10A NCAC 06T .0201

Follow Up Flag: Follow up
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Misty,

I am not a subject matter expert and therefore have to solicit answers from the agencies with the expertise. I have asked the following question a few times and I still do not have an answer.

In the published version of 10A NCAC 06T .0201(c) and (d), the proposed temporary rule stated that the rates shall “be set by the local entities or each county lead agency...”

In the published version of 10A NCAC 06Q .0201(a) and (b), the proposed temporary rule stated that the rates shall “be set by the local entities or each county lead agency...”

Are there “local entities” other than the county lead agencies? Please answer this question.

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Sent: Monday, May 16, 2022 1:25 PM
To: Peaslee, William W <bill.peaslee@oah.nc.gov>
Cc: Burgos, Alexander N <alexander.burgos@oah.nc.gov>; Piekaar, Misty L <Misty.Piekaar@dhhs.nc.gov>
Subject: RE: Temporary Rules 10A NCAC 06T .0201

William-

Thank you for your email. We originally used all three (3) terms from the budget bill to be inclusive.

That being stated, please note we are proposing to define local level as attached which would include counties and their designees. A designee could be a county lead agency. If you look at rule 10A NCAC 71R .0104, we believe it adds some clarity as it reads, “Services funded by the Social Services Block Grant [10A NCAC 06T .0201 is funded by the referenced grant] shall be provided directly by the Department of Health and Human Services, its divisions or *their local counterparts*; or services shall be purchased from public or private providers by contracting in accordance with federal, state, and local regulations governing such purchases”. (emphasis added) However, the distinction is 10A NCAC 71R .0104 applies to 28 programs whereas this program isn’t as broad as 10A NCAC 71R .0104 and, so, we have not cross referenced it in this rule.

Please let us know if further questions.

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From: Peaslee, William W <bill.peaslee@oah.nc.gov>
Sent: Monday, May 16, 2022 9:26 AM
To: Piekaar, Misty L <Misty.Piekaar@dhhs.nc.gov>
Cc: Burgos, Alexander N <alexander.burgos@oah.nc.gov>
Subject: RE: Temporary Rules 10A NCAC 06T .0201

Great. Now that you have acknowledged that the county lead agencies are at the local level, are there any other entities at the “local level”? Do any cities have agencies?

If the answer is no, then the language in the proposed rule “set by the local entity or county lead agency” is redundant and ambiguous.

If the answer is yes, then please identify the local entities at the local level. Further, if there are multiple local entities within a county, including the county lead agencies, which agency has authority, or supremacy in the event of a conflict, to determine the rate?

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From: Piekaar, Misty L <Misty.Piekaar@dhhs.nc.gov>
Sent: Friday, May 13, 2022 12:08 PM
To: Peaslee, William W <bill.peaslee@oah.nc.gov>
Cc: Burgos, Alexander N <alexander.burgos@oah.nc.gov>; Piekaar, Misty L <Misty.Piekaar@dhhs.nc.gov>
Subject: RE: Temporary Rules 10A NCAC 06T .0201

William-

Yes, the Social Services Commission considers the county lead agency to be at the local level because the local level is the county for the purpose of this rule.

We propose to add the following language to the rule (but not include the proposed wording we offered yesterday). For the purpose of this Rule, local level is defined as the county or its designee. County shall have the same meaning as stated in G.S. 153A-1(3).

Please advise.

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From: Peaslee, William W <bill.peaslee@oah.nc.gov>
Sent: Thursday, May 12, 2022 5:30 PM
To: Piekaar, Misty L <Misty.Piekaar@dhhs.nc.gov>
Cc: Burgos, Alexander N <alexander.burgos@oah.nc.gov>
Subject: RE: Temporary Rules 10A NCAC 06T .0201

Thank you for your email.

G.S. 143B-153 (2a)b.3. states that the reimbursement rates shall be determined at the “local level”. Does the agency consider the “county lead agency” to be at the “local level”? If the answer is yes, then I would agree that the agency has the authority. If the answer is no, then the agency does not have authority to adopt a rule in which entities not at the “local level” determine the rates.

So far the agency has “abstained” from defining “local level”. In proposed temporary rule 10A NCAC 06T .0201, the agency makes a distinction between a “local entity” and “county lead agency” by the use of the word “or”.

Facially, a “local entity” is at the “local level”.

So I ask again, does the Social Services Commission consider a “county lead agency” to be at the “local level” pursuant to G.S. 143B-153(2a)b.3.?

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From: Piekaar, Misty L <Misty.Piekaar@dhhs.nc.gov>
Sent: Thursday, May 12, 2022 4:23 PM
To: Peaslee, William W <bill.peaslee@oah.nc.gov>
Cc: Burgos, Alexander N <alexander.burgos@oah.nc.gov>; Piekaar, Misty L <Misty.Piekaar@dhhs.nc.gov>
Subject: RE: Temporary Rules 10A NCAC 06T .0201

William-

Thank you for your email. The authority for this rule comes from NCGS 143B-153 due to its funding source and not from NCGS 143B-181.1(c).

If we added this proposed wording at the end of 10A NCAC 06T .0201, would it suffice?

For the purpose of this Rule, local level is defined as the county department of social services as stated in G.S. 108A-74(a)(3).

Thanks.

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From: Peaslee, William W <bill.peaslee@oah.nc.gov>
Sent: Thursday, May 12, 2022 3:19 PM
To: Piekaar, Misty L <Misty.Piekaar@dhhs.nc.gov>
Cc: Burgos, Alexander N <alexander.burgos@oah.nc.gov>
Subject: RE: Temporary Rules 10A NCAC 06T .0201

Thank you for your email. Regrading proposed temporary rule 10A NCAC 06T .0201:

Are “county Lead agencies” at the “local level”? If they are, then the agency has at least partially defined “local level”. If they are not, it would appear that the agency lacks the authority to allow county lead agencies to set the rate for the purchase of adult day care services.

If county lead service agencies are at the “local level”, are there any entities other than the “county lead agencies” at the local level? If the answer is no, then the language in the proposed rule “set by the local entity or county lead agency” is redundant and ambiguous. If the answer is yes, then the local entities at the local level need to be identified by way of definition. Further, if there are multiple local entities at the local level, including the county lead agencies, which agency has authority, or supremacy in the event of a conflict, to determine the rate?

If the agency abstains from interpreting or defining the phrases “local level” or “local entity”, isn’t the proposed rule facially ambiguous? If the agency won’t define them, how can the public? Does G.S. 143B-181.1(c) not give the Secretary the authority to define these terms? Do agencies not routinely “assume the intentions” of a law ratified by the legislature and signed into law by the Governor?

While I understand the agency’s desire for a statutory definition of “local level” and “local entities” (the latter of which was only used in a subtitle in S.L. 2021-180), doesn’t the use of these terms in an administrative rule without definition by the agency creates ambiguity precluded by G.S. 150B-21.9?

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Sent: Thursday, May 12, 2022 9:33 AM
To: Peaslee, William W <bill.peaslee@oah.nc.gov>
Cc: Burgos, Alexander N <alexander.burgos@oah.nc.gov>; Piekaar, Misty L <Misty.Piekaar@dhhs.nc.gov>
Subject: RE: Temporary Rules 10A NCAC 06Q .0201 and 10A NCAC 06T .0201

William-

It is a pleasure connecting with you. Thank you for your review. Please find attached the technical changes form in addition to the rules with changes. In the past, I used a different color

for my responses to technical changes to make it easier and hope that works for you as well. Please let me know if you have further questions and/or concerns.

Regarding the meeting, please note that it is our intent to have myself, Glenda Artis and Heather Carter personally present at the meeting, if that is fine. I know with social distancing, there is limited space but in the past, if the room was too crowded, we would wait outside (or the additional room) so I hope this will work for RRC.

Again, it is my pleasure and I look forward to working with you.

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From: Peaslee, William W <bill.peaslee@oah.nc.gov>
Sent: Monday, May 9, 2022 4:54 PM
To: Piekaar, Misty L <Misty.Piekaar@dhhs.nc.gov>
Cc: Burgos, Alexander N <alexander.burgos@oah.nc.gov>
Subject: Temporary Rules 10A NCAC 06Q .0201 and 10A NCAC 06T .0201

Good afternoon, Misty,

I'm the attorney who reviewed the temporary Rules submitted by the North Carolina Department of Health and Human Services for the May 2022 RRC meeting. The RRC will formally review these Rules at its meeting on Thursday, May 19, 2022, at 9:00 a.m. The meeting will be a hybrid of in-person and WebEx attendance, and an invite should be sent to you

as we get closer to the meeting. If there are any other representatives from your agency who will want to attend virtually, let me know prior to the meeting, and we will get invites out to them as well.

Please submit the revised Rules and forms to me via email, as soon as possible but no later than Friday, May 13, 2022.

In the meantime, please let me know if you have any questions or concerns about these changes.

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