

RRC STAFF OPINION

PLEASE NOTE: THIS COMMUNICATION IS EITHER 1) ONLY THE RECOMMENDATION OF AN RRC STAFF ATTORNEY AS TO ACTION THAT THE ATTORNEY BELIEVES THE COMMISSION SHOULD TAKE ON THE CITED RULE AT ITS NEXT MEETING, OR 2) AN OPINION OF THAT ATTORNEY AS TO SOME MATTER CONCERNING THAT RULE. THE AGENCY AND MEMBERS OF THE PUBLIC ARE INVITED TO SUBMIT THEIR OWN COMMENTS AND RECOMMENDATIONS (ACCORDING TO RRC RULES) TO THE COMMISSION.

AGENCY: DHHS Social Services Commission

RULE CITATION: 10A NCAC 06T .0201 (Temporary)

RECOMMENDED ACTION:

- Approve, but note staff's comment
- X Object, based on:
 - X Lack of statutory authority
 - X Unclear or ambiguous
 - Unnecessary
 - Failure to comply with the APA
- Extend the period of review

COMMENT:

Before the Rules Review Commission (hereinafter "RRC") in May 2022 is a proposed temporary rule amending 10A NCAC 06T .0201 (hereinafter "Rule") which was adopted on May 3, 2022 by the Social Services Commission (hereinafter "Commission") of the North Carolina Department of Health and Human Services (hereinafter "DHHS") in response to S.L. 2021-180.

On November 18, 2021, Session Law 2021-180 was approved. Section 9A.3B.(b) is an amendment to G.S. 143B-153(2a) b.3. Prior to the amendment, reimbursement rates for the provision of adult day cares services, adult day health services, and associated transportation services (hereinafter "rates") were capped by the Commission pursuant to Rule 10A NCAC 06T .0201. S.L. 2021-180 removed the cap by taking away the Commission's authority to establish rates.

William W. Peaslee
Commission Counsel

Post adoption of S.L. 2021-180, reimbursement rates “shall be determined at the local level to allow flexibility in responding to local variables.”

Section 9A.3B(c) of S.L. 2021-180 instructs the Commission to promulgate rules to “allow” the rates “to be set by each county lead agency for planning and coordination.”

The first version of the proposed Rule stated that the rates would be “set by the local entity or county lead agency for planning and coordination.”

The Commission subsequently changed the Rule to state that the reimbursement rates shall “be set at the local level per day, per client.”

While the Commission initially stated that it would “refrain” from defining “local entity” or “local level,” the Commission added subsection (c) which defined “local level” as a “county” pursuant to G.S. 153A-1(3), or the county’s designee.

The Commission’s definition of “county” can be taken two ways, either a geographic area or a governmental entity. As the Commission has included “or the county’s designee” it appears to staff that the Commission intended “county” to be a governmental entity. It is unclear which governmental entity within a county the Commission intended, although to be in compliance with Section 9A.3B(c) of S.L. 2021-180 it would have to be “each county lead agency for planning and coordination” which it removed. It appears to RRC staff counsel that the Commission did not intend “county” to be the respective “county lead agency for planning and coordination”. Accordingly, staff counsel recommends the RRC object to the Rule for lack of authority and/or clarity pursuant to G.S. 150B-21.9(a)(1) and/or (2).

Assuming *arguendo* that the Commission did not exceed its authority and the RRC finds that the Rule is clear and unambiguous, the Rule requires the “county” to set a rate “per day, per client.” This is an infringement upon the authority granted to the entities at the local level, including “counties”, to establish the rate pursuant to S.L. 2021-180. Accordingly, staff counsel recommends the RRC object to the Rule for lack of statutory authority pursuant to G.S. 150B-21.9(a)(1).

SECTION 9A.3B.(b) G.S. 143B-153 reads as rewritten:

"§ 143B-153. Social Services Commission – creation, powers and duties.

There is hereby created the Social Services Commission of the Department of Health and Human Services with the power and duty to adopt rules and regulations to be followed in the conduct of the State's social service programs with the power and duty to adopt, amend, and rescind rules and regulations under and not inconsistent with the laws of the State necessary to carry out the provisions and purposes of this Article. Provided, however, the Department of Health and Human Services shall have the power and duty to adopt rules and regulations to be followed in the conduct of the State's medical assistance program. [The Commission has the following powers and duties:]

...

(2a) The Social Services Commission shall have the power and duty to establish standards and adopt rules and regulations:

- a. For social services programs established by federal legislation and by Article 3 of G.S. Chapter ~~108A~~;108A.
- b. For implementation of Title XX of the Social Security Act, except for Title XX services provided solely through the Division of Mental Health, Developmental Disabilities, and Substance Abuse Services, by promulgating rules and regulations in the following areas:
 1. Eligibility for all services established under a Comprehensive Annual Services Plan, as required by federal ~~law~~;law.
 2. Standards to implement all services established under the Comprehensive Annual Services ~~Plan~~;Plan.
 3. Maximum rates of payment for the provision of social ~~services~~;services, except there shall be no maximum statewide reimbursement rate for adult day care services, adult day health services, and the associated transportation services, as these reimbursement rates shall be determined at the local level to allow flexibility in responding to local variables.
 4. Fees for services to be paid by recipients of social ~~services~~;services.
 5. Designation of certain mandated services, from among the services established by the Secretary ~~below~~, in accordance with sub-subdivision c. of this subdivision which shall be provided in each county of the ~~State~~; andState.

6. Title XX services for the blind, after consultation with the Commission for the Blind.
- c. Provided, that the Secretary is authorized to promulgate all other rules in at least the following areas:
1. Establishment, identification, and definition of all services offered under the Comprehensive Annual Services ~~Plan~~; Plan.
 2. Policies governing the allocation, budgeting, and expenditures of funds administered by the ~~Department~~; Department.
 3. Contracting for and purchasing ~~services~~; and services
 4. Monitoring for effectiveness and compliance with State and federal law and regulations.

...."

SECTION 9A.3B.(c) The Department of Health and Human Services, Division of Aging and Adult Services, Division of Social Services, and the Social Services Commission shall amend or repeal any rules requiring a maximum statewide reimbursement rate for adult day care and adult day health services paid under the Home and Community Care Block Grant and the State Adult Day Care Fund. Rules shall be promulgated to allow the reimbursement rates for adult day care services, adult day health services, and associated transportation services **to be set by each county lead agency for planning and coordination (emphasis added)**. The rates shall reflect geographical differences, the availability of services, the cost to provide services, and other local variables.

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.*