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: INDUSTRIAL COMMISSION

RULE CITATION: 04 NCAC 10A .0404

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:

In (f), it is not clear what is meant by "good cause shown." Twice when it is used, it modifies a requirement set by rule without the specific guidelines required by G.S. 150B-19(6). The first time it is used, it repeats the statutory standard and is therefore acceptable to staff.

ROBERT A. BRYAN, JR.
COMMISSION COUNSEL

§ 150B-19. Restrictions on what can be adopted as a rule.

An agency may not adopt a rule that does one or more of the following:

(1) Implements or interprets a law unless that law or another law specifically authorizes the agency to do so.

(2) Enlarges the scope of a profession, occupation, or field of endeavor for which an occupational license is required.

(3) Imposes criminal liability or a civil penalty for an act or omission, including the violation of a rule, unless a law specifically authorizes the agency to do so or a law declares that violation of the rule is a criminal offense or is grounds for a civil penalty.

(4) Repeats the content of a law, a rule, or a federal regulation. A brief statement that informs the public of a requirement imposed by law does not violate this subdivision and satisfies the "reasonably necessary" standard of review set in G.S. 150B-21.9(a)(3).

(5) Establishes a fee or other charge for providing a service in fulfillment of a duty unless a law specifically authorizes the agency to do so or the fee or other charge is for one of the following:

a. A service to a State, federal, or local governmental unit.

b. A copy of part or all of a State publication or other document, the cost of mailing a document, or both.

c. A transcript of a public hearing.

d. A conference, workshop, or course.

e. Data processing services.

(6) Allows the agency to waive or modify a requirement set in a rule unless a rule establishes specific guidelines the agency must follow in determining whether to waive or modify the requirement.

(7) Repealed by Session Laws 2011-398, s. 61.2, effective July 25, 2011. (1973, c. 1331, s. 1; 1985, c. 746, s. 1; 1991, c. 418, s. 1; 1996, 2nd Ex. Sess., c. 18, s. 7.10(a); 2011-13, s. 1; 2011-398, s. 61.2.)

RRC STAFF OPINION

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AGENCY: INDUSTRIAL COMMISSION

RULE CITATION: 04 NCAC 10A .0617

RECOMMENDED ACTION:

Approve**,** but note staff's comment

X Object, based on:

Lack of statutory authority

X Unclear or ambiguous

Unnecessary

Failure to comply with the APA

Extend the period of review

COMMENT:

In (c), it is not clear what would constitute "good cause shown" for the Commission to allow an attorney to withdraw from representation.

ROBERT A. BRYAN, JR.
COMMISSION COUNSEL

RRC STAFF OPINION

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AGENCY: INDUSTRIAL COMMISSION

RULE CITATION: 04 NCAC 10B .0201

RECOMMENDED ACTION:

Approve**,** but note staff's comment

X Object, based on:

Lack of statutory authority

Unclear or ambiguous

X Unnecessary

Failure to comply with the APA

Extend the period of review

COMMENT:

This rule repeats G.S. 143-300 and is this unnecessary.

§ 143-300. Rules and regulations of Industrial Commission; destruction of records.

The Industrial Commission is hereby authorized and empowered to adopt such rules and regulations as may, in the discretion of the Commission, be necessary to carry out the purpose and intent of this Article. The North Carolina Rules of Civil Procedure and Rules of Evidence, insofar as they are not in conflict with the provisions of this Article, shall be followed in proceedings under this Article. When any case or claim under this Article has been closed by proper order or award, all records concerning such case or claim may, after five years, in the discretion of the Industrial Commission with and by the authorization of the Department of Cultural Resources, be destroyed by burning or otherwise; provided, that no record pertaining to a case or claim of a minor shall be destroyed until the expiration of three years after such minor attains the age of 18 years. (1951, c. 1059, s. 12; 1957, c. 311; 1971, c. 1231, s. 1; 1973, c. 476, s. 48; 1987 (Reg. Sess., 1988), c. 1087, s. 7.)

ROBERT A. BRYAN, JR.
COMMISSION COUNSEL

RRC STAFF OPINION

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AGENCY: INDUSTRIAL COMMISSION

RULE CITATION: 04 NCAC 10B .0203

RECOMMENDED ACTION:

Approve**,** but note staff's comment

X Object, based on:

X Lack of statutory authority

Unclear or ambiguous

Unnecessary

Failure to comply with the APA

Extend the period of review

COMMENT:

G.S. 143-300 requires that the North Carolina Rules of Civil Procedure be followed in Tort Claim proceedings if they are not in conflict with the Tort Claims Act. Rule 17(b) of the Rules of Civil Procedure requires general and testamentary guardians to appear for infants and incompetents if they have any. By requiring the use of a guardian *ad litem*, the rule is not consistent with the statute and thus outside the authority of the agency.

ROBERT A. BRYAN, JR.
COMMISSION COUNSEL

Rule 17. Parties plaintiff and defendant; capacity.

(a) Real party in interest. – Every claim shall be prosecuted in the name of the real party in interest; but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute of the State so provides, an action for the use or benefit of another shall be brought in the name of the State of North Carolina. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

(b) Infants, incompetents, etc. –

(1) Infants, etc., Sue by Guardian or Guardian Ad Litem. – In actions or special proceedings when any of the parties plaintiff are infants or incompetent persons, whether residents or nonresidents of this State, they must appear by general or testamentary guardian, if they have any within the State or by guardian ad litem appointed as hereinafter provided; but if the action or proceeding is against such guardian, or if there is no such known guardian, then such persons may appear by guardian ad litem.

(2) Infants, etc., Defend by Guardian Ad Litem. – In actions or special proceedings when any of the defendants are infants or incompetent persons, whether residents or nonresidents of this State, they must defend by general or testamentary guardian, if they have any within this State or by guardian ad litem appointed as hereinafter provided; and if they have no known general or testamentary guardian in the State, and any of them have been summoned, the court in which said action or special proceeding is pending, upon motion of any of the parties, may appoint some discreet person to act as guardian ad litem, to defend in behalf of such infants, or incompetent persons, and fix and tax his fee as part of the costs. The guardian so appointed shall, if the cause is a civil action, file his answer to the complaint within the time required for other defendants, unless the time is extended by the court; and if the cause is a special proceeding, a copy of the complaint, with the summons, must be served on him. After 20 days' notice of the summons and complaint in the special proceeding, and after answer filed as above prescribed in the civil action, the court may proceed to final judgment as effectually and in the same manner as if there had been personal service upon the said infant or incompetent persons or defendants.

All orders or final judgments duly entered in any action or special proceeding prior to April 8, 1974, when any of the defendants were infants or incompetent persons, whether residents or nonresidents of this State, and were defended therein by a general or testamentary guardian or guardian ad litem, and summons and complaint or petition in said action or special proceeding were duly served upon the guardian or guardian ad litem and answer duly filed by said guardian or guardian ad litem, shall be good and valid notwithstanding that said order or final judgment was entered less than 20 days after notice of the summons and complaint served upon said guardian or guardian ad litem.

(3) Appointment of Guardian Ad Litem Notwithstanding the Existence of a General or Testamentary Guardian. – Notwithstanding the provisions of subsections (b)(1) and (b)(2), a guardian ad litem for an infant or incompetent person may be appointed in any case when it is deemed by the court in which the action is pending expedient to have the infant, or insane or incompetent person so represented, notwithstanding such person may have a general or testamentary guardian.

(4) Appointment of Guardian Ad Litem for Unborn Persons. – In all actions in rem and quasi in rem and in all actions and special proceedings which involve the construction of wills, trusts and contracts or any instrument in writing, or which involve the determination of the ownership of property or the distribution of property, if there is a possibility that some person may thereafter be born who, if then living, would be a necessary or proper party to such action or special proceeding, the court in which said action or special proceeding is pending, upon motion of any of the parties or upon its own motion, may appoint some discreet person guardian ad litem to defend on behalf of such unborn person. Service upon the guardian ad litem appointed for such unborn person shall have the same force and effect as service upon such unborn person would have had if such person had been living. All proceedings by and against the said guardian ad litem after appointment shall be governed by all provisions of the law applicable to guardians ad litem for living persons.

(5) Appointment of Guardian Ad Litem for Corporations, Trusts, or Other Entities Not in Existence. – In all actions which involve the construction of wills, trusts, contracts or written instruments, or the determination of the ownership of property or the disposition or distribution of property pursuant to the provisions of a will, trust, contract or written instrument, if such will, trust, contract or written instrument provides benefits for disposition or distribution of property to a corporation, a trust, or an entity thereafter to be formed for the purpose of carrying into effect some provision of the said will, trust, contract or written instrument, the court in which said action or special proceeding is pending, upon motion of any of the parties or upon its own motion, may appoint some discreet person guardian ad litem for such corporation, trust or other entity. Service upon the guardian ad litem appointed for such corporation, trust or other entity shall have the same force and effect as service upon such corporation, trust or entity would have had if such corporation, trust or other entity had been in existence. All proceedings by and against the said guardian ad litem after appointment shall be governed by all provisions of the law applicable to guardians ad litem for living persons.

(6) Repealed by Session Laws 1981, c. 599, s. 1.

(7) Miscellaneous Provisions. – The provisions of this rule are in addition to any other remedies or procedures authorized or permitted by law, and it shall not be construed to repeal or to limit the doctrine of virtual representation or any other law or rule of law by which unborn persons or nonexistent corporations, trusts or other entities may be represented in or bound by any judgment or order entered in any action or special proceeding. This rule shall apply to all pending actions and special proceedings to which it may be constitutionally applicable. All judgments and orders heretofore entered in any action in which a guardian or guardians ad litem have been appointed for any unborn person or persons or any nonexistent corporations, trusts or other entities, are hereby validated as of the several dates of entry thereof in the same manner and to the full extent that they would have been valid if this rule had been in effect at the time of the appointment of such guardians ad litem; provided, however, that the provisions of this sentence shall be applicable only in such cases and to the extent to which the application thereof shall not be prevented by any constitutional limitation.

(c) Guardian ad litem for infants, insane or incompetent persons; appointment procedure. – When a guardian ad litem is appointed to represent an infant or insane or incompetent person, he must be appointed as follows:

(1) When an infant or insane or incompetent person is plaintiff, the appointment shall be made at any time prior to or at the time of the commencement of the action, upon the written application of any relative or friend of said infant or insane or incompetent person or by the court on its own motion.

(2) When an infant is defendant and service under Rule 4(j)(1)a is made upon him the appointment may be made upon the written application of any relative or friend of said infant, or, if no such application is made within 10 days after service of summons, upon the written application of any other party to the action or, at any time by the court on its own motion.

(3) When an infant or insane or incompetent person is defendant and service can be made upon him only by publication, the appointment may be made upon the written application of any relative or friend of said infant, or upon the written application of any other party to the action, or by the court on its own motion, before completion of publication, whereupon service of the summons with copy of the complaint shall be made forthwith upon said guardian so appointed requiring him to make defense at the same time that the defendant is required to make defense in the notice of publication.

(4) When an insane or incompetent person is defendant and service by publication is not required, the appointment may be made upon the written application of any relative or friend of said defendant, or upon the written application of any other party to the action, or by the court on its own motion, prior to or at the time of the commencement of the action, and service upon the insane or incompetent defendant may thereupon be dispensed with by order of the court making such appointment.

(d) Guardian ad litem for persons not ascertained or for persons, trusts or corporations not in being. – When under the terms of a written instrument, or for any other reason, a person or persons who are not in being, or any corporation, trust, or other legal entity which is not in being, may be or may become legally or equitably interested in any property, real or personal, the court in which an action or proceeding of any kind relative to or affecting such property is pending, may, upon the written application of any party to such action or proceeding or of other person

interested, appoint a guardian ad litem to represent such person or persons not ascertained or such persons, trusts or corporations not in being.

(e) Duty of guardian ad litem; effect of judgment or decree where party represented by guardian ad litem. – Any guardian ad litem appointed for any party pursuant to any of the provisions of this rule shall file and serve such pleadings as may be required within the times specified by these rules, unless extension of time is obtained. After the appointment of a guardian ad litem under any provision of this rule and after the service and filing of such pleadings as may be required by such guardian ad litem, the court may proceed to final judgment, order or decree against any party so represented as effectually and in the same manner as if said party had been under no legal disability, had been ascertained and in being, and had been present in court after legal notice in the action in which such final judgment, order or decree is entered. (1967, c. 954, s. 1; 1969, c. 895, ss. 5, 6; 1971, c. 1156, ss. 3, 4; 1973, c. 1199; 1981, c. 599, s. 1; 1987, c. 550, s. 13.)

RRC STAFF OPINION

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AGENCY: INDUSTRIAL COMMISSION

RULE CITATION: 04 NCAC 10D .0104

RECOMMENDED ACTION:

Approve**,** but note staff's comment

X Object, based on:

Lack of statutory authority

X Unclear or ambiguous

Unnecessary

Failure to comply with the APA

Extend the period of review

COMMENT:

It is not clear what is meant by "change the provision of medical compensation" in this context. "Medical compensation" is defined in G.S. 97-2(19) as services. If "provision" read "provider" this rule might be clear, but it is not clear why what is provided would be changed because of problems with the provider.

ROBERT A. BRYAN, JR.
COMMISSION COUNSEL

§ 97-2. Definitions.

When used in this Article, unless the context otherwise requires:

...

(19) Medical Compensation. – The term "medical compensation" means medical, surgical, hospital, nursing, and rehabilitative services, including, but not limited to, attendant care services prescribed by a health care provider authorized by the employer or subsequently by the Commission, vocational rehabilitation, and medicines, sick travel, and other treatment, including medical and surgical supplies, as may reasonably be required to effect a cure or give relief and for such additional time as, in the judgment of the Commission, will tend to lessen the period of disability; and any original artificial members as may reasonably be necessary at the end of the healing period and the replacement of such artificial members when reasonably necessitated by ordinary use or medical circumstances.

RRC STAFF OPINION

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AGENCY: INDUSTRIAL COMMISSION

RULE CITATION: 04 NCAC 10E .0101

RECOMMENDED ACTION:

Approve**,** but note staff's comment

X Object, based on:

X Lack of statutory authority

Unclear or ambiguous

Unnecessary

Failure to comply with the APA

Extend the period of review

COMMENT:

There is no authority cited for the Chair to independently decide whether to grant or deny a petition for rulemaking. G.S. 150B-20 gives that responsibility to the agency, the full Commission. There is no authority cited for the agency to delegate that responsibility to a single member.

ROBERT A. BRYAN, JR.
COMMISSION COUNSEL

§ 150B-20. Petitioning an agency to adopt a rule.

(a) Petition. – A person may petition an agency to adopt a rule by submitting to the agency a written rule-making petition requesting the adoption. A person may submit written comments with a rule-making petition. If a rule-making petition requests the agency to create or amend a rule, the person must submit the proposed text of the requested rule change and a statement of the effect of the requested rule change. Each agency must establish by rule the procedure for submitting a rule-making petition to it and the procedure the agency follows in considering a rule-making petition.

(b) Time. – An agency must grant or deny a rule-making petition submitted to it within 30 days after the date the rule-making petition is submitted, unless the agency is a board or commission. If the agency is a board or commission, it must grant or deny a rule-making petition within 120 days after the date the rule-making petition is submitted.

(c) Action. – If an agency denies a rule-making petition, it must send the person who submitted the petition a written statement of the reasons for denying the petition. If an agency grants a rule-making petition, it must inform the person who submitted the rule-making petition of its decision and must initiate rule-making proceedings. When an agency grants a rule-making petition, the notice of text it publishes in the North Carolina Register may state that the agency is initiating rule making as the result of a rule-making petition and state the name of the person who submitted the rule-making petition. If the rule-making petition requested the creation or amendment of a rule, the notice of text the agency publishes may set out the text of the requested rule change submitted with the rule-making petition and state whether the agency endorses the proposed text.

(d) Review. – Denial of a rule-making petition is a final agency decision and is subject to judicial review under Article 4 of this Chapter. Failure of an agency to grant or deny a rule-making petition within the time limits set in subsection (b) is a denial of the rule-making petition.

(e) Repealed by Session Laws 1996, Second Extra Session, c. 18, s. 7.10(b). (1973, c. 1331, s. 1; 1985, c. 746, s. 1; 1991, c. 418, s. 1; c. 477, s. 2; 1996, 2nd Ex. Sess., c. 18, s. 7.10(b); 1997-34, s. 2; 2003-229, s. 1.)

RRC STAFF OPINION

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AGENCY: INDUSTRIAL COMMISSION

RULE CITATION: 04 NCAC 10F .0105

RECOMMENDED ACTION:

Approve**,** but note staff's comment

X Object, based on:

Lack of statutory authority

X Unclear or ambiguous

X Unnecessary

Failure to comply with the APA

Extend the period of review

COMMENT:

In (a)(1)(C), it is not clear what is meant by "support methods."

In (a)(2)(D), it is not clear what is meant by "process."

In (b)(4)(F), it is not clear what this "companion guide" is or who publishes it.

ROBERT A. BRYAN, JR.
COMMISSION COUNSEL

RRC STAFF OPINION

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AGENCY: INDUSTRIAL COMMISSION

RULE CITATION: 04 NCAC 10G – ALL RULES

RECOMMENDED ACTION:

X Approve**,** but **note staff's comment**

Object, based on:

Lack of statutory authority

Unclear or ambiguous

Unnecessary

Failure to comply with the APA

Extend the period of review

COMMENT:

The statutory authority for the rules in this Subchapter requires that the rules be substantially similar to those approved by the Supreme Court for use in the Superior Court decision. In at least two of these rules, .0101 and .0105, the rules use the term "good cause" in substantially the same context as used in the Superior Court rules. The Rules Review Commission has historically objected to the use of "good cause" unless there is some definition of the term or at least a list of factors to be used in determining if "good cause" exists, or when the term is used in the same context as used in a statute making "good cause" the standard. I am not recommending objecting to the use of "good cause" in these rules when it is used in substantially the same context as used in the Superior Court rules. This is a close call in my opinion, but it seems that the Industrial Commission could consider rulings by Superior Court judges in comparable decisions in determining what constitutes "good cause."

ROBERT A. BRYAN, JR.
COMMISSION COUNSEL

RRC STAFF OPINION

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AGENCY: INDUSTRIAL COMMISSION

RULE CITATION: 04 NCAC 10G .0107

RECOMMENDED ACTION:

Approve**,** but note staff's comment

X Object, based on:

Lack of statutory authority

X Unclear or ambiguous

Unnecessary

Failure to comply with the APA

Extend the period of review

COMMENT:

In (b)(3), it is not clear what constitutes "good cause." The comparable rule of the Rules Implementing Statewide Mediated Settlement Conference in Superior Court Civil Actions contains a definition of "good cause." These rules are required by statute to be substantially similar to those rules. It is not clear if the agency intends the same definition to apply or if some other definition applies.

ROBERT A. BRYAN, JR.
COMMISSION COUNSEL

RULE 7. COMPENSATION OF THE MEDIATOR AND SANCTIONS

A. **BY AGREEMENT.** When the mediator is stipulated by the parties, compensation shall be as agreed upon between the parties and the mediator. The terms of the parties' agreement with the mediator notwithstanding, Section D below shall apply to issues involving the compensation of the mediator. Sections E and F below shall apply unless the parties' agreement provides otherwise.

B. **BY COURT ORDER.** When the mediator is appointed by the court, the parties shall compensate the mediator for mediation services at the rate of $150 per hour. The parties shall also pay to the mediator a one time, per case administrative fee of $150 that is due upon appointment.

C. **CHANGE OF APPOINTED MEDIATOR.** Pursuant to Rule 2.A, the parties may select a certified mediator to conduct their mediated settlement conference. Parties who fail to select a certified mediator and then desire a substitution after the court has appointed a mediator, shall obtain court approval for the substitution. The court may approve the substitution only upon proof of payment to the court's original appointee the $150 one time, per case administrative fee, any other amount due and owing for mediation services pursuant to Rule 7.B and any postponement fee due and owing pursuant to Rule 7.E.

D. **INDIGENT CASES.** No party found to be indigent by the court for the purposes of these rules shall be required to pay a mediator fee. Any mediator conducting a settlement conference pursuant to these rules shall waive the payment of fees from parties found by the court to be indigent. Any party may move the senior resident superior court judge for a finding of indigence and to be relieved of that party's obligation to pay a share of the mediator's fee.

Said motion shall be heard subsequent to the completion of the conference or, if the parties do not settle their case, subsequent to the trial of the action. In ruling upon such motions, the judge shall apply the criteria enumerated in N.C.G.S. § 1-110(a), but shall take into consideration the outcome of the action and whether a judgment was rendered in the movant's favor. The court shall enter an order granting or denying the party's request.

E. **POSTPONEMENTS AND FEES.**

(1) As used herein, the term "postponement" shall mean reschedule or not proceed with a settlement conference once a date for a session of the settlement conference has been scheduled by the mediator. After a settlement conference has been scheduled for a specific date, a party may not unilaterally postpone the conference.

(2) A conference session may be postponed by the mediator for good cause only after notice by the movant to all parties of the reasons for the postponement and a finding of good cause by the mediator. Good cause shall mean that the reason for the postponement involves a situation over which the party seeking the postponement has no control, including but not limited to, a party or attorney's illness, a death in a party or attorney's family, a sudden and unexpected demand by a judge that a party or attorney for a party appear in court for a purpose not inconsistent with the Guidelines established by Rule 3.1(d) of the General Rules of Practice for the Superior and District Courts or inclement weather such that travel is prohibitive. Where good cause is found, a mediator shall not assess a postponement fee.

(3) The settlement of a case prior to the scheduled date for mediation shall be good cause provided that the mediator was notified of the settlement immediately after it was reached and the mediator received notice of the settlement at least 14 calendar days prior to the date scheduled for mediation.

(4) Without a finding of good cause, a mediator may also postpone a scheduled conference session with the consent of all parties. A fee of $150 shall be paid to the mediator if the postponement is allowed, except that if the request for postponement is made within seven calendar days of the scheduled date for mediation, the fee shall be $300. The postponement fee shall be paid by the party requesting the postponement unless otherwise agreed to between the parties. Postponement fees are in addition to the one time, per case administrative fee provided for in Rule 7.B.

(5) If all parties select the certified mediator and they contract with the mediator as to compensation, the parties and the mediator may specify in their contract alternatives to the postponement fees otherwise required herein.

F. **PAYMENT OF COMPENSATION BY PARTIES.** Unless otherwise agreed to by the named parties or ordered by the court, the mediator's fee shall be paid in equal shares by the parties. For purposes of this rule, multiple parties shall be considered one party when they are represented by the same counsel. Parties obligated to pay a share of the fees shall pay them equally. Payment shall be due upon completion of the conference.

RRC STAFF OPINION

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AGENCY: INDUSTRIAL COMMISSION

RULE CITATION: 04 NCAC 10G .0108

RECOMMENDED ACTION:

Approve**,** but note staff's comment

X Object, based on:

Lack of statutory authority

X Unclear or ambiguous

Unnecessary

Failure to comply with the APA

Extend the period of review

COMMENT:

In (a), it is not clear what constitutes "good cause" for the Commission to bar any person from holding himself out as a mediator, etc. There does not appear to be a comparable provision in the Mediated Settlement Conference rules.

In (c), it is not clear what constitutes "good cause" for the failure of a mediator to appear. There does not appear to be a comparable provision in the Mediated Settlement Conference rules.

ROBERT A. BRYAN, JR.
COMMISSION COUNSEL

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: INDUSTRIAL COMMISSION

RULE CITATION: 04 NCAC 10H .0201

RECOMMENDED ACTION:

Approve**,** but note staff's comment

X Object, based on:

Lack of statutory authority

X Unclear or ambiguous

Unnecessary

Failure to comply with the APA

Extend the period of review

COMMENT:

In (b), it is not clear if the standard here also applies in Rule .0202(b).

ROBERT A. BRYAN, JR.
COMMISSION COUNSEL

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: INDUSTRIAL COMMISSION

RULE CITATION: 04 NCAC 10H .0202

RECOMMENDED ACTION:

Approve**,** but note staff's comment

X Object, based on:

Lack of statutory authority

X Unclear or ambiguous

Unnecessary

Failure to comply with the APA

Extend the period of review

COMMENT:

In (b), it is not clear what factors or standards the Commission will use in ordering a hearing or rehearing. It is also not clear if the Commission will use a different standard than that set out in .0201(b).

ROBERT A. BRYAN, JR.
COMMISSION COUNSEL

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: INDUSTRIAL COMMISSION

RULE CITATION: 04 NCAC 10I .0201

RECOMMENDED ACTION:

Approve**,** but note staff's comment

X Object, based on:

Lack of statutory authority

Unclear or ambiguous

X Unnecessary

Failure to comply with the APA

Extend the period of review

COMMENT:

This rule repeats the contents of G.S. 130A-425(d) and is thus unnecessary.

ROBERT A. BRYAN, JR.
COMMISSION COUNSEL

§ 130A-425. Filing of claims.

(a) Notwithstanding any other provision of State law, no action for compensation for a vaccine-related injury may be filed against any person unless that person was named as a respondent in a claim filed pursuant to this section and unless the claim was filed within the applicable time period set forth in G.S. 130A-429.

(b) In all claims filed pursuant to this Article, the claimant or the person in whose behalf the claim is made shall file with the Commission a verified petition in duplicate, setting forth the following information:

(1) The name and address of the claimant;

(2) The name and address of each respondent;

(3) The amount of compensation in money and services sought to be recovered;

(4) The time and place where the injury occurred;

(5) A brief statement of the facts and circumstances surrounding the injury and giving rise to the claim; and

(6) Supporting documentation and a statement of the claim that the claimant or the person in whose behalf the claim is made suffered a vaccine-related injury and has not previously collected an award or settlement of a civil action for damages for this injury. This supporting documentation shall include all available medical records pertaining to the alleged injury, including autopsy reports, if any, and if the injured person was under two years of age at the time of injury, all prenatal, obstetrical, and pediatric records of care preceding the injury, and an identification of any unavailable records known to the claimant or the person in whose behalf the claim is made.

(7) Documentation to show that the claimant has filed an election pursuant to Section 2121 of the Public Health Service Act, P.L. 99-660, permitting such claimant to file a civil action for damages for a vaccine-related injury or death or documentation to show that such claimant is otherwise permitted by federal law to file an action against a vaccine manufacturer.

(c) Upon receipt of this verified petition in duplicate, the Commission shall enter the case upon its hearing docket and shall determine the matter in the county where the injury occurred unless the parties agree or the Commission directs that the case may be heard in some other county. All parties shall be given reasonable notice of the date when and the place where the claim will be heard. Immediately upon receipt of the claim, the Commission shall serve a copy of the verified petition on each respondent by registered or certified mail. The Commission shall also send a copy of the verified petition to the Secretary, who shall be a party to all proceedings involving the claim, and to the Attorney General who shall represent the State's interest in all the proceedings involving the claim.

(d) The Commission shall adopt rules necessary to govern the proceedings required by this Article. The Rules of Civil Procedure as contained in G.S. 1A-1 **et seq.** and the General Rules of Practice for the Superior and District Courts as authorized by G.S. 7A-34 apply to claims filed with the Industrial Commission under this Article. The Commission shall keep a record of all proceedings conducted under this Article, and has the right to subpoena any persons and records it considers necessary in making its determinations. The Commission may require all persons called as witnesses to testify under oath or affirmation, and any member of the Commission may administer oaths. If any persons refuse to comply with any subpoena issued pursuant to this Article or to testify with respect to any matter relevant to proceedings conducted under this Article, the Superior Court of Wake County, on application of the Commission, may issue an order requiring the person to comply with the subpoena and to testify. Any failure to obey any such order may be punished by the court as for contempt. (1985 (Reg. Sess., 1986), c. 1008, s. 1; 1987, c. 215, s. 3; 1989, c. 727, s. 150; 1991, c. 410, s. 2.)

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: NC CHILD CARE COMMISSION

RULE CITATION: 10A NCAC 09 .3004

RECOMMENDED ACTION:

Return the rule to the agency for failure to comply with the Administrative Procedure Act

Approve, but note staff's comment

X Object, based on:

X Lack of statutory authority

X Unclear or ambiguous

Unnecessary

Failure to adopt the rule in accordance with the APA

Extend the period of review

COMMENT:

I have asked the agency to provide specific authority for the restrictions in this rule which prohibit "[a]ctivities, instruction, or communications, which promote religious beliefs" from being "directed toward children participating in the NC Pre-K program (formerly the "More at Four" program) during the NC Pre-K day."

Part of my concern over this provision is that I am under the impression that these programs can be operated by any child care facility that are covered by these rules, including child care programs run by religious groups, and are not restricted to programs operated by a public school system. If that is so, then there needs to be explicit authority to restrict any religious component of a school curriculum that might normally be offered by the child care program.

If "religious sponsored child care facilities" are eligible to operate under the NC Pre-K program and receive funding under it, then this rule would seem to violate G.S. 110-106 (attached at the end of this opinion).

If they are unable to provide that authority then I shall likely recommend an objection to this rule based on lack of authority.

Joseph J DeLuca
Commission Counsel

In addition this rule is potentially ambiguous in that it is not abundantly clear what constitutes "activities, instruction, or communications which promote religious beliefs." Would the presence of any religious art, pictures, signs or symbols on or within a building or room housed in a religious building or room constitute a violation?

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2011
SESSION LAW 2011-145

CONSOLIDATE MORE AT FOUR PROGRAM INTO DIVISION OF CHILD DEVELOPMENT

SECTION 10.7.(a) The Department of Public Instruction, Office of Early Learning, and the Department of Health and Human Services are directed to consolidate the More At Four program into the Division of Child Development. The Division of Child Development is renamed the Division of Child Development and Early Education (DCDEE). The DCDEE is directed to maintain the More At Four program's high programmatic standards. The Department of Health and Human Services shall assume the functions of the regulation and monitoring system and payment and reimbursement system for the More At Four program.

All regulation and monitoring functions shall begin July 1, 2011. The More At Four program shall be designated as "prekindergarten" on the five-star rating scale. All references to "prekindergarten" in this section shall refer to the program previously titled the "More At Four" program. All references to "non-prekindergarten" shall refer to all four- and five-star rated facilities.

The Office of State Budget and Management shall transfer positions to the Department of Health and Human Services to assume the regulation, monitoring, and accounting functions within the Division of Child Development's Regulatory Services Section. This transfer shall have all the elements of a Type I transfer as defined in G.S. 143A-6. All funds transferred pursuant to this section shall be used for the funding of prekindergarten slots for four-year-olds and for the management of the program. The Department of Health and Human Services shall incorporate eight consultant positions into the regulation and accounting sections of DCDEE, eliminate the remaining positions, and use position elimination savings for the purpose of funding prekindergarten students. DCDEE may use funds from the transfer of the More At Four program for continuing the teacher mentoring program and contracting for the environmental rating scale assessments.

SECTION 10.7.(b) The Childcare Commission shall adopt rules for programmatic standards for regulation of prekindergarten classrooms. The Commission shall review and approve comprehensive, evidenced-based early childhood curricula with a reading component. These curricula shall be added to the currently approved "More At Four" curricula.

SECTION 10.7.(c) G.S. 143B-168.4(a) reads as rewritten:

"(a) The Child Care Commission of the Department of Health and Human Services shall consist of 15 <u>17</u> members. Seven of the members shall be appointed by the Governor and eight <u>10</u> by the General Assembly, four <u>five</u> upon the recommendation of the President Pro Tempore of the Senate, and four <u>five</u> upon the recommendation of the Speaker of the House of Representatives. Four of the members appointed by the Governor, two by the General Assembly on the recommendation of the President Pro Tempore of the Senate, and two by the General Assembly on the recommendation of the Speaker of the House of Representatives, shall be members of the public who are not employed in, or providing, child care and who have no financial interest in a child care facility. Two of the foregoing public members appointed by the Governor, one of the foregoing public members recommended by the President Pro Tempore of the Senate, and one of the foregoing public members recommended by the Speaker of the House of Representatives shall be parents of children receiving child care services. Of the remaining two

Joseph J DeLuca
Commission Counsel

public members appointed by the Governor, one shall be a pediatrician currently licensed to practice in North Carolina. Three of the members appointed by the Governor shall be child care providers, one of whom shall be affiliated with a for profit child care center, one of whom shall be affiliated with a for profit family child care home, and one of whom shall be affiliated with a nonprofit facility. Two of the members appointed by the General Assembly on the recommendation of the President Pro Tempore of the Senate, and two by the General Assembly on recommendation of the Speaker of the House of Representatives, shall be child care providers, one affiliated with a for profit child care facility, and one affiliated with a nonprofit child care facility. The General Assembly, upon the recommendation of the President Pro Tempore of the Senate, and the General Assembly, upon the recommendation of the Speaker of the House of Representatives, shall appoint two early childhood education specialists. None may be employees of the State."

SECTION 10.7.(d) The additional curricula approved and taught in prekindergarten classrooms shall also be taught in four- and five-star rated facilities in the non-prekindergarten four-year-old classrooms. The Child Care Commission shall increase standards in the four- and five-star-rated facilities for the purpose of placing an emphasis on early reading. The Commission shall require the four- and five-star-rated facilities to teach from the Commission's approved curricula. The Division of Child Development may use funds from the Child Care Development Fund Block Grant to assist with the purchase of curricula or adjust rates of reimbursements to cover increased costs.

SECTION 10.7.(e) The Division of Child Development and Early Education shall adopt a policy to encourage all prekindergarten classrooms to blend private pay families with prekindergarten subsidized children in the same manner that regular subsidy children are blended with private pay children. The Division may implement a waiver or transition period for the public classrooms.

SECTION 10.7.(f) The prekindergarten program may continue to serve at-risk children identified through the existing "child find" methods in which at-risk children are currently served within the Division of Child Development. The Division of Child Development shall serve at-risk children regardless of income. However, the total number of at-risk children served shall constitute no more than twenty percent (20%) of the four-year-olds served within the prekindergarten program. Any age-eligible child who is a child of either of the following shall be eligible for the program: (i) an active duty member of the Armed Forces of the United States, including the North Carolina National Guard, State military forces, or a reserve component of the Armed Forces, who was ordered to active duty by the proper authority within the last 18 months or is expected to be ordered within the next 18 months or (ii) a member of the Armed Forces of the United States, including the North Carolina National Guard, State military forces, or a reserve component of the Armed Forces, who was injured or killed while serving on active duty. Eligibility determinations for prekindergarten participants may continue through local education agencies and local North Carolina Partnership for Children, Inc., partnerships.

SECTION 10.7.(g) The Division of Child Development and Early Education (DCDEE) shall adopt policies that improve the quality of childcare for subsidized children. The DCDEE shall phase in a new policy in which child care subsidies will be paid, to the extent possible, for child care in the higher quality centers and homes only. The DCDEE shall define higher quality, and subsidy funds shall not be paid for one- or two-star-rated facilities. For those counties with an inadequate number of three-, four-, and five-star-rated facilities, the DCDEE shall establish a transition period that allows the facilities to continue to receive subsidy funds while the facilities work on the increased star ratings. The DCDEE may allow exemptions in counties where there is an inadequate number of three-, four-, and five-star-rated facilities for nonstar-rated programs, such as religious programs.

SECTION 10.7.(h) The Division of Child Development and Early Education shall implement a parent co-payment requirement for prekindergarten classrooms the same as what is required of parents subject to regular child care subsidy payments. All at-risk children and age-eligible

children of military personnel as described in subsection (g) of this section are exempt from the co-payment requirements of this subsection.

Fees for families who are required to share in the cost of care shall be established based on a percent of gross family income and adjusted for family size. Fees shall be determined as follows:

FAMILY SIZE	PERCENT OF GROSS FAMILY INCOME
1-3	10%
4-5	9%
6 or more	8%.

SECTION 10.7.(i) All prekindergarten classrooms regulated pursuant to this section shall be required to participate in the Subsidized Early Education for Kids (SEEK) accounting system to streamline the payment function for these classrooms with a goal of eliminating duplicative systems and streamlining the accounting and payment processes among the subsidy reimbursement systems. Prekindergarten funds transferred may be used to add these programs to SEEK.

SECTION 10.7.(j) Based on market analysis and within funds available, the Division of Child Development and Early Education shall establish reimbursement rates based on newly increased requirements of four- and five-star-rated facilities and the higher teacher standards within the prekindergarten class rooms, specifically More At Four teacher standards, when establishing the rates of reimbursements. Additionally, the prekindergarten curriculum day shall cover six and one-half to 10 hours daily and no less than 10 months per year. The public classrooms will have a one-year transition period to become licensed through the Division of Child Development and may continue to operate prekindergarten, formerly "More At Four," classrooms during the 2011-2012 fiscal year.

§ 110-91. MANDATORY STANDARDS FOR A LICENSE.

All child care facilities shall comply with all State laws and federal laws and local ordinances that pertain to child health, safety, and welfare. Except as otherwise provided in this Article, the standards in this section shall be complied with by all child care facilities. However, none of the standards in this section apply to the school-age children of the operator of a child care facility but do apply to the preschool-age children of the operator. Children 13 years of age or older may receive child care on a voluntary basis provided all applicable required standards are met. The standards in this section, along with any other applicable State laws and federal laws or local ordinances, shall be the required standards for the issuance of a license by the Secretary under the policies and procedures of the Commission except that the Commission may, in its discretion, adopt less stringent standards for the licensing of facilities which provide care on a temporary, part-time, drop-in, seasonal, after-school or other than a full-time basis.

(1) Medical Care and Sanitation. – The Commission for Public Health shall adopt rules which establish minimum sanitation standards for child care centers and their personnel. The sanitation rules adopted by the Commission for Public Health shall cover such matters as the cleanliness of floors, walls, ceilings, storage spaces, utensils, and other facilities; adequacy of ventilation; sanitation of water supply, lavatory facilities, toilet facilities, sewage disposal, food protection facilities, bactericidal treatment of eating and drinking utensils, and solid-waste storage and disposal; methods of food preparation and serving; infectious disease control; sleeping facilities; and other items and facilities as are necessary in the interest of the public health. The Commission for Public Health shall allow child care centers to use domestic kitchen equipment, provided appropriate temperature levels for heating, cooling, and storing are maintained. Child care centers that fry foods shall use commercial hoods. These rules shall be developed in consultation with the Department.

The Commission shall adopt rules for child care facilities to establish minimum requirements for child and staff health assessments and medical care procedures. These rules shall be developed in

consultation with the Department. Each child shall have a health assessment before being admitted or within 30 days following admission to a child care facility. The assessment shall be done by: (i) a licensed physician, (ii) the physician's authorized agent who is currently approved by the North Carolina Medical Board, or comparable certifying board in any state contiguous to North Carolina, (iii) a certified nurse practitioner, or (iv) a public health nurse meeting the Departments Standards for Early Periodic Screening, Diagnosis, and Treatment Program. However, no health assessment shall be required of any staff or child who is and has been in normal health when the staff, or the child's parent, guardian, or full-time custodian objects in writing to a health assessment on religious grounds which conform to the teachings and practice of any recognized church or religious denomination.

Organizations that provide prepared meals to child care centers only are considered child care centers for purposes of compliance with appropriate sanitation standards.

(2) Health-Related Activities. – The Commission shall adopt rules for child care facilities to ensure that all children receive nutritious food and beverages according to their developmental needs. The Commission shall consult with the Division of Child Development of the Department of Health and Human Services to develop nutrition standards to provide for requirements appropriate for children of different ages. In developing nutrition standards, the Commission shall consider the following recommendations:

a. Limiting or prohibiting the serving of sweetened beverages, other than 100% fruit juice, to children of any age.

b. Limiting or prohibiting the serving of whole milk to children two years of age or older or flavored milk to children of any age.

c. Limiting or prohibiting the serving of more than six ounces of juice per day to children of any age.

d. Limiting or prohibiting the serving of juice from a bottle.

e. Creating an exception from the rules for parents of children who have medical needs, special diets, or food allergies.

f. Creating an exception from the rules to allow a parent or guardian, or to allow the center upon the request of a parent or guardian, to provide to a child food and beverages that may not meet the nutrition standards.

Each child care facility shall have a rest period for each child in care after lunch or at some other appropriate time and arrange for each child in care to be out-of-doors each day if weather conditions permit.

(3) Location. – Each child care facility shall be located in an area which is free from conditions which are considered hazardous to the physical and moral welfare of the children in care in the opinion of the Secretary.

(4) Building. – Each child care facility shall be located in a building which meets the appropriate requirements of the North Carolina Building Code under standards which shall be developed by the Building Code Council, subject to adoption by the Commission specifically for child care facilities, including facilities operated in a private residence. These standards shall be consistent with the provisions of this Article. A local building code enforcement officer shall approve any proposed alternate material, design, or method of construction, provided the building code enforcement officer finds that the alternate, for the purpose intended, is at least the equivalent of that prescribed in the technical building codes in quality, strength, effectiveness, fire resistance, durability, or safety. A local building code enforcement officer shall require that sufficient evidence or proof be submitted to substantiate any claim made regarding the alternate. The Child Care Commission may request changes to the Building Code to suit the special needs of preschool children. Satisfactorily written reports from representatives of building inspection agencies shall be required prior to the issuance of a license and whenever renovations are made to a child care center, or when the operator requests licensure of space not previously approved for child care.

(5) Fire Prevention. – Each child care facility shall be located in a building that meets appropriate requirements for fire prevention and safe evacuation that apply to child care facilities as established by the Department of Insurance in consultation with the Department. Except for child care centers located on State property, each child care center shall be inspected at least annually by a local fire department or volunteer fire department for compliance with these requirements. Child care centers located on State property shall be inspected at least annually by an official designated by the Department of Insurance.

(6) Space and Equipment Requirements. – There shall be no less than 25 square feet of indoor space for each child for which a child care center is licensed, exclusive of closets, passageways, kitchens, and bathrooms, and this floor space shall provide during rest periods 200 cubic feet of airspace per child for which the center is licensed. There shall be adequate outdoor play area for each child under rules adopted by the Commission which shall be related to the size of center and the availability and location of outside land area. In no event shall the minimum required exceed 75 square feet per child. The outdoor area shall be protected to assure the safety of the children receiving child care by an adequate fence or other protection. A center operated in a public school shall be deemed to have adequate fencing protection. A center operating exclusively during the evening and early morning hours, between 6:00 P.M. and 6:00 A.M., need not meet the outdoor play area requirements mandated by this subdivision.

Each child care facility shall provide indoor area equipment and furnishings that are child size, sturdy, safe, and in good repair. Each child care facility that provides outdoor area equipment and furnishings shall provide outdoor area equipment and furnishings that are child size, sturdy, free of hazards that pose a threat of serious injury to children while engaged in normal play activities, and in good repair. The Commission shall adopt standards to establish minimum requirements for equipment appropriate for the size of child care facility. Space shall be available for proper storage of beds, cribs, mats, cots, sleeping garments, and linens as well as designated space for each child's personal belongings.

The Division of Child Development of the Department of Health and Human Services shall establish and implement a policy that defines any building which is currently approved for school occupancy and which houses a public or private elementary school to include the playgrounds and athletic fields as part of the school building when that building is used to serve school-age children in after-school child care programs. Playgrounds and athletic fields referenced in this section that do not meet licensure standards promulgated by the North Carolina Child Care Commission shall be noted on the program's licensure and rating information.

(7) Staff-Child Ratio and Capacity for Child Care Facilities. – In determining the staff-child ratio in child care facilities, all children younger than 13 years old shall be counted.

a. The Commission shall adopt rules for child care centers regarding staff-child ratios, group sizes and multi-age groupings other than for infants and toddlers, provided that these rules shall be no less stringent than those currently required for staff-child ratios as enacted in Section 156(e) of Chapter 757 of the 1985 Session Laws.

1. Except as otherwise provided in this subdivision, the staff-child ratios and group sizes for infants and toddlers in child care centers shall be no less stringent than as follows:

Age	Ratio Staff/ Children	Group Size
0 to 12 months	1/5	10
12 to 24 months	1/6	12
2 to 3 years	1/10	20.

No child care center shall care for more than 25 children in one group. Child care centers providing care for 26 or more children shall provide for two or more groups according to the ages of children and shall provide separate supervisory personnel and separate identifiable space for each group.

Joseph J DeLuca
Commission Counsel

2. When any preschool-aged child is enrolled in a child care center and the licensed capacity of the center is six through 12 children, the staff-child ratios shall be no less stringent than as follows:

Age	Ratio Staff/Children
0 to 12 months	1/5 preschool children plus 3 additional school-aged children
12 to 24 months	1/6 preschool children plus 2 additional school-aged children.

The following shall also apply:

I. There is no specific group size.

II. When only one caregiver is required to meet the staff-child ratio, the operator shall make available to parents the name, address, and phone number of an adult who is nearby and available for emergency relief.

III. Children shall be supervised at all times. All children who are not asleep or resting shall be visually supervised. Children may sleep or rest in another room as long as a caregiver can hear them and respond immediately.

b. Family Child Care Home Capacity. – Of the children present at any one time in a family child care home, no more than five children shall be preschool-aged, including the operator's own preschool-age children.

(8) Qualifications for Staff. – All child care center administrators shall be at least 21 years of age. All child care center administrators shall have the North Carolina Early Childhood Administration Credential or its equivalent as determined by the Department. All child care administrators performing administrative duties as of the date this act becomes law and child care administrators who assume administrative duties at any time after this act becomes law and until September 1, 1998, shall obtain the required credential by September 1, 2000. Child care administrators who assume administrative duties after September 1, 1998, shall begin working toward the completion of the North Carolina Early Childhood Administration Credential or its equivalent within six months after assuming administrative duties and shall complete the credential or its equivalent within two years after beginning work to complete the credential. Each child care center shall be under the direction or supervision of a person meeting these requirements. All staff counted toward meeting the required staff-child ratio shall be at least 16 years of age, provided that persons younger than 18 years of age work under the direct supervision of a credentialed staff person who is at least 21 years of age. All lead teachers in a child care center shall have at least a North Carolina Early Childhood Credential or its equivalent as determined by the Department. Lead teachers shall be enrolled in the North Carolina Early Childhood Credential coursework or its equivalent as determined by the Department within six months after becoming employed as a lead teacher or within six months after this act becomes law, whichever is later, and shall complete the credential or its equivalent within 18 months after enrollment.

For child care centers licensed to care for 200 or more children, the Department, in collaboration with the North Carolina Institute for Early Childhood Professional Development, shall establish categories to recognize the levels of education achieved by child care center administrators and teachers who perform administrative functions. The Department shall use these categories to establish appropriate staffing based on the size of the center and the individual staff responsibilities.

Effective January 1, 1998, an operator of a licensed family child care home shall be at least 21 years old and have a high school diploma or its equivalent. Operators of a family child care home licensed prior to January 1, 1998, shall be at least 18 years of age and literate. Literate is defined as understanding licensing requirements and having the ability to communicate with the family and relevant emergency personnel. Any operator of a licensed family child care home shall be the person on-site providing child care.

No person shall be an operator of nor be employed in a child care facility who has been convicted of a crime involving child neglect, child abuse, or moral turpitude, or who is an habitually

excessive user of alcohol or who illegally uses narcotic or other impairing drugs, or who is mentally or emotionally impaired to an extent that may be injurious to children.

The Commission shall adopt standards to establish appropriate qualifications for all staff in child care centers. These standards shall reflect training, experience, education and credentialing and shall be appropriate for the size center and the level of individual staff responsibilities. It is the intent of this provision to guarantee that all children in child care are cared for by qualified people. Pursuant to G.S. 110-106, no requirements may interfere with the teachings or doctrine of any established religious organization. The staff qualification requirements of this subdivision do not apply to religious-sponsored child care facilities pursuant to G.S. 110-106.

(8a) Expired pursuant to Session Laws 2010-178, s. 2, as amended by Session Laws 2011-145, s. 10.4A, effective July 1, 2011.

(9) Records. – Each child care facility shall keep accurate records on each child receiving care in the child care facility and on each staff member or other person delegated responsibility for the care of children in accordance with a form furnished or approved by the Commission, and shall submit records as required by the Department.

All records of any child care facility, except financial records, shall be available for review by the Secretary or by duly authorized representatives of the Department or a cooperating agency who shall be designated by the Secretary and shall be submitted as required by the Department.

(10) Each operator or staff member shall attend to any child in a nurturing and appropriate manner, and in keeping with the child's developmental needs.

Each child care facility shall have a written policy on discipline, describing the methods and practices used to discipline children enrolled in that facility. This written policy shall be discussed with, and a copy given to, each child's parent prior to the first time the child attends the facility. Subsequently, any change in discipline methods or practices shall be communicated in writing to the parents prior to the effective date of the change.

The use of corporal punishment as a form of discipline is prohibited in child care facilities and may not be used by any operator or staff member of any child care facility, except that corporal punishment may be used in religious sponsored child care facilities as defined in G.S. 110-106, only if (i) the religious sponsored child care facility files with the Department a notice stating that corporal punishment is part of the religious training of its program, and (ii) the religious sponsored child care facility clearly states in its written policy of discipline that corporal punishment is part of the religious training of its program. The written policy on discipline of nonreligious sponsored child care facilities shall clearly state the prohibition on corporal punishment.

(11) Staff Development. – The Commission shall adopt minimum standards for ongoing staff development for facilities but limited to the following topic areas:

a. Planning a safe, healthy learning environment;
b. Steps to advance children's physical and intellectual development;
c. Positive ways to support children's social and emotional development;
d. Strategies to establish productive relationships with families;
e. Strategies to manage an effective program operation;
f. Maintaining a commitment to professionalism;
g. Observing and recording children's behavior;
h. Principles of child growth and development; and
i. Learning activities that promote inclusion of children with special needs.

These standards shall include annual requirements for ongoing staff development appropriate to job responsibilities. A person may carry forward in-service training hours that are in excess of the previous year's requirement to meet up to one-half of the current year's required in-service training hours.

(12) Developmentally Appropriate Activities. – Each facility shall have developmentally appropriate activities and play materials. The Commission shall establish minimum standards for

developmentally appropriate activities for child care facilities. Each child care facility shall have a planned schedule of developmentally appropriate activities displayed in a prominent place for parents to review and the appropriate materials and equipment available to implement the scheduled activities. Each child care center shall make four of the following activity areas available daily: art and other creative play, children's books, blocks and block building, manipulatives, and family living and dramatic play.

(13) Transportation. – When a child care facility staff person or a volunteer of a child care facility transports children in a vehicle, each adult and child shall be restrained by an appropriate seat safety belt or restraint device when the vehicle is in motion. Children may never be left unattended in a vehicle.

The ratio of adults to children in child care vehicles may not be less than the staff/child ratios prescribed by G.S. 110-91(7). The Commission shall adopt standards for transporting children under the age of two, including standards addressing this particular age's staff/child ratio during transportation.

(14) Any effort to falsify information provided to the Department shall be considered by the Secretary to be evidence of violation of this Article on the part of the operator or sponsor of the child care facility and shall constitute a cause for revoking or denying a license to such child care facility.

(15) Safe Sleep Policy. – Operators of child care facilities that care for children ages 12 months or younger shall develop and maintain a written safe sleep policy, in accordance with rules adopted by the Commission. The safe sleep policy shall address maintaining a safe sleep environment and shall include the following requirements:

a. A caregiver in a child care facility shall place a child age 12 months or younger on the child's back for sleeping, unless: (i) for a child age 6 months or younger, the operator of the child care facility obtains a written waiver of this requirement from a health care professional, as defined in rules adopted by the Commission; or (ii) for a child older than 6 months, the operator of the child care facility obtains a written waiver of this requirement from a health care professional, as defined in rules adopted by the Commission, a parent, or a legal guardian.

b. The operator of the child care facility shall discuss the safe sleep policy with the child's parent or guardian before the child is enrolled in the child care facility. The child's parent or guardian shall sign a statement attesting that the parent or guardian received a copy of the safe sleep policy and that the policy was discussed with the parent or guardian before the child's enrollment.

c. Any caregiver responsible for the care of children ages 12 months or younger shall receive training in safe sleep practices.

(1971, c. 803, s. 1; 1973, c. 476, s. 128; 1975, c. 879, s. 15; 1977, c. 1011, s. 4; c. 1104; 1979, c. 9, ss. 1, 2; 1981 (Reg. Sess., 1982), c. 1382, ss. 1, 2; 1983, c. 46, s. 2; cc. 62, 277, 612; 1985, c. 757, ss. 155(h), (i), 156(c)-(h); 1987, c. 543, s. 3; c. 788, s. 6; c. 827, s. 234; 1989 (Reg. Sess., 1990), c. 1004, s. 56; 1991, c. 273, s. 5; c. 640, s. 1; 1993, c. 185, s. 3; c. 321, s. 254(c); c. 513, s. 9; c. 553, s. 32; 1995, c. 94, s. 32; 1997-443, s. 11A.44; 1997-456, s. 43.1(a); 1997-506, s. 8(a); 1998-217, s. 11; 1999-130, s. 2; 2003-407, s. 1; 2007-182, s. 2; 2009-64, s. 1; 2009-244, s. 1; 2010-117, s. 1; 2010-178, s. 1; 2011-145, s. 10.4A.)

§ 110-106. Religious sponsored child care facilities.

(a) The term "religious sponsored child care facility" as used in this section shall include any child care facility or summer day camp operated by a church, synagogue or school of religious charter.

(b) Procedure Regarding Religious Sponsored Child Care Facilities. –

(1) Religious sponsored child care facilities shall file with the Department a notice of intent to operate a child care facility and the date it will begin operation at least 30 days prior to that date. Within 30 days after beginning operation, the facility shall provide to the Department written reports and supporting data which show the facility is in compliance with applicable

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provisions of G.S. 110-91. After the religious sponsored child care facility has filed this information with the Department, the facility shall be visited by a representative of the Department to ensure compliance with the applicable provisions of G.S. 110-91.

(2) Each religious sponsored child care facility shall file with the Department a report indicating that it meets the minimum standards for facilities as provided in the applicable provisions of G.S. 110-91 as required by the Department. The reports shall be in accordance with rules adopted by the Commission. Each religious sponsored child care facility shall be responsible for supplying with its report the necessary supporting data to show conformity with those minimum standards, including reports from the local and district health departments, local building inspectors, local firemen, volunteer firemen, and other, on forms which shall be provided by the Department.

(3) It shall be the responsibility of the Department to notify the facility if it fails to meet the minimum requirements. The Secretary shall be responsible for carrying out the enforcement provisions provided by the General Assembly in Article 7 of Chapter 110 including inspection to ensure compliance. The Secretary may issue an order requiring a religious sponsored child care facility which fails to meet the standards established pursuant to this Article to cease operating. A religious sponsored child care facility may request a hearing to determine if it is in compliance with the applicable provisions of G.S. 110-91. If the Secretary determines that it is not, the Secretary may order the facility to cease operation until it is in compliance.

(4) Religious sponsored child care facilities including summer day camps shall be exempt from the requirement that they obtain a license and that the license be displayed and shall be exempt from any subsequent rule or regulatory program not dealing specifically with the minimum standards as provided in the applicable provisions of G.S. 110-91. Nothing in this Article shall be interpreted to allow the State to regulate or otherwise interfere with the religious training offered as a part of any religious sponsored child care program. Nothing in this Article shall prohibit any religious sponsored child care facility from becoming licensed by the State if it so chooses.

(5) Religious sponsored child care facilities found to be in violation of the applicable provisions of G.S. 110-91 shall be subject to the injunctive provisions of G.S. 110-104, except that they may not be enjoined for operating without a license. The Secretary may seek an injunction against any religious sponsored child care facility under the conditions specified in G.S. 110-104 with the above exception and when any religious sponsored child care facility operates without submitting the required forms and following the procedures required by this Article.

(c) G.S. 110-91(8), 110-91(11), 110-91(12) do not apply to religious sponsored child care facilities, and these facilities are exempt from any requirements prescribed by subsection (b) of this section that arise out of these provisions. *[G.S. 110-91 in its entirety is set out above and the relevant passages cited here are highlighted above.]*

(d) No person shall be an operator of nor be employed in a religious sponsored child care facility who has been convicted of a crime involving child neglect, child abuse, or moral turpitude, or who is a habitually excessive user of alcohol or who illegally uses narcotic or other impairing drugs, or who is mentally or emotionally impaired to an extent that may be injurious to children.

(e) Each religious sponsored child care facility shall be under the direction or supervision of a literate person at least 21 years of age. All staff counted toward meeting the required staff/child ratio shall be at least 16 years old, provided that persons younger than 18 years old work under the direct supervision of a literate staff person at least 21 years old. Effective January 1, 1998, a person operating a religious sponsored child care home must be at least 21 years old and literate. Persons operating religious sponsored child care homes prior to January 1, 1998, shall be at least 18 years old and literate. The definition of literate in G.S. 110-91(8) shall apply to this subsection.

(1983, c. 283, ss. 1, 2; 1985, c. 757, ss. 155(p), 156(k); 1987, c. 788, s. 20; 1997-506, s. 26.)

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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: NC CHILD CARE COMMISSION

RULE CITATION: 10A NCAC 09 .3005

RECOMMENDED ACTION:

Return the rule to the agency for failure to comply with the Administrative Procedure Act

Approve, but note staff's comment

X Object, based on:

Lack of statutory authority

X Unclear or ambiguous

Unnecessary

Failure to adopt the rule in accordance with the APA

Extend the period of review

COMMENT:

In (b) it is unclear what constitutes "necessary [health assessment related] referrals" or how it is determined that a referral is "necessary." The health assessment related referrals would be derived from the "health assessment" requirements in (a)(1 –(5). Other than the ability to read an immunization history required by (a)(2) and comparing it to a chart that lists various immunizations required at or by certain ages, it is unclear that the other four assessments would necessarily list the "necessity" for a given "referral." It is not clear whether a referral that might be recommended would be considered a "necessary" referral or how "necessity" is determined.

It is also unclear what constitutes satisfying the requirement that the administrator of a Pre-K program "ensure that ... referrals ... have been made." It is unclear whether that means simply making sure that parents or guardians are aware of the need for a referral or actually making the referral to a provider directly or making sure a parent or guardian meets with a provider. It does not seem that a program administrator would have any authority to make an appointment or any enforcement authority to "ensure" that an appointment was kept.

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Commission Counsel

RRC STAFF OPINION

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AGENCY: NC CHILD CARE COMMISSION

RULE CITATION: 10A NCAC 09 .3006

RECOMMENDED ACTION:

Return the rule to the agency for failure to comply with the Administrative Procedure Act

Approve, but note staff's comment

X Object, based on:

Lack of statutory authority

X Unclear or ambiguous

Unnecessary

Failure to adopt the rule in accordance with the APA

Extend the period of review

COMMENT:

In (b) it is unclear what an "approved screening instrument" is or how the approval is made. There is no authority to make the "approved" determination outside rulemaking.

In (c), just as in the previous rule, it is unclear what a "necessary referral" is, how the administrator is to "ensure that all necessary referrals ... have been made" or what constitutes satisfying the requirement to "ensure" that something is done.

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RRC STAFF OPINION

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AGENCY: NC CHILD CARE COMMISSION

RULE CITATION: 10A NCAC 09 .3008

RECOMMENDED ACTION:

Return the rule to the agency for failure to comply with the Administrative Procedure Act

Approve, but note staff's comment

X Object, based on:

Lack of statutory authority

X Unclear or ambiguous

Unnecessary

Failure to adopt the rule in accordance with the APA

Extend the period of review

COMMENT:

In this rule, just as in rule .3006, it is unclear what an "approved assessment instrument" is or how the approval is made. There is no authority to make the "approved" determination outside rulemaking.

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RRC STAFF OPINION

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AGENCY: NC DEPARTMENT OF TRANSPORTATION

RULE CITATION: 19A NCAC 02E .0210

RECOMMENDED ACTION:

Return the rule to the agency for failure to comply with the Administrative Procedure Act

Approve, but note staff's comment

X Object, based on:

Lack of statutory authority

X Unclear or ambiguous

Unnecessary

Failure to adopt the rule in accordance with the APA

Extend the period of review

COMMENT:

The removal of the adjective "initial" in (6) line 17 now makes the term "newly erected outdoor advertising structure" unclear. It is unclear what constitutes a "newly erected" structure, i.e., how long a structure is "newly erected."

Previously that term had little significance since it was the "initial" inspection that determined whether the structure was in compliance. It did not matter when the "initial" inspection was since in relation to that inspection any structure could be thought of as "newly erected."

Now any inspection, not just the initial one, can make the determination, but it must be an inspection of a "newly erected structure." So the determination of when a structure is still considered "newly erected" is critical.

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