

NORTH CAROLINA

IN THIS ISSUE



REGISTER

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Office of Administrative Hearings
Rules Division
424 North Blount Street (27601)
6714 Mail Service Center
Raleigh, NC 27699-6714
(919) 733-2678
FAX (919) 733-3462

Julian Mann III, Director
Camille Winston, Deputy Director
Molly Masich, Director of APA Services
Ruby Creech, Publications Coordinator
Linda Dupree, Editorial Assistant
Dana Sholes, Editorial Assistant
Rhonda Wright, Editorial Assistant

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NORTH CAROLINA ADMINISTRATIVE CODE CLASSIFICATION SYSTEM

The North Carolina Administrative Code (NCAC) has four major subdivisions of rules. Two of these, titles and chapters, are mandatory. The major subdivision of the NCAC is the title. Each major department in the North Carolina executive branch of government has been assigned a title number. Titles are further broken down into chapters which shall be numerical in order. The other two, subchapters and sections are optional subdivisions to be used by agencies when appropriate.

TITLE/MAJOR DIVISIONS OF THE NORTH CAROLINA ADMINISTRATIVE CODE

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9	Governor	General Contractors	12
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NORTH CAROLINA REGISTER
Publication Schedule for January 2003 – December 2003

Filing Deadlines			Notice of Rule-Making Proceedings	Notice of Text							Temporary Rule
volume & issue number	issue date	last day for filing	earliest register issue for publication of text	earliest date for public hearing	non-substantial economic impact			substantial economic impact			270 th day from issue date
					end of required comment period	deadline to submit to RRC for review at next meeting	first legislative day of the next regular session	end of required comment period	deadline to submit to RRC for review at next meeting	first legislative day of the next regular session	
17:13	01/02/03	12/06/02	03/03/03	01/17/03	02/03/03	02/20/03	05/00/04	03/03/03	03/20/03	05/00/04	09/29/03
17:14	01/15/03	12/19/02	03/17/03	01/30/03	02/14/03	02/20/03	05/00/04	03/17/03	03/20/03	05/00/04	10/12/03
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17:16	02/17/03	01/27/03	05/01/03	03/04/03	03/19/03	03/20/03	05/00/04	04/21/03	04/21/03	05/00/04	11/14/03
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18:11	12/01/03	11/05/03	02/02/04	12/16/03	12/31/03	01/20/04	05/00/04	01/30/04	02/20/04	05/00/04	08/27/04
18:12	12/15/03	11/20/03	02/16/04	12/30/03	01/14/04	01/20/04	05/00/04	02/13/04	02/20/04	05/00/04	09/10/04

EXPLANATION OF THE PUBLICATION SCHEDULE

This Publication Schedule is prepared by the Office of Administrative Hearings as a public service and the computation of time periods are not to be deemed binding or controlling. Time is computed according to 26 NCAC 2C .0302 and the Rules of Civil Procedure, Rule 6.

GENERAL

The North Carolina Register shall be published twice a month and contains the following information submitted for publication by a state agency:

- (1) temporary rules;
- (2) notices of rule-making proceedings;
- (3) text of proposed rules;
- (4) text of permanent rules approved by the Rules Review Commission;
- (5) notices of receipt of a petition for municipal incorporation, as required by G.S. 120-165;
- (6) Executive Orders of the Governor;
- (7) final decision letters from the U.S. Attorney General concerning changes in laws affecting voting in a jurisdiction subject of Section 5 of the Voting Rights Act of 1965, as required by G.S. 120-30.9H;
- (8) orders of the Tax Review Board issued under G.S. 105-241.2; and
- (9) other information the Codifier of Rules determines to be helpful to the public.

COMPUTING TIME: In computing time in the schedule, the day of publication of the North Carolina Register is not included. The last day of the period so computed is included, unless it is a Saturday, Sunday, or State holiday, in which event the period runs until the preceding day which is not a Saturday, Sunday, or State holiday.

FILING DEADLINES

ISSUE DATE: The Register is published on the first and fifteen of each month if the first or fifteenth of the month is not a Saturday, Sunday, or State holiday for employees mandated by the State Personnel Commission. If the first or fifteenth of any month is a Saturday, Sunday, or a holiday for State employees, the North Carolina Register issue for that day will be published on the day of that month after the first or fifteenth that is not a Saturday, Sunday, or holiday for State employees.

LAST DAY FOR FILING: The last day for filing for any issue is 15 days before the issue date excluding Saturdays, Sundays, and holidays for State employees.

NOTICE OF RULE-MAKING PROCEEDINGS

END OF COMMENT PERIOD TO A NOTICE OF RULE-MAKING PROCEEDINGS: This date is 60 days from the issue date. An agency shall accept comments on the notice of rule-making proceeding until the text of the proposed rules is published, and the text of the proposed rule shall not be published until at least 60 days after the notice of rule-making proceedings was published.

EARLIEST REGISTER ISSUE FOR PUBLICATION OF TEXT: The date of the next issue following the end of the comment period.

NOTICE OF TEXT

EARLIEST DATE FOR PUBLIC HEARING: The hearing date shall be at least 15 days after the date a notice of the hearing is published.

END OF REQUIRED COMMENT PERIOD
(1) RULE WITH NON-SUBSTANTIAL ECONOMIC IMPACT: An agency shall accept comments on the text of a proposed rule for at least 30 days after the text is published or until the date of any public hearings held on the proposed rule, whichever is longer.

(2) RULE WITH SUBSTANTIAL ECONOMIC IMPACT: An agency shall accept comments on the text of a proposed rule published in the Register and that has a substantial economic impact requiring a fiscal note under G.S. 150B-21.4(b1) for at least 60 days after publication or until the date of any public hearing held on the rule, whichever is longer.

DEADLINE TO SUBMIT TO THE RULES REVIEW COMMISSION: The Commission shall review a rule submitted to it on or before the twentieth of a month by the last day of the next month.

FIRST LEGISLATIVE DAY OF THE NEXT REGULAR SESSION OF THE GENERAL ASSEMBLY: This date is the first legislative day of the next regular session of the General Assembly following approval of the rule by the Rules Review Commission. See G.S. 150B-21.3, Effective date of rules.

This Section contains public notices that are required to be published in the Register or have been approved by the Codifier of Rules for publication.

Notice of Application for Innovative Approval of a Wastewater System for On-site Subsurface Use

Pursuant to NCGS 130A-343(g), the North Carolina Department of Environment and Natural Resources (DENR) shall publish a Notice in the NC Register that a manufacturer has submitted a request for approval of a wastewater system, component, or device for on-site subsurface use. The following application has been submitted to DENR:

Application by: Marie-Christine Belanger
Premier Tech
1, Avenue Premier
Riviere-du-Loup (Quebec)
G5R 6C1 CANADA
418.867.8883
Fax 418.862.6642

For: Modification to "Ecoflo" Peat Biofilter System Innovative Approval

DENR Contact: Steven Berkowitz
919.715.3271
FAX 919.715.3227
Steven.berkowitz@ncmail.net

The application may be reviewed by contacting the applicant or at 2728 Capital Blvd., Raleigh, NC, On-Site Wastewater Section, Division of Environmental Health. Draft proposed innovative approvals and proposed final action on the application by DENR can be viewed on the On-Site Wastewater Section web site: www.deh.enr.state.nc/oww/.

Written public comments may be submitted to DENR within 30 days of the date of the Notice publication in the North Carolina Register. All written comments should be submitted to Mr. Steve J. Steinbeck, Head, Enforcement and Special Projects, On-site Wastewater section, 1642 Mail Service Center, Raleigh, NC 27699-1642, or steve.steinbeck@ncmail.net, or Fax 919.715.3227. Written comments received by DENR in accordance with this Notice will be taken into consideration before final agency decision of the innovative subsurface wastewater system application.

A Notice of Rule-making Proceedings is a statement of subject matter of the agency's proposed rule making. The agency must publish a notice of the subject matter for public comment at least 60 days prior to publishing the proposed text of a rule. Publication of a temporary rule serves as a Notice of Rule-making Proceedings and can be found in the Register under the section heading of Temporary Rules. A Rule-making Agenda published by an agency serves as Rule-making Proceedings and can be found in the Register under the section heading of Rule-making Agendas. Statutory reference: G.S. 150B-21.2.

TITLE 15A – DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

CHAPTER 10 - WILDLIFE RESOURCES AND WATER SAFETY

Notice of Rule-making Proceedings is hereby given by NC Wildlife Resources Commission in accordance with G.S. 150B-21.2. The agency shall subsequently publish in the Register the text of the rule(s) it proposes to adopt as a result of this notice of rule-making proceedings and any comments received on this notice.

Citation to Existing Rule Affected by this Rule-making: 15A NCAC 10H. Other rules may be proposed in the course of the rule-making process.

Authority for the Rule-making: G.S. 113-140

Statement of the Subject Matter: Prohibit release of wild boar.

Reason for Proposed Action: The NC Wildlife Resources Commission proposes to make unlawful the release of wild boar into the wild.

Comment Procedures: Written comments should be submitted to Joan Troy, 1701 Mail Service Center, Raleigh, NC 27699-1701. Phone; (919) 733-7191, email: joan.troy@ncwildlife.org.

This Section contains the text of proposed rules. At least 60 days prior to the publication of text, the agency published a Notice of Rule-making Proceedings. The agency must accept comments on the proposed rule for at least 30 days from the publication date, or until the public hearing, or a later date if specified in the notice by the agency. The required comment period is 60 days for a rule that has a substantial economic impact of at least five million dollars (\$5,000,000). Statutory reference: G.S. 150B-21.2.

TITLE 15A – DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

COMMISSION

SECTION .1000 - WARNING TICKETS

Notice is hereby given in accordance with G.S. 150B-21.2 that the NC Wildlife Resources Commission intends to amend the rules cited as 15A NCAC 10A .1001; 10B .0105; 10F .0343, .0360. Notice of Rule-making Proceedings was published in the Register on January 15, 2003, March 17, 2003, and April 1, 2003.

Proposed Effective Date: August 1, 2004

Public Hearing: (15A NCAC 10A .1001; 10F .0343, .0360)

Date: July 21, 2003

Time: 9:00 a.m.

Location: WRC conference room, 512 N. Salisbury Street, 3rd floor Archdale Bldg, Raleigh, NC

Date: July 23, 2003 (15A NCAC 15A 10B .0105)

Time: 9:00 a.m.

Location: WRC conference room, 512 N. Salisbury Street, 3rd floor Archdale Bldg, Raleigh, NC

Reason for Proposed Action:

15A NCAC 10A .1001 – To set forth those violations for which a warning ticket may be issued.

15A NCAC 10B .0105 – To create a waterfowl refuge in Gaddy Goose area.

15A NCAC 10F .0343 and .0360 – To establish no wake zones for public safety.

Comment Procedures: Written comments for 15A NCAC 10A .1001 should be submitted to Kenneth Everhart, 1701 Mail Service Center, Raleigh, NC 27699-1701. Phone: (919) 733-7191, ext. 247. Comments should be submitted by August 1, 2003. Written comments for 15A NCAC 10B .0105 should be submitted to Brad Gunn, 1701 Mail Service Center, Raleigh, NC 27699-1701. Phone: (919) 733-7291, ext. 287. Comments should be submitted by August 2, 2003. Written comments for 15A NCAC 10F .0343 and .0360 should be submitted to Joan Troy, 1701 Mail Service Center, Raleigh, NC 27699-1701. Phone: (919) 733-7191, ext. 247. Comments should be submitted by August 1, 2003.

Fiscal Impact

- State
- Local
- Substantive (≥\$5,000,000)
- None

CHAPTER 10 - WILDLIFE RESOURCES AND WATER SAFETY

SUBCHAPTER 10A - WILDLIFE RESOURCES

15A NCAC 10A .1001 PARTICULAR OFFENSES

(a) Warning Tickets Prohibited. Wildlife Enforcement Officers shall not issue warning tickets for the following offenses, classes of offenses or offenses committed in a particular manner:

- (1) second offense of a similar charge;
- (2) hunting, fishing, or trapping without a license, except as listed in this Rule;
- (3) exceeding bag or creel limits;
- (4) taking fish or wildlife by use of poison, explosives, or electricity;
- (5) hunting, fishing, or trapping in closed season;
- (6) hunting on Game Lands during closed days;
- (7) firelighting deer;
- (8) unlawful taking or possession of antlerless deer;
- (9) unlawful taking or possession of bear or wild turkey;
- (10) unlawful purchase or sale of wildlife;
- (11) unlawful taking of fox; or
- (12) taking wildlife with the aid of or from a motor vehicle or boat under power or while in motion.

(b) Warning Tickets Permitted. In accordance with the conditions provided in G.S. 113-140(c) and where there is a contemporaneous occurrence of more than three violations of the motorboat statutes or administrative rules, Wildlife Enforcement Officers may issue a citation on the two most serious violations and a warning ticket on the lesser violation(s). In addition, Wildlife Enforcement Officers may issue warning tickets for the following offenses:

- (1) Boating Violations:
 - (A) number missing, lack of contrast, not properly spaced or less than three inches in height;
 - (B) no validation decal affixed or incorrect placement;
 - (C) fire extinguisher not charged or non-approved;
 - (D) no fire extinguisher on boats with false bottoms not completely sealed to hull or filled with flotation material;
 - (E) failure to notify North Carolina Wildlife Resources Commission of change of address of boat owner;
 - (F) personal flotation device not Coast Guard approved;
 - (G) failure to display navigation lights when there is evidence that lights malfunctioned while underway;

PROPOSED RULES

- (H) no sound device on Class I boats only;
 - (I) muffler not adequate;
 - (J) loaded firearm on access area;
 - (K) parking on access area in other than designated parking area, provided traffic to ramp not impeded;
 - (L) motorboat registration expired ten days or less;
 - (M) no Type IV throwable personal flotation device on board, but other personal flotation device requirements met; ~~or~~
 - (N) violation of no-wake speed zone when mitigating circumstances ~~present~~; present;
 - (O) running lights on motorboat are obstructed, not visible or improperly configured
 - (P) personal flotation device is not readily accessible on board motorboat;
 - (Q) failure to wear a kill-switch lanyard on personal watercraft;
 - (R) exceeding capacity of personal watercraft while towing a skier;
 - (S) allowing youth under the age of 12 to operate a personal watercraft while accompanied by an adult; or
 - (T) operate a personal watercraft wearing an inflatable personal flotation device.
- (2) License Violations:
- (A) persons under 16 hunting, trapping, or trout fishing without meeting statutory requirements;
 - (B) senior citizens hunting or fishing without valid license(s) (Senior citizens are those persons 65 years old or older);
 - (C) when it appears evident that the wrong license was purchased or issued by mistake;
 - (D) failure to carry required license or identification on person, if positive identification can be established;
 - (E) non-resident hunting, fishing, or trapping with resident license, if domicile is established, but not 60 days;
 - (F) hunting, fishing, or trapping on Game Lands or fishing in Designated Trout Waters that are not properly posted or have been posted for no more than 30 days; or
 - (G) persons who are 18 years or older or who do not reside with their parents, when such persons are taking wildlife upon their parent's land without a license as required by G.S. 113-270.2, 113-270.3(b) except for subdivision (5), 113-270.5, 113-271, or 113-272.
- (3) Game Lands Violations:
- (A) camping on Game Lands in other than designated area; or
 - (B) possession of weapons readily available for use while on game land thoroughfare, during closed season.
- (4) Trapping Violations:
- (A) improper chain length at dry land sets;
 - (B) trap tag not legible;
 - (C) trap tag missing, but with a group of properly tagged traps;
 - (D) trap tag missing, but evidence that animal destroyed;
 - (E) improper jawsize;
 - (F) failure to comply with "offset" jaw requirement for traps with jaw spread of more than 5 ½ inches;
 - (G) failure to attend traps daily, during severe weather (ice, high water, heavy snow); or
 - (H) no written permission, but on right-of-way of public road.
- (5) Miscellaneous Violations:
- (A) allowing dogs, not under the control of the owner to chase deer during closed season;
 - (B) attempting to take deer with dogs, or allowing dogs to chase deer in restricted areas;
 - (C) using dogs to track wounded deer during primitive weapon season;
 - (D) failure to report big game kill to nearest cooperater agent, when game is tagged and subject is enroute to another agent;
 - (E) training dogs or permitting them to run unleashed on Game Lands west of I-95 during the period of April 1 through August 15;
 - (F) violation of newly adopted regulations, when not readily available to the public;
 - (G) violation of local laws, when information not available to the public;
 - (H) all permits (except for fox depredation permit);
 - (I) closed season, if misprinted in digest or suddenly changed;
 - (J) minor record violation (taxidermist);
 - (K) failure to put name and address on marker (trotline); or
 - (L) failure to put name and address on nets.
- (c) Special Consideration. Special consideration may be given in local areas where the offender is hunting or fishing out of his normal locality and is unfamiliar with the local law. Consideration may also be given for violations on newly opened

or established Game Lands and on reclassified or newly Designated Mountain Trout Waters. Special consideration may be given to offenders under 18 years of age.

Authority G.S. 113-140.

SUBCHAPTER 10B - HUNTING AND TRAPPING

SECTION .0100 - GENERAL REGULATIONS

15A NCAC 10B .0105 MIGRATORY GAME BIRDS IS PROPOSED FOR AMENDMENT AS FOLLOWS:

(a) Cooperative State Rules:

- (1) The taking of sea ducks (scoter, eider and old squaw) during any special federally-announced season for these species shall be limited to the waters of the Atlantic Ocean, and to those coastal waters south of US 64 which are separated by a distance of at least 800 yards of open water from any shore, island or marsh.
- (2) The extra daily bag and possession limits allowed by the federal regulations on scaup apply in all coastal waters east of US Highway 17, except Currituck Sound north of US 158.
- (3) Tundra swans may be taken during the open season by permit only subject to annual limitations imposed by the U. S. Fish and Wildlife Service. Based upon the annual limitations imposed by the U.S. Fish and Wildlife Service, nontransferable swan permits will be issued by the Wildlife Resources Commission to applicants who will be selected at random by computer, and only one swan may be taken under each permit which must be cancelled at the time of the kill by cutting out the month and day of the kill. Accompanying the permit is a tag which must be affixed to the swan at the time and place of the kill. The tag must be affixed in accordance with instructions provided with the permit. In addition, a preaddressed post-paid card is supplied to each permittee on which to report the number of days hunted and the details of the kill if made. It is unlawful to hunt swans without having the permit and the tag in possession or to possess a swan without the cancelled permit in possession and the tag properly affixed to the swan. It is unlawful to possess a swan permit or tag while hunting that was assigned to another person or to alter the permit or tag in any way other than cutting out the proper month and day of kill.
- (4) Canada geese may be taken during the open season by permit holders only subject to limitations imposed by the U.S. Fish and Wildlife Service. Permits will be issued by the North Carolina Wildlife Resources Commission. It is unlawful to hunt or possess Canada geese without having the permit in

possession. It is unlawful to possess a Canada goose permit while hunting that was assigned to another person or to alter the permit in any way.

(b) Notwithstanding the provisions of G.S. 113-291.1(a) and (b), the following restrictions apply to the taking of migratory game birds:

- (1) No migratory game bird may be taken:
 - (A) With a rifle;
 - (B) With a shotgun of any description capable of holding more than three shells, unless it is plugged with a one-piece filler, incapable of removal without disassembling the gun, so as to limit its total capacity to not more than three shells.
- (2) No migratory game bird may be taken:
 - (A) From or by the use of a sinkbox or any other type of low floating device affording the hunter a means of concealment beneath the surface of the water;
 - (B) With the aid of bait, or on, over or within 300 yards of any place where any grain, salt or other feed is exposed so as to constitute an attraction to migratory game birds or has been so exposed during any of the 10 consecutive days preceding the taking, except that this Part shall not apply to standing crops, flooded croplands, grain crops properly shocked on the field where grown, or grains found scattered solely as the result of normal agricultural planting or harvesting;
 - (C) With the aid of live decoys, or on, over or within 300 yards of any place where tame or captive migratory game birds are present, unless such birds are and have been for a period of 10 consecutive days prior to such taking confined within an enclosure which substantially reduces the audibility of their calls and totally conceals them from the sight of wild migratory game birds.
- (3) Waterfowl hunting and harassment and other unauthorized activities shall be prohibited on posted waterfowl management areas established by the Wildlife Resources Commission for Canada Geese and ducks restoration.
- (4) In that area of Roanoke Sound adjacent to and immediately Northeast of Roanoke Island as marked by buoys designating the waterfowl rest area, it shall be unlawful to harass or take any waterfowl.
- (5) The area east of US 17 shall be designated as an experimental September teal season zone as

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- (6) referenced by the Federal frameworks calling for state rules designating experimental areas. It shall be unlawful to harass or take any waterfowl in the Gaddy Goose Refuge, which is in that area of Anson County starting at the NC 109 bridge over the Pee Dee River and following NC 109 south to Dennis Road (SR1650); west on Dennis Road to Pleasant Grove Church Road (SR 1649); continue west on Pleasant Grover Church Road to US 52; south on US 52 to Lockhart Road (SR 1652); west on Lockhart Road to Brown Creek Church-Cox Road (SR 1641); west on Brown Creek Church-Cox Road to NC 742; northwest on NC 742 to Lanes Creek; Lanes Creek north (downstream) to Rocky River; Rocky River downstream to the Pee Dee River; and from Pee Dee River downstream to the beginning of the NC 109 bridge.

Authority G.S. 113-134; 113-274; 113-291.1; 113-291.2; 50 C.F.R. 20.21; 50 C.F.R. 20.105.

SUBCHAPTER 10F - MOTORBOATS AND WATER SAFETY

SECTION .0300 - LOCAL WATER SAFETY REGULATIONS

15A NCAC 10F .0343 CHATHAM COUNTY IS PROPOSED FOR AMENDMENT AS FOLLOWS:

(a) Definitions. In addition to the definitions set forth in Paragraph (b) of Rule .0301 of this Section, the following definitions apply in this Rule:

- (1) Corps - Corps of engineers, United States Army;
- (2) Regulated Area - That portion of the B. Everette Jordan Reservoir located within the boundaries of Chatham County.

(b) Speed Limit. No person shall operate a vessel at greater than no-wake speed on the regulated area as follows:

- (1) within 50 yards of any public boat launching ramp;
- (2) within the restricted zone adjacent to the Crosswinds Marina located north of US 64 and west of SR 1008 as indicated by markers located with approval of the Executive Director of the Wildlife Resources Commission;
- (3) within 100 feet of all ~~bridges~~ bridges; and
- (4) within the restricted zone at the Ebenezer Church Road access point.

(c) Restricted Swimming Areas. No person operating or responsible for the operation of any vessel, surfboard or water skis shall permit the same to enter any marked swimming area located on the regulated area.

(d) Placement and Maintenance of Markers. The Board of Commissioners of Chatham County is designated a suitable agency for placement and maintenance of the markers implementing this Rule, subject to the approval of the corps. With regard to marking the regulated area described in

Paragraph (a) of this Rule, the supplementary standards listed in Subparagraphs (1) through (8) of Rule .0301(g) of this Section shall apply.

Authority G.S. 75A-3; 75A-15.

15A NCAC 10F .0360 GRAHAM COUNTY IS PROPOSED FOR AMENDMENT AS FOLLOWS:

(a) Regulated Area. This Rule applies to the waters and portions of waters described as follows:

- (1) Lake Santeetlah Boat Dock on Lake Santeetlah in Graham County.
- (2) Entrance of Fontana Boat Dock in Fontana Lake in Graham County.
- (3) Thomas Boat Dock on Fontana Lake in Graham County.
- (4) Crisp's Boat Dock, Panther Creek on Fontana Lake in Graham County.
- (5) Deyton Camp Boat Dock at N35° 20.489 W083° 49.091, off the main channel of the Tallulah prong of Santeetlah Lake.

(b) Speed Limit. No person shall operate a vessel at greater than no-wake speed within 50 yards of the regulated areas as described in Paragraph (a) of this Rule.

(c) Cheoah Point Swimming Area, Lake Santeetlah - No person shall operate a vessel within the Cheoah Point Swimming Area which begins at the head of Cheoah Point Cove and extends to the mouth of the Cove as designated by marker buoys and float lines.

(d) Placement and Maintenance of Markers. The Graham County Board of Commissioners is designated as a suitable agency for the placement and maintenance of markers implementing this Rule.

Authority G.S. 75A-3; 75A-15.

TITLE 21 – OCCUPATIONAL LICENSING BOARDS

CHAPTER 32 - NORTH CAROLINA MEDICAL BOARD

Notice is hereby given in accordance with G.S. 150B-21.2 that the North Carolina Medical Board intends to adopt the rule cited as 21 NCAC 32B .0104. Notice of Rule-making Proceedings was published in the Register on December 1, 2002.

Proposed Effective Date: August 1, 2004

Public Hearing:

Date: July 21, 2003

Time: 10:00 a.m.

Location: North Carolina Medical Board, 1203 Front St., Raleigh, NC

Reason for Proposed Action: Pursuant to G.S. 90-11(b), the Board may request the North Carolina Department of Justice conduct a criminal record check. The statute allows the Department of Justice to charge each applicant a fee for conducting the background checks. The statute states that the Board “shall provide to the Department of Justice, along with

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the request, the fingerprints of the applicant, any additional information required by the Department of Justice, and a form signed by the applicant consenting to the check . . .” Importantly, however, the statute does not require the applicant to provide the necessary information to the Board. 21 NCAC 32B .0104, a temporary rule effective December 1, 2002, permits the Board require such information from the applicants. The Board now seeks to make this Rule, as amended, a permanent rule.

Comment Procedures: Comments from the public shall be directed to Brian L. Blankenship, Board Attorney, 1203 Front St., Raleigh, NC 27609 and email brian.blankenship@ncmedboard.org. Comments shall be received through July 31, 2003.

Fiscal Impact

- State
- Local
- Substantive (≥\$5,000,000)
- None

SUBCHAPTER 32B - LICENSE TO PRACTICE MEDICINE

SECTION .0100 – GENERAL

21 NCAC 32B .0104 CRIMINAL BACKGROUND CHECK

(a) All applicants for a license to practice medicine or to perform medical acts, tasks, and functions as a physician assistant contained in Subchapters 32B and 32S, shall be fingerprinted and a search made of local, state, and national files to disclose any criminal record.

(b) All applicants shall submit a signed consent form, one completed Fingerprint Record Card, Form FD-258, and such other form(s) that may be required at that time by the agency performing the criminal history check to the Board at the time of their application.

(c) The Board shall forward the consent form and completed Fingerprint Record Cards to the North Carolina State Bureau of Investigation for fingerprint and criminal history checks against local, state, and national files.

(d) The Board will receive a report of the results of the fingerprint card against local, state and federal files.

(e) An applicant for license to practice medicine in North Carolina may be licensed to practice medicine in North Carolina prior to the date on which the Board receives the report of the results of the fingerprint record check, if all the following requirements are met:

(1) The completed Fingerprint Record Cards and signed consent form have been received by the Board; and

(2) The applicant meets all other minimum licensing requirements.

Authority: G.S. 90-6; 90-9; 90-11.

This Section includes temporary rules reviewed by the Codifier of Rules and entered in the North Carolina Administrative Code and includes, from time to time, a listing of temporary rules that have expired. See G.S. 150B-21.1 and 26 NCAC 02C .0500 for adoption and filing requirements. Pursuant to G.S. 150B-21.1(e), publication of a temporary rule in the North Carolina Register serves as a notice of rule-making proceedings unless this notice has been previously published by the agency.

TITLE 10A – DEPARTMENT OF HEALTH AND HUMAN SERVICES

Rule-making Agency: *NC Medical Care Commission*

Rule Citation: *10A NCAC 13F .0201-.0203, .0206-.0209, .0212-.0213, .0215, .0301, .0402, .0404, .0406-.0407, .0503, .0601, .0701-.0702, .0801-.0802, .0902-.0906, .0908, .1202-.1204, .1206; 13G .0705, .0904*

Effective Date: *July 1, 2003*

Findings Reviewed and Approved by: *Beecher R. Gray*

Authority for the rulemaking: *G.S. 131D-2; 131D-4.5; 143B-165; S.L. 2002-260*

Reason for Proposed Action: *Session Law 2002-260 (HB 1777) authorizes the NC Medical Care Commission to "adopt temporary rules and permanent rules to amend Subchapter 13F and Subchapter 13G of Title 10A of the North Carolina Administrative Code." Prior to adoption, the legislation requires the Commission to: (a) consult with persons who may be interested in the subject matter of the temporary rule; (b) notify persons on the mailing list of its intent to adopt a temporary rule; (c) publish the proposed text of the temporary rule in the NC Register; (d) hold at least one public hearing; and (e) accept written comments for at least 30 days after the publication of the proposed text. This rule-making action satisfies items (c), (d) and (e) of this Paragraph.*

Comment Procedures: *Comments from the public shall be directed to Mark Benton, Chief of Budget and Planning, NC Division of Facility Services, 2701 Mail Service Center, Raleigh, NC 27699-2701 and email mark.benton@ncmail.net.*

CHAPTER 13 – NC MEDICAL CARE COMMISSION

SUBCHAPTER 13F - LICENSING OF HOMES FOR THE AGED AND INFIRM

SECTION .0200 – LICENSING

~~10 NCAC 42D .2201~~10A NCAC 13F .0201 DEFINITIONS

~~Rule 10 NCAC 42C .3901 shall control for this Subchapter.~~

The following definitions shall apply throughout this Section:

- (1) "Person" means an individual; a trust or estate; a partnership; a corporation; or any grouping of individuals, each of whom owns five percent or more of a partnership or corporation, who collectively own a majority interest of either a partnership or a corporation.
- (2) "Owner" means any person who has or had legal or equitable title to or a majority interest in an adult care home.

(3) "Affiliate" means any person that directly or indirectly controls or did control an adult care home or any person who is controlled by a person who controls or did control an adult care home. In addition, two or more adult care homes who are under common control are affiliates.

(4) "Principal" means any person who is or was the owner or operator of an adult care home, an executive officer of a corporation that does or did own or operate an adult care home, a general partner of a partnership that does or did own or operate an adult care home, or a sole proprietorship that does or did own or operate an adult care home.

(5) "Indirect control" means any situation where one person is in a position to act through another person over whom the first person has control due to the legal or economic relationship between the two.

History Note: Authority G.S. 131D-2; 131D-4.5; 143B-165; S.L. 1999-0113; S.L. 1999-0334; S.L. 2002-0160; Temporary Adoption Eff. December 1, 1999; Eff. July 1, 2000; Temporary Amendment Eff. July 1, 2003.

~~10 NCAC 42D .1820~~10A NCAC 13F .0202 THE LICENSE

~~The rules stated in 10 NCAC 42C .3401 shall control for this Subchapter.~~

(a) Except as otherwise provided in Rule .0203 of this Subchapter, the Department shall issue an adult care home license to any person who submits an application on the forms provided by the Department if the Department determines that the applicant complies with the provisions of all applicable State adult care home licensure statutes and rules. All applications for a new license shall disclose the names of individuals who are co-owners, partners or shareholders holding an ownership or controlling interest of five percent or more of the applicant entity.

(b) The license shall be conspicuously posted in a public place in the home.

(c) The license shall be in effect for 12 months from the date of issuance unless revoked for cause, voluntarily or involuntarily terminated, or changed to provisional licensure status.

(d) A provisional license may be issued in accordance with G.S. 131D-2(b).

(e) When a provisional license is issued, the administrator shall post the provisional license and a copy of the notice from the Division of Facility Services identifying the reasons for it, in place of the full license.

History Note: Authority G.S. 131D-2; 143B-153; 143B-165; S.L. 2002-0160; Eff. January 1, 1977;

*Readopted Eff. October 31, 1977;
Temporary Amendment Eff. July 1, 2003.*

~~10 NCAC 42D .2202~~10A NCAC 13F .0203 PERSONS NOT ELIGIBLE FOR NEW ADULT CARE HOME LICENSES

~~Rule 10 NCAC 42C .3902 shall control for this Subchapter.~~
(a) ~~A new license shall not be issued for an adult care home if any of the conditions specified in G.S. 131D-2(b)(1b) apply to the applicant for the adult care home license.~~
(b) ~~Additionally, no new license shall be issued for any adult care home to an applicant for licensure who is the owner, principal or affiliate of an adult care home that has had its admissions suspended until six months after the suspension is lifted.~~

*History Note: Authority G.S. 131D-2; 131D-4.5; 143B-165; S.L. 1999-0334; S.L. 2002-0160;
Temporary Adoption Eff. December 1, 1999;
Eff. July 1, 2000;
Temporary Amendment Eff. July 1, 2003.*

~~10 NCAC 42D .1814~~10A NCAC 13F .0206 CAPACITY

~~The requirements in 10 NCAC 42C .3202 shall control for this Subchapter except that the licensed capacity of homes for the aged and disabled is seven or more residents.~~
(a) ~~Family care homes have a capacity of from two to six residents only. The licensed capacity of adult care homes is seven or more residents.~~
(b) ~~The total number of residents shall not exceed the number shown on the license.~~
(c) ~~A request for an increase in capacity without building modification shall be made to the county department of social services. The Division of Facility Services has authority for approval of the request.~~
(d) ~~A request for an increase in capacity by adding rooms or remodeling shall be made to the county department of social services and submitted to the state Division of Facility Services, accompanied by one copy of blueprints and specifications, showing the existing building and the addition. Plans shall show how the addition will be tied onto the old building and all proposed changes in old structure.~~
(e) ~~When licensed homes increase their designed capacity by the addition to or remodeling of the existing physical plant, the entire home shall meet all current fire safety regulations.~~

*History Note: Authority G.S. 131D-2; 143B-153; 143B-165; S.L. 2002-0160;
Eff. January 1, 1977;
Readopted Eff. October 31, 1977;
Amended Eff. April 1, 1984;
Temporary Amendment Eff. July 1, 2003.*

~~10 NCAC 42D .1818~~10A NCAC 13F .0207 CHANGE OF OWNERSHIP

~~The requirements in 10 NCAC 42C .3304 (1) through (5) shall control for this Subchapter.~~
~~When a currently licensed administrator wishes to sell or lease the home to another, the following procedure is required:~~

- (1) ~~The administrator shall notify the county department of social services that a change is desired. When there is a plan for a change of~~

~~administrator and another person applies to operate the home immediately, the administrator shall notify the county department and the residents or their responsible persons. It is the responsibility of the county department to talk with the residents, giving them the opportunity to make other plans if they so desire.~~

- (2) ~~The applicant shall meet the qualifications for administrator as specified in Rule .0401 of this Subchapter.~~
- (3) ~~The county department of social services will submit all forms and reports specified in Rule .0204(c) of this Subchapter with the exception of Subparagraph (4) to the Division of Facility Services.~~
- (4) ~~The Division of Facility Services will review the records of the facility and, if necessary, visit the home.~~
- (5) ~~The administrator and prospective applicant will be advised by the Division of Facility Services of any changes which shall be made to the building before licensing to a new administrator can be recommended.~~

*History Note: Authority G.S. 131D-2; 143B-153; 143B-165; S.L. 2002-0160;
Eff. January 1, 1977;
Readopted Eff. October 31, 1977;
Amended Eff. April 1, 1984;
Temporary Amendment Eff. July 1, 2003.*

~~10 NCAC 42D .1821~~10A NCAC 13F .0208 RENEWAL OF LICENSE

~~Rule 10 NCAC 42C .3402 shall control for this Subchapter.~~
(a) ~~The license shall be renewed annually, except as otherwise provided in Rule .0209 of this Subchapter, if the licensee submits an application for renewal on the forms provided by the Department and the Department determines that the licensee complies with the provisions of all applicable State adult care home licensure statutes and rules. When violations of licensure rules or statutes are documented and have not been corrected prior to expiration of license, the Department may approve a continuation or extension of a plan of correction, or may issue a provisional license or revoke the license for cause.~~
(b) ~~All applications for license renewal shall disclose the names of individuals who are co-owners, partners or shareholders holding an ownership or controlling interest of five percent or more of the applicant entity.~~

*History Note: Authority G.S. 131D-2; 131D-4.5; 143B-153; 143B-165; S.L. 1999-0334; S.L. 2002-0160;
Eff. January 1, 1977;
Readopted Eff. October 31, 1977;
Temporary Amendment Eff. December 1, 1999;
Amended Eff. July 1, 2000;
Temporary Amendment Eff. July 1, 2003.*

~~10 NCAC 42D .2203~~10A NCAC 13F .0209 CONDITIONS FOR LICENSE RENEWAL

~~Rule 10 NCAC 42C .3903 shall control for this Subchapter.~~

TEMPORARY RULES

(a) Before renewing an existing license of an adult care home, the Department shall conduct a compliance history review of the facility and its principals and affiliates.

(b) In determining whether to renew a license under G.S. 131D-2(b)(6), the Department shall take into consideration at least the following:

- (1) the compliance history of the applicant facility;
- (2) the compliance history of the owners, principals or affiliates in operating other adult care homes in the state;
- (3) the extent to which the conduct of a related facility is likely to affect the quality of care at the applicant facility; and
- (4) the hardship on residents of the applicant facility if the license is not renewed.

(c) Pursuant to G.S. 131D-2(b)(1), an adult care home is not eligible to have its license renewed if any outstanding fines or penalties imposed by the Department have not been paid; provided, however that if an appeal is pending the fine or penalty will not be considered imposed until the appeal is resolved.

History Note: Authority G.S. 131D-2; 131D-4.5; 143B-165; S.L. 1999-0334; S.L. 2002-0160; Temporary Adoption Eff. December 1, 1999; Eff. July 1, 2000; Temporary Amendment Eff. July 1, 2003.

10 NCAC 42D .182310A NCAC 13F .0212 DENIAL OR REVOCATION OF LICENSE

The rules stated in 10 NCAC 42C .3404 shall control for this Subchapter.

(a) A license may be denied by the Division of Facility Services for failure to comply with the rules of this Subchapter.

(b) Denial by the Division of Facility Services shall be effected by mailing to the applicant, by registered mail, a notice setting forth the particular reasons for such action.

(c) A license may be revoked by the Division of Facility Services in accordance with G.S. 131D-2(b) and G.S. 131D-29.

(d) When a facility receives a notice of revocation, the administrator shall inform each resident and his responsible person of the notice and the basis on which it was issued.

History Note: Authority G.S. 131D-2; 143B-153; 143B-165; S.L. 2002-0160; Eff. January 1, 1977; Readopted Eff. October 31, 1977; Temporary Amendment Eff. July 1, 2003.

10 NCAC 42D .182410A NCAC 13F .0213 APPEAL OF LICENSURE ACTION

The rules stated in 10 NCAC 42C .3405 shall control for this Subchapter.

(a) In accordance with G.S. 150B-2(2), any person may request a determination of his legal rights, privileges, or duties as they relate to laws or rules administered by the Department of Health & Human Services. All requests shall be in writing and contain a statement of facts prompting the request sufficient to allow for appropriate processing by the Department of Health & Human Services.

(b) Any person seeking such a determination shall comply with G.S. 150B-22 concerning informal remedies.

(c) All petitions for hearings regarding matters under the control of the Department of Health & Human Services shall be filed with the Office of Administrative Hearings in accordance with G.S. 150B-23 and 26 NCAC 03 .0103. In accordance with G.S. 1A-1, Rule 4(j)4, the petition shall be served on a registered agent for service of process for the Department of Health & Human Services. A list of registered agents may be obtained from the Office of Legal Affairs, 2005 Mail Service Center, Raleigh, NC 27699-2005.

(d) An administrator of a facility which has its license revoked may not apply to operate another facility except according to the terms set forth by the Director of the Division of Facility Services in his final closure notice.

History Note: Authority G.S. 131D-2; 143B-153; 143B-165; S.L. 2002-0160; Eff. January 1, 1977; Readopted Eff. October 31, 1977; Temporary Amendment Eff. July 1, 2003.

10 NCAC 42D .182610A NCAC 13F .0215 ADMINISTRATIVE PENALTY DETERMINATION PROCESS

10 NCAC 42C .3601 shall control for this Subchapter.

(a) The county department of social services or the Division of Facility Services shall identify areas of non-compliance resulting from a complaint investigation or monitoring or survey visit which may be violations of residents' rights contained in G.S. 131D-21 or rules contained in this Subchapter. If the county department of social services or the Division of Facility Services decides that the violation is a Type B violation as defined in G.S. 131D-34(a)(2), it shall require a plan of correction pursuant to G.S. 131D-34(a)(2). If the county department of social services or the Division of Facility Services decides that the violation is a Type A violation as defined in G.S. 131D-34(a)(1), it shall follow the procedure required in G.S. 131D-34(a)(1)(a-c) and prepare an administrative penalty proposal for submission to the Department. The proposal shall include a copy of the written confirmation required in G.S. 131D-34(a)(1)(c) and documentation that the licensee was notified of the county department of social services' or the Division of Facility Services' intent to prepare and forward an administrative penalty proposal to the Department; offered an opportunity to provide additional information prior to the preparation of the proposal; after the proposal is prepared, given a copy of the contents of the proposal; and then extended an opportunity to request a conference with the agency proposing the administrative penalty, allowing the licensee 10 days to respond prior to forwarding the proposal to the Department. The conference, if requested of the county department of social services, shall include the county department director or his designee. The licensee may request a conference and produce information to cause the agency recommending the administrative penalty to change its proposal. The agency recommending the administrative penalty may rescind its proposal; or change its proposal and submit it to the Department or submit it unchanged to the Department pursuant to G.S. 131D-34(c2).

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(b) An assistant chief of the Adult Care Licensure Section shall receive the proposal, review it for completeness and evaluate it to determine the penalty amount.

(1) If the proposal is complete, the assistant chief shall make a decision on the amount of penalty to be submitted for consideration and whether to recommend training in lieu of an administrative penalty pursuant to G.S. 131D-34(g1).

(2) If the proposal is incomplete, the assistant chief shall contact the agency that submitted the proposal to request necessary changes or additional material.

(3) When the proposal is complete and the amount of penalty determined, the assistant chief shall forward the proposal to the administrative penalty monitor for processing. If the assistant chief recommends training in lieu of an administrative penalty pursuant to G.S. 131D-34(g1), the recommendation shall be forwarded with the proposal.

(c) The Department shall notify the licensee by certified mail within 10 working days from the time the proposal is received by the administrative penalty monitor that an administrative penalty is being considered.

(d) The licensee shall have 10 working days from receipt of the notification to provide both the Department and the county department of social services any additional information relating to the proposed administrative penalty.

(e) If a facility fails to correct a Type A or a Type B violation within the time specified on the plan of correction, an assistant chief of the Adult Care Licensure Section shall make a decision on the amount of penalty pursuant to G.S. 131D-34(b)(1) and (2) and submit a penalty proposal for consideration by the Penalty Review Committee.

(f) The Penalty Review Committee shall consider Type A violations and Type A and Type B violations that have not been corrected within the time frame specified on the plan of correction. Providers, complainants, affected parties and any member of the public may attend Penalty Review Committee meetings. Upon written request of any affected party for reasons of illness or schedule conflict, the department may grant a delay until the following month for Penalty Review Committee review. The Penalty Review Committee chair may ask questions of any of these persons, as resources, during the meeting. Time shall be allowed during the meeting for individual presentations which provide pertinent additional information. The order in which presenters speak and the length of each presentation shall be at the discretion of the Penalty Review Committee chair.

(g) The Penalty Review Committee shall have for review the entire record relating to the penalty recommendation shall make recommendations after review of administrative penalty proposals, any supporting evidence, any additional information submitted by the licensee as described in Paragraph (d) and the factors specified in G.S. 131D-34(c).

(h) There shall be no taking of sworn testimony or cross-examination of anyone during the course of the Penalty Review Committee meetings.

(i) If the Penalty Review Committee determines that the licensee has violated applicable rules or statutes, the Penalty

Review Committee shall recommend an administrative penalty for each violation pursuant to G.S. 131D-34. Recommendations for adult care home penalties shall be submitted to the Chief of the Adult Care Licensure Section who shall have five working days from the date of the Penalty Review Committee meeting to determine and impose administrative penalties for each violation or require staff training pursuant to G.S. 131D-34(g1) and notify the licensee by certified mail.

(j) The licensee shall have 60 days from receipt of the notification to pay the penalty or shall file a petition for a contested case with the Office of Administrative Hearings within 30 days of the mailing of the notice of penalty imposition as provided by G.S. 131D-34.

History Note: Authority G.S. 131D-2; 131D-34; 143B-153; 143B-165; S.L. 2002-0160; Eff. December 1, 1993; Temporary Amendment Eff. July 1, 2003.

SECTION .0300 - PHYSICAL PLANT

~~10 NCAC 42D .1501~~ 10A NCAC 13F .0301 LOCATION

In addition to the requirements in 10 NCAC 42C .2101, the following shall apply:

(a) The home must be in a location approved by local zoning boards and be a safe distance from streets, highways, railroads, open lakes and other hazards. It must be located on a street, road or highway accessible by car.

(b) Plans for the building and site are to be reviewed and approved by the Construction Section of the Division of Facility Services.

~~(1)(c) A home for the aged and disabled~~ An adult care home may be located in an existing building or in a building newly constructed specifically for that purpose; and purpose.

~~(2)(d)~~ The building and site are to be reviewed and approved by the Construction Section of the Division of Facility Services.

History Note: Authority G.S. 131D-2; 143B-153; 143B-165; S.L. 2002-0160; Eff. January 1, 1977; Readopted Eff. October 31, 1977; Amended Eff. January 1, 1991; April 1, 1984; Temporary Amendment Eff. July 1, 2003.

SECTION .0400 - STAFF QUALIFICATIONS

~~10 NCAC 42D .1402~~ 10A NCAC 13F .0402

QUALIFICATIONS OF SUPERVISOR-IN- CHARGE IN FACILITIES WITH A CAPACITY OR CENSUS OF 7 TO 30 RESIDENTS

Rule 10 NCAC 42C .2002 shall control for this Subchapter for facilities with a capacity or census of seven to thirty residents. The supervisor-in-charge is responsible to the administrator for carrying out the program in the home in the absence of the administrator. All of the following requirements shall be met:

(1) The applicant shall complete the Application for Supervisor-in-Charge (DSS-1862);

(2) The qualifications of the administrator and co-administrator referenced in Paragraphs (2), (5), (6), and (7) of Rule 10A NCAC 13G .0401 shall apply to the supervisor-in-charge. The

supervisor-in-charge (employed on or after August 1, 1991) shall meet a minimum educational requirement by being at least a high school graduate or certified under the GED Program or by passing an alternative examination established by the Department of Health and Human Services. Documentation that these qualifications have been met shall be on file in the home prior to employing the supervisor-in-charge;

- (3) The supervisor-in-charge shall be willing to work with bonafide inspectors and the monitoring and licensing agencies toward meeting and maintaining the rules of this Subchapter and other legal requirements;
- (4) The supervisor-in-charge shall verify that he earns 12 hours a year of continuing education credits related to the management of adult care homes and care of aged and disabled persons in accordance with procedures established by the Department of Health and Human Services; and
- (5) When there is a break in employment as a supervisor-in-charge of one year or less, the educational qualification under which the person was last employed will apply.

History Note: Authority G.S. 131D-2; 131D-4.5; 143B-165; S.L. 2002-0160; Eff. January 1, 1977; Readopted Eff. October 31, 1977; Temporary Amendment Eff. December 1, 1999; Amended Eff. July 1, 2000; Temporary Amendment Eff. July 1, 2003.

10 NCAC 42D .140310A NCAC 13F .0404 QUALIFICATIONS OF ACTIVITIES COORDINATOR

~~(a) Since activities are a required part of the program of the home for the aged and disabled, there must be a designated activities coordinator.~~

~~(b) Rules contained in 10 NCAC 42C .2006(1) through (3) shall control for this Subchapter.~~

Since activities are a required part of the program of the family care home, there shall be a designated activities coordinator who meets the requirements and qualifications set forth in this Rule.

- (1) The qualifications of the administrator and co-administrator referenced in Paragraphs (2) and (5) of Rule 10A NCAC 13G .0401 shall apply to the activities coordinator. The activities coordinator (employed on or after August 1, 1991) shall meet a minimum educational requirement by being at least a high school graduate or certified under the GED Program or by passing an alternative examination established by the Department of Health & Human Services;
- (2) The activities coordinator shall complete, within 18 months of employment or assignment to this position, the 48-hour course entitled "The Activities Coordinator Program." A person with a degree in recreational

administration or a related field meets this requirement as does a person who completed the required course before the effective date of this Rule; and

- (3) The activities coordinator shall be willing to work with bona fide inspectors and the monitoring and licensing agencies toward meeting and maintaining the rules of this Subchapter and other legal requirements.

History Note: Authority G.S. 131D-2; 143B-153; 143B-165; S.L. 2002-0160; Eff. January 1, 1977; Readopted Eff. October 31, 1977; Amended Eff. April 1, 1987; April 1, 1984; Temporary Amendment Eff. July 1, 2003.

10 NCAC 42D .140610A NCAC 13F .0406 HEALTH REQUIREMENTS OF STAFF AND FAMILY

~~The rules stated in 10 NCAC 42C .2004 shall control for this Subchapter.~~

(a) The administrator shall be tested for tuberculosis disease within 90 days before employment and annually thereafter. There shall be documentation on file in the home that the administrator is free of tuberculosis disease that poses a direct threat to the health or safety of others.

(b) All other staff and live-in non-residents shall be tested for tuberculosis disease within 90 days before or seven days after employment or living in the home, and annually thereafter. There shall be documentation on file in the home that each person is free of tuberculosis disease that poses a direct threat to the health or safety of others.

(c) Tests for tuberculosis disease shall comply with the control measures adopted by the Commission for Health Services as specified in 10A NCAC 41A .0205 including subsequent amendments and editions. Copies of the rule are available at no charge by contacting the of Department of Health and Human Services, Tuberculosis Control Program, 1902 Mail Service Center, Raleigh, NC 27699-1902.

History Note: Authority G.S. 131D-2; 143B-153; 143B-165; S.L. 2002-0160; Eff. January 1, 1977; Readopted Eff. October 31, 1977; Temporary Amendment Eff. July 1, 2003.

10 NCAC 42D .140510A NCAC 13F .0407 OTHER STAFF QUALIFICATIONS

~~The rules stated in 10 NCAC 42C .2005 shall control for this Subchapter.~~

(a) In addition to the personnel requirements set forth in Rules .0401, .0402, and .0404 of this Subchapter, additional competent staff shall be employed, as needed, to assure good housekeeping, supervision and personal care of the residents.

(b) In homes where there are minor children, aged or infirm relatives of the administrator or other management staff residing, the number of extra staff shall be determined by the capacity for which the home is licensed plus the minors and relatives who require care and supervision.

(c) The Division of Facility Services shall make the final determination of the need for additional staff, based on the

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home's licensed capacity; the number of live-in minors and relatives requiring care; the condition, needs and ambulation capacity of the residents; and the layout of the building.

(d) Each staff member shall have a well-defined job description that reflects actual duties and responsibilities, signed by the administrator and the employee.

(e) Each staff member shall be able to apply all of the home's accident, fire safety and emergency procedures for the protection of the residents.

(f) Each staff member authorized by the administrator to have access to confidential resident information shall be informed of the confidential nature of the information and shall protect and preserve such information from unauthorized use and disclosure. G.S. 131D-2(b)(4), G.S. 131D-21(6), and G.S. 131D-21.1 govern the disclosure of such information.

(g) Each staff member shall encourage and assist the residents in the exercise of the rights guaranteed under the Adult Care Home Residents' Bill of Rights. No staff member shall hinder or interfere with the proper performance of duty of a lawfully appointed Adult Care Home Community Advisory Committee.

(h) Each staff member left alone with the residents shall be 18 years or older.

(i) By January 1, 2001, each facility shall have at least one staff person on the premises at all times who has successfully completed within the last 24 months a course on cardiopulmonary resuscitation (CPR) and choking management, including Heimlich maneuver, provided by the American Heart Association, the American Red Cross or a trainer with documented certification as a trainer in these procedures unless the only staff person on-site has been deemed physically incapable of performing these procedures by a licensed physician. For the purpose of this Rule, successfully completed means demonstrating competency, as evaluated by the instructor, in performing the Heimlich maneuver and cardiopulmonary resuscitation. Documentation of successful completion of the course shall be on file and available for review in the facility. The facility shall not have a policy prohibiting staff from administering CPR to residents except those residents with physician orders for no resuscitation or no CPR.

(j) Staff who transport residents shall maintain a valid driver's license.

(k) If licensed practical nurses are employed by the facility, there shall be continuous availability of a registered nurse consistent with Rules 21 NCAC 36 .0224(I) and 21 NCAC 36 .0225.

Note: The practice of licensed practical nurses is governed by their occupational licensing laws.

History Note: Authority G.S. 131D-2; 143B-153; 143B-165; S.L. 2002-0160;

Eff. January 1, 1977;

Readopted Eff. October 31, 1977;

Amended Eff. April 1, 1984;

Temporary Amendment Eff. July 1, 2003.

SECTION .0500 - STAFF ORIENTATION, TRAINING, COMPETENCY AND CONTINUING EDUCATION

~~10 NCAC 42D .1415~~10A NCAC 13F .0503 MEDICATION ADMINISTRATION COMPETENCY

Rule 10 NCAC 42C .2014 shall control for this Subchapter.

(a) The competency evaluation for medication administration shall consist of a written examination and a clinical skills evaluation to determine competency in the following areas: medical abbreviations and terminology; transcription of medication orders; obtaining and documenting vital signs; procedures and tasks involved with the preparation and administration of oral (including liquid, sublingual and inhaler), topical (including transdermal), ophthalmic, otic, and nasal medications; infection control procedures; documentation of medication administration; monitoring for reactions to medications and procedures to follow when there appears to be a change in the resident's condition or health status based on those reactions; medication storage and disposition; regulations pertaining to medication administration in adult care facilities; and the facility's medication administration policy and procedures.

(b) An individual shall score at least 90% on the written examination which shall be a standardized examination established by the Department.

(c) A certificate of successful completion of the written examination shall be issued to each participant successfully completing the examination. A copy of the certificate shall be maintained and available for review in the facility. The certificate is transferable from one facility to another as proof of successful completion of the written examination. A medication study guide for the written examination is available at no charge by contacting the Division of Facility Services, Adult Care Licensure Section, 2708 Mail Service Center, Raleigh, NC 27699-2708.

(d) The clinical skills validation portion of the competency evaluation shall be conducted by a registered nurse or a registered pharmacist consistent with their occupational licensing laws and who has a current unencumbered license in North Carolina. This validation shall be completed for those medication administration tasks to be performed in the facility. Competency validation by a registered nurse is required for unlicensed staff who perform any of the personal care tasks related to medication administration specified in Rule .0903 of this Subchapter.

(e) The Medication Administration Skills Validation Form shall be used to document successful completion of the clinical skills validation portion of the competency evaluation for those medication administration tasks to be performed in the facility employing the medication aide. Copies of this form and instructions for its use may be obtained at no cost by contacting the Adult Care Licensure Section, Division of Facility Services, 2708 Mail Service Center, Raleigh, NC 27699-2708. The completed form shall be maintained and available for review in the facility and is not transferable from one facility to another.

History Note: Authority G.S. 131D-2; 131D-4.5; 143B-165; S.L. 1999-0334; S.L. 2002-0160;

Temporary Adoption Eff. December 1, 1999;

Eff. July 1, 2000;

Temporary Amendment Eff. July 1, 2003.

SECTION .0600 - STAFFING

~~10 NCAC 42D .1301~~10A NCAC 13F.0601 MANAGEMENT OF FACILITIES WITH A CAPACITY OR CENSUS OF SEVEN TO THIRTY RESIDENTS

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~~(a) The requirements in Paragraphs (a) and (c) of Rule 10-NCAC 42C .1901 shall control for this Subchapter for facilities with a capacity or census of 7 to 30 residents.~~

~~(a) The administrator is responsible for the total operation of a home and is also responsible to the licensing agency and the monitoring agency for meeting and maintaining the rules of this Subchapter. The co-administrator, when there is one, shares equal responsibility with the administrator for the operation of the home and for meeting and maintaining the rules of this Subchapter. The term administrator also refers to co-administrator where it is used in this Subchapter.~~

(b) At all times there shall be one administrator or supervisor-in-charge who is directly responsible for assuring that all required duties are carried out in the home and for assuring that at no time is a resident left alone in the home without a staff member. ~~In addition to the requirements in 10 NCAC 42C .1901(a) and (c), one~~ One of the following arrangements shall be used to manage a facility with a capacity of 7 to 30 residents:

- (1) The administrator is in the home or within 500 feet of the home and immediately available. To be immediately available, the administrator shall be on stand-by and have direct access to either a two-way intercom system or a two-way intercom line on the existing telephone system that connects the licensed home with the private residence of the administrator. The equipment installed shall be in working condition and must be located in the bedroom of the administrator; or
- (2) A supervisor-in-charge is in the home or within 500 feet of the home and is immediately available. The conditions of being "immediately available" cited in Subparagraph (b)(1) of this Rule shall apply to this arrangement; or
- (3) When there is a cluster of licensed homes, each with a capacity of 7 to 12 residents, located adjacently on the same site, there shall be at least one staff member, either live-in or on a shift basis in each of these homes. In addition, there shall be at least one administrator or supervisor-in-charge who is within 500 feet of each home, immediately available, and directly responsible for assuring that all required duties are carried out in each home. To be immediately available, the administrator or supervisor-in-charge shall be on stand-by and have direct access to either a two-way intercom system or a two-way intercom line on the existing telephone system that connects these homes with each other and with the residence of the administrator or supervisor-in-charge. The equipment installed shall be in working condition and shall be located in the bedroom of the administrator or supervisor-in-charge.

~~(c) When the administrator or supervisor-in-charge is absent from the home or not immediately available, the following apply:~~

- (1) ~~If the administrator or supervisor-in-charge is absent temporarily (not to exceed 24 hours per~~

week), a relief-person-in-charge shall be designated by the administrator to be in the home and in charge of it during the absence. The administrator shall assure that the relief-person-in-charge is prepared to respond appropriately in case of an emergency in the home. The relief-person-in-charge shall be 18 years or older; and

- (2) When the administrator or supervisor-in-charge will be away from the home for an extended absence (more than 24 hours per week), a relief-supervisor-in-charge shall be designated by the administrator to be in charge of the home during the absence. The relief-supervisor-in-charge shall meet all of the qualifications required for the supervisor-in-charge (as specified in Rule .0402 of this Subchapter) with the exception of Paragraph (4), pertaining to the continuing education requirement.

History Note: Authority G.S. 131D-2; 131D-4.5; 143B-165; S.L. 1999-0334; S.L. 2002-0160; Eff. January 1, 1977; Readopted Eff. October 31, 1977; Amended Eff. July 1, 1990; April 1, 1987; April 1, 1984; Temporary Amendment Eff. January 1, 2000; December 1, 1999; Amended Eff. July 1, 2000; Temporary Amendment Eff. July 1, 2003.

SECTION .0700 - ADMISSION AND DISCHARGE

~~**10 NCAC 42D .1801**~~ **10A NCAC 13F .0701 ADMISSION OF RESIDENTS**

~~The rules stated in 10 NCAC 42C .2400 shall control for this Subchapter.~~

(a) Any adult (18 years of age or over) who, because of a temporary or chronic physical condition or mental disability, needs a substitute home may be admitted when, in the opinion of the resident, physician, family or social worker, and the administrator the services and accommodations of the home will meet his particular needs.

(b) Exceptions. People are not to be admitted:

- (1) for treatment of mental illness, or alcohol or drug abuse;
- (2) for maternity care;
- (3) for professional nursing care under continuous medical supervision;
- (4) for lodging, when the personal assistance and supervision offered for the aged and disabled are not needed; or
- (5) who pose a direct threat to the health or safety of others.

History Note: Authority G.S. 131D-2; 143B-153; 143B-165; S.L. 2002-0160; Eff. January 1, 1977; Readopted Eff. October 31, 1977; Temporary Amendment Eff. July 1, 2003.

10 NCAC 42D .180210A NCAC 13F .0702 DISCHARGE OF RESIDENTS

The rules stated in 10 NCAC 42C .2500 shall control for this Subchapter.

(a) The discharge of a resident initiated by the facility shall be according to conditions and procedures specified in Paragraphs (a) through (g) of this Rule. The discharge of a resident initiated by the facility involves the termination of residency by the facility resulting in the resident's move to another location and the facility not holding the bed for the resident based on the facility's bed hold policy.

Note: The discharge requirements in this Rule do not apply when a resident is transferred to an acute inpatient facility for mental or physical health evaluation or treatment and the adult care facility's bed hold policy applies based on the expected return of the resident. If the facility decides to discharge a resident who has been transferred to an acute inpatient facility and there has been no physician-documented level of care change for the resident, the discharge requirements in this Rule would apply.

(b) The discharge of a resident shall be based on one of the following reasons:

- (1) the discharge is necessary for the resident's welfare and the resident's needs cannot be met in the facility as documented by the resident's physician, physician assistant or nurse practitioner;
- (2) the resident's health has improved sufficiently so the resident no longer needs the services provided by the facility as documented by the resident's physician, physician assistant or nurse practitioner;
- (3) the safety of other individuals in the facility is endangered;
- (4) the health of other individuals in the facility is endangered as documented by a physician, physician assistant or nurse practitioner;
- (5) failure to pay the costs of services and accommodations by the payment due date according to the resident contract after receiving written notice of warning of discharge for failure to pay; or
- (6) the discharge is mandated under G.S. 131D-2(a)(1).

(c) The notices of discharge and appeal rights as required in Paragraph (e) of this Rule shall be made by the facility at least 30 days before the resident is discharged except that notices may be made as soon as practicable when:

- (1) the resident's health or safety is endangered and the resident's needs cannot be met in the facility under Subparagraph (b)(1) of this Rule; or
- (2) reasons under Subparagraphs (b)(2), (b)(3), (b)(4) and (b)(6) of this Rule exist.

(d) The reason for discharge shall be documented in the resident's record. Documentation shall include one or more of the following as applicable to the reasons under Paragraph (b) of this Rule:

- (1) documentation by physician, physician assistant or nurse practitioner as required in Paragraph (b) of this Rule;

(2) the condition or circumstance that endangers the health or safety of the resident being discharged or endangers the health or safety of individuals in the facility, and the facility's action taken to address the problem prior to pursuing discharge of the resident;

(3) written notices of warning of discharge for failure to pay the costs of services and accommodations; or

(4) the specific health need or condition of the resident that the facility determined could not be met in the facility pursuant to G.S. 131D-2(a)(1)(4) and as disclosed in the resident contract signed upon the resident's admission to the facility.

(e) The facility shall assure the following requirements for written notice are met before discharging a resident:

(1) The Adult Care Home Notice of Discharge with the Adult Care Home Hearing Request Form shall be hand delivered, with receipt requested, to the resident on the same day the Adult Care Home Notice of Discharge is dated. These forms may be obtained at no cost from the Division of Medical Assistance, 2505 Mail Service Center, Raleigh, NC 27699-2505.

(2) A copy of the Adult Care Home Notice of Discharge with a copy of the Adult Care Home Hearing Request Form shall be hand delivered, with receipt requested, or sent by certified mail to the resident's responsible person or legal representative on the same day the Adult Care Home Notice of Discharge is dated.

(3) Failure to use and simultaneously provide the specific forms according to Subparagraphs (e)(1) and (e)(2) of this Rule shall invalidate the discharge. Failure to use the latest version of these forms shall not invalidate the discharge unless the facility has been previously notified of a change in the forms and been provided a copy of the latest forms by the Department of Health and Human Services.

(4) A copy of the completed Adult Care Home Notice of Discharge, the Adult Care Home Hearing Request Form as completed by the facility prior to giving to the resident and a copy of the receipt of hand delivery or the notification of certified mail delivery shall be maintained in the resident's record.

(f) The facility shall provide assistance in preparing for a safe and orderly discharge as evidenced by:

(1) notifying staff in the county department of social services responsible for placement services;

(2) explaining to the resident and responsible person or legal representative why the discharge is necessary;

(3) informing the resident and responsible person or legal representative about an appropriate discharge destination; and

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- (4) offering the following material to the caregiver with whom the resident is to be placed and providing this material as requested prior to or upon discharge of the resident:
 - (A) a copy of the resident's most current FL-2;
 - (B) a copy of the resident's most current assessment and care plan;
 - (C) a copy of the resident's current physician orders;
 - (D) a list of the resident's current medications;
 - (E) the resident's current medications; and
 - (F) a record of the resident's vaccinations and TB screening.

(g) If an appeal hearing is requested:

- (1) the facility shall provide to the resident or legal representative or the resident and the responsible person, and the Hearing Unit copies of all documents and records that the facility intends to use at the hearing at least five working days prior to the scheduled hearing; and
- (2) the facility shall not discharge the resident before the final decision resulting from the appeal has been rendered, except in those cases of discharge specified in Subparagraph (c)(2) of this Rule.

(h) If a discharge is initiated by the resident or responsible person, the administrator may require up to a 14-day written notice from the resident or responsible person prior to the resident leaving the facility. The facility's requirement for a notice from the resident or responsible person shall be established in the resident contract or the house rules provided to the resident or responsible person upon admission.

History Note: Authority G.S. 131D-2; 131D-4.5; 143B-165; S.L. 2002-0160; Eff. January 1, 1977; Readopted Eff. October 31, 1977; Temporary Amendment Eff. July 1, 2003.

SECTION .0800 - RESIDENT ASSESSMENT AND CARE PLAN

10 NCAC 42D .182710A NCAC 13F .0801 RESIDENT ASSESSMENT

10 NCAC 42C .3701 shall control for this Subchapter.

(a) The facility shall assure that an admission assessment of each resident is completed 72 hours of admitting the resident using an assessment instrument approved by the Department. Effective January 1, 2002, in addition to the admission assessment within 72 hours, an evaluation of each resident shall be completed within 30 calendar days from the date of admission and annually thereafter using the Resident Assessment Instrument as approved by the Department. The evaluation within 30 calendar days of admission and annually thereafter is a functional assessment to determine a resident's level of functioning to include routines, preferences, needs, mood and psychosocial well-being, cognitive status and physical

functioning in activities of daily living. Activities of daily living are personal functions essential for the health and well-being of the resident which are bathing, dressing, personal hygiene, ambulation or locomotion, transferring, toileting and eating. The evaluation within 30 calendar days of admission and annually thereafter shall indicate if the resident requires referral to the resident's physician or other appropriate licensed health care professional or community resource.

(b) The facility shall assure a reassessment of a resident is completed within 10 days of a significant change in the resident's condition using the assessment instrument to be completed within 72 hours of resident admission prior to January 1, 2002 and the Resident Assessment Instrument thereafter. For the purposes of this Subchapter, significant change in the resident's condition is defined as follows:

(1) Significant change is one or more of the following:

- (A) deterioration in two or more activities of daily living;
- (B) change in ability to walk or transfer;
- (C) change in the ability to use one's hands to grasp small objects;
- (D) deterioration in behavior or mood to the point where daily problems arise or relationships have become problematic;
- (E) no response by the resident to the treatment for an identified problem;
- (F) initial onset of unplanned weight loss or gain of five percent of body weight within a 30-day period or 10 percent weight loss or gain within a six-month period;
- (G) threat to life such as stroke, heart condition, or metastatic cancer;
- (H) emergence of a pressure ulcer at Stage II or higher;
- (I) a new diagnosis of a condition likely to affect the resident's physical, mental, or psychosocial well-being over a prolonged period of time such as initial diagnosis of Alzheimer's disease or diabetes;
- (J) improved behavior, mood or functional health status to the extent that the established plan of care no longer matches what is needed;
- (K) new onset of impaired decision-making;
- (L) continence to incontinence or indwelling catheter; or
- (M) the resident's condition indicates there may be a need to use a restraint and there is no current restraint order for the resident.

(2) Significant change is not any of the following:

- (A) changes that suggest slight upward or downward movement in the resident's status;
- (B) short-term changes that resolve with or without intervention;

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- (C) changes that arise from easily reversible causes;
- (D) a short-term acute illness or episodic event;
- (E) a well-established, predictive, cyclical pattern; or
- (F) steady improvement under the current course of care.

(c) If a resident experiences a significant change as defined in Paragraph (b) of this Rule, the facility shall refer the resident to the resident's physician or other appropriate licensed health professional such as a mental health professional, nurse practitioner, physician assistant or registered nurse in a timely manner consistent with the resident's condition but no longer than 10 days from the significant change, and document the referral in the resident's record.

(d) The assessment to be completed within 72 hours and the evaluation to be completed within 30 calendar days of admission and annually thereafter as required in Paragraph (a) of this Rule and any reassessment as required in Paragraph (b) of this Rule shall be completed and signed by the administrator or a person designated by the administrator to perform resident assessments or reassessments.

(e) The facility administrator or a person designated by the administrator to perform resident assessments and reassessments using the Resident Assessment Instrument shall successfully complete training provided by the Department on assessing residents before performing any assessments or reassessments using the Resident Assessment Instrument as required in Paragraph (a) of this Rule. Registered nurses are exempt from the assessment training. Documentation of assessment training shall be maintained in the facility and available for review.

*History Note: Authority G.S. 131D-2; 131D-4.3; 143B-153; 143B-165; S.L. 2002-0160;
Temporary Adoption Eff. January 1, 1996;
Eff. May 1, 1997;
Temporary Amendment Eff. July 1, 2003.*

10 NCAC 42D .182810A NCAC 13F .0802 RESIDENT CARE PLAN

10 NCAC 42C .3702 shall control for this Subchapter.

(a) Effective January 1, 2002, the facility shall assure a care plan is developed for each resident in conjunction with the resident evaluation to be completed within 30 calendar days of admission according to Rule .0801 of this Section and revised as needed based on annual assessments and any reassessments of the resident. Prior to January 1, 2002, the administrator shall assure a care plan is developed in conjunction with the admission assessment to be completed within 72 hours of admission according to Rule .0801 of this Section and revised as needed based on annual assessments and any reassessments of the resident. For the purposes of this Subchapter, the care plan is an individualized, written program of personal care for each resident.

(b) The care plan shall include the following:

- (1) a statement of the care or service to be provided based on the assessment or reassessment; and
- (2) frequency of the service provision.

(c) The assessor shall sign the care plan upon its completion.

(d) The facility shall assure that the resident's physician authorizes personal care services and certifies the following by signing and dating the care plan within 15 calendar days of completion of the assessment:

- (1) the resident is under the physician's care; and
- (2) the resident has a medical diagnosis with associated physical or mental limitations that justify the personal care services specified in the care plan.

*History Note: Authority G.S. 131D-2; 131D-4.3; 143B-153; 143B-165; S.L. 2002-0160;
Temporary Adoption Eff. January 1, 1996;
Eff. May 1, 1997;
Temporary Amendment Eff. July 1, 2003.*

SECTION .0900 - RESIDENT CARE AND SERVICES

10 NCAC 42D .170210A NCAC 13F .0902 HEALTH CARE

The rules stated in 10 NCAC 42C .2302 shall control for this Subchapter.

(a) The administrator is responsible for providing occasional or incidental medical care, such as providing therapeutic diets, rotating positions of residents confined to bed, and applying heat pads.

(b) The resident or his responsible person shall be allowed to choose a physician to attend to him.

(c) Immediate arrangements shall be made by the administrator with the resident or his responsible person for the resident to secure another physician when he cannot remain under the care of his own physician. The name, address and telephone number of the resident's physician shall be recorded on the Resident Register.

(d) If a resident is hospitalized, a completed FL-2 or patient transfer form shall be obtained before the resident can be readmitted to the facility.

(e) Between annual medical examinations there may be a need for a physician's care. The resident's health services record is to be used by the physician to report any drugs prescribed and any treatment given or recommended for minor illnesses.

(f) All contacts (office, home or telephone) with the resident's physician shall be recorded on the resident's health services record which is to be retained in the resident's record in the home. The physician's orders shall be included in the resident's health services record including telephone orders initialed by staff and signed by the physician within 15 days from the date the order is given.

(g) Until January 1, 2001, the following restraint requirements shall apply. The use of a physical restraint refers to the application of a mechanical device to a person to limit movement for therapeutic or protective reasons, excluding siderails for safety reasons. Residents shall be physically restrained only as provided for in the Declaration of Residents' Rights, G.S. 131D-21(5), and in accordance with the following:

- (1) The use of physical restraints is allowed only with a written order from a licensed physician. If the order is obtained from a physician other than the resident's attending physician, the attending physician shall be notified of the order within seven days.

- (2) In emergency situations the administrator or supervisor-in-charge shall make the determination relative to necessity for the type and duration of the physical restraint to use until a physician is contacted. Contact shall be made within 24 hours.
- (3) The physician shall specify in the restraint order the medical need for the physical restraint, the type to be used, the period of time it is to be used, and the time intervals it is to be checked, loosened, or removed.
- (4) The current order for the physical restraint shall be on or attached to Form FL-2 or Form MR-2 (upon entering the home) or the Report of Health Services to Residents Form, or approved equivalent (for subsequent orders).
- (5) The physician ordering the physical restraint shall update the restraint order at a minimum of every six months.
- (6) If the resident's physician changes after admission to the home, the physician who is to attend the resident shall update and sign the existing restraint order.
- (h) Effective January 1, 2001, the following restraint requirements shall apply. The use of physical restraints refers to the application of a physical or mechanical device attached to or adjacent to the resident's body that the resident cannot remove easily which restricts freedom of movement or normal access to one's body and includes bed rails when used to keep the resident from voluntarily getting out of bed as opposed to enhancing mobility of the resident while in bed. Residents shall be physically restrained only in accordance with the following:
- (1) The facility shall prohibit the use of physical restraints for discipline or convenience and limit restraint use to circumstances in which the resident has medical symptoms that warrant the use of restraints. Medical symptoms may include, but are not limited to, the following: confusion with risk of falls; and risk of abusive or injurious behaviors to self or others.
- (2) Alternatives to physical restraints that would provide safety to the resident and prevent a potential for decline in the resident's functioning shall be provided prior to restraining the resident and documented in the medical record. Alternatives may include, but are not limited to, the following: providing restorative care to enhance abilities to stand safely and to walk, providing a device that monitors attempts to rise from chair or bed, placing the bed lower to the floor, providing frequent staff monitoring with periodic assistance in toileting and ambulation and offering fluids, providing activities, providing supportive devices such as wedge cushions, controlling pain and providing a calm relaxing environment with minimal noise and confusion.
- (3) If alternatives to physical restraints have failed and the resident's medical symptoms warrant
- the use of physical restraints, the facility shall assure that the resident is restrained with the least restrictive restraint that would provide safety.
- (4) When physical restraints are used, the facility shall engage in a systemic and gradual process towards reducing restraint time by using alternatives.
- (5) The administrator shall assure the development and implementation of written policies and procedures in the use of alternatives to physical restraints and in the care of residents who are physically restrained.
- (A) The administrator shall consult with a registered nurse in developing policies and procedures for alternatives to physical restraints and in the care of residents who are physically restrained.
- (B) Policies and procedures for alternatives to physical restraints and the use of physical restraints shall comply with requirements of this section. Orientation of these policies and procedures shall be provided to staff responsible for the care of residents who are restrained or require alternatives to restraints. This orientation shall be provided as part of the training required prior to staff providing care to residents who are restrained or require alternatives to restraints.
- (6) The administrator shall assure that each resident with medical symptoms that warrant the use of physical restraints is assessed and a care plan is developed. This assessment and care planning shall be completed prior to the resident being restrained; except in emergency situations. This assessment and care planning shall meet any additional requirements in Section .0800 of this Subchapter.
- (A) The assessment shall include consideration of the following:
- (i) Medical symptoms that warrant the use of a physical restraint;
- (ii) How the medical symptoms affect the resident;
- (iii) When the medical symptoms were first observed;
- (iv) How often the medical symptoms occur; and
- (v) Alternatives that have been provided and the resident's response.
- (B) The care plan shall be individualized and indicate specific care to be given to the resident. The care plan shall include consideration of the following:

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- (i) Alternatives and how the alternatives will be used;
 - (ii) The least restrictive type of physical restraint that would provide safety; and
 - (iii) Care to be provided to the resident during the time the resident is restrained.
 - (C) The assessment and care planning shall be completed through a team process. The team shall consist of, but is not limited to, the following: the supervisor or a personal care aide, a registered nurse and the resident's representative. If the resident's representative is not present, there shall be documented evidence that the resident's representative was notified and declined an invitation to attend.
- (7) The resident's right to participate in his or her care and to refuse treatment includes the right to accept or refuse restraints. For the resident to make an informed choice about the use of physical restraints, negative outcomes, benefits and alternatives to restraint use shall be explained to the resident. Potential negative outcomes include incontinence, decreased range of motion, decreased ability to ambulate, increased risk of pressure ulcers, symptoms of withdrawal or depression and reduced social contact. In the case of a resident who is incapable of making a decision, the resident's representative shall exercise this right based on the same information that would have been provided to the resident. However, the resident's representative cannot give permission to use restraints for the sake of discipline or staff convenience or when the restraint is not necessary to treat the resident's medical symptoms.
- (8) The resident or the resident representative involvement in the restraint decision shall be documented in the resident's medical record. Documentation shall include the following:
- (A) The resident or the resident's representative shall sign and date a statement indicating they have been informed as required above.
 - (B) The statement shall indicate the resident's or the resident's representative's decision in restraint use, either consent for or a desire not to use restraints.
 - (C) The consent shall include the type of restraint to be used and the medical symptoms for use.
- (9) When a physical restraint is warranted and consent has been given, a physician's order shall be written. The following requirements apply to the physician's order:
- (A) The use of physical restraints is allowed only with a written order from a licensed physician. If the order is obtained from a physician other than the resident's attending physician, the attending physician shall be notified of the order within seven days.
 - (B) In emergency situations, the administrator or supervisor-in-charge shall make the determination relative to necessity for the type and duration of the physical restraint to use until a physician is contacted. Contact shall be made within 24 hours.
 - (C) The physician shall specify in the restraint order the medical need for the physical restraint, the type to be used, the period of time it is to be used, and the time intervals it is to be checked and removed.
 - (D) The current order for the physical restraint shall be on or attached to Form FL-2 or Form MR-2 (upon entering the home) or the Report of Health Services to Residents Form, or approved equivalent (for subsequent orders).
 - (E) The physician ordering the physical restraint shall update the restraint order at a minimum of every three months.
 - (F) If the resident's physician changes after admission to the home, the physician who is to attend the resident shall update and sign the existing restraint order.
- (10) The physical restraint shall be applied correctly according to manufacture's instructions and the physician's order.
- (11) The resident shall be checked and released from the physical restraint and care provided, as stated in the care plan at least every 15 minutes for checks and at least every two hours for release.
- (12) Alternatives shall be provided in an effort to reduce restraint time.
- (13) All instances of physical restraint use shall be documented and shall include at least the following:
- (A) Alternatives to physical restraints that were provided and the resident's response;
 - (B) Type of physical restraint that was used;
 - (C) Medical symptoms warranting the use of the physical restraint;
 - (D) Time and duration of the physical restraint;
 - (E) Care that was provided to the resident during the restraint use; and

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(F) Behaviors of the resident during the restraint use.

(14) Physical restraints shall be applied only by staff who have received training and who have been validated for competency by a registered nurse on the proper use of restraints. Training and competency validation on restraints shall occur before staff members apply restraints. Competency validation of restraint use by a registered nurse shall be completed annually. This Rule is consistent with the requirements in 10A NCAC 13F .0501, Personal Care Training and Competency and 10A NCAC 13F .0903 Licensed Health Professional Support.

(15) The administrator shall assure that training in the use of alternatives to physical restraints and in the care of residents who are physically restrained is provided to all staff responsible for caring for residents with medical symptoms that warrant restraints. Training shall be provided by a registered nurse and shall include the following:

- (A) Alternatives to physical restraints;
- (B) Types of physical restraints;
- (C) Medical symptoms that warrant physical restraints;
- (D) Negative outcomes from using physical restraints;
- (E) Correct application of physical restraints;
- (F) Monitoring and caring for residents who are restrained; and
- (G) Process of reducing restraint time by using alternatives.

(i) The administrator shall have specific written instructions recorded as to what to do in case of sudden illness, accident, or death of a resident.

(j) There shall be an adequate supply of first aid supplies available in the home for immediate use.

(k) The administrator shall make arrangements with the resident, his responsible person, the county department of social services or other appropriate party for appropriate health care as needed to enable the resident to be in the best possible health condition.

History Note: Authority G.S. 131D-2; 143B-153; 143B-165; S.L. 2002-0160; Eff. January 1, 1977; Readopted Eff. October 31, 1977; Temporary Amendment Eff. July 1, 2003.

~~10 NCAC 42D .1829~~ 10A NCAC 13F .0903 LICENSED HEALTH PROFESSIONAL SUPPORT

~~10 NCAC 42C .3703 shall control for this Subchapter.~~

(a) The facility shall assure that a registered nurse, licensed under G.S. 90, Article 9A, participates in the on-site review and evaluation of the residents' health status, care plan and care provided for residents requiring, but not limited to, one or more of the following personal care tasks. The review and evaluation shall be completed within the first 30 days of admission or

within 30 days from the date a resident develops the need for the task and at least quarterly thereafter.

- (1) applying and removing ace bandages, ted hose and binders;
- (2) feeding techniques for residents with swallowing problems;
- (3) bowel or bladder training programs to regain continence;
- (4) enemas, suppositories and vaginal douches;
- (5) positioning and emptying of the urinary catheter bag and cleaning around the urinary catheter;
- (6) chest physiotherapy or postural drainage;
- (7) clean dressing changes;
- (8) collecting and testing of fingerstick blood samples;
- (9) care of well established colostomy or ileostomy;
- (10) care for pressure ulcers;
- (11) inhalation medication by machine;
- (12) maintaining accurate intake and output data;
- (13) medication administration through gastrostomy feeding tube;
- (14) medication administration through injection;

Note: Unlicensed staff may only administer subcutaneous injections as stated in Rule .1001 of this Subchapter:

- (15) oxygen administration and monitoring;
- (16) the care of residents who are physically restrained and the use of care practices as alternatives to restraints;
- (17) oral suctioning;
- (18) care of well established tracheostomy; or
- (19) administering and monitoring of gastrostomy tube feedings.

(b) The facility shall assure that a registered nurse, occupational therapist licensed under G.S. 90, Article 18D or physical therapist licensed under G.S. 90-270.24, Article 18B, participates in the on-site review and evaluation of the residents' health status, care plan and care provided within the time frames specified in Paragraph (a) of this Rule for those residents who require one or more of the following personal care tasks:

- (1) application of prescribed heat therapy;
- (2) application and removal of prosthetic devices except as used in early post-operative treatment for shaping of the extremity;
- (3) ambulation using assistive devices;
- (4) range of motion exercises;
- (5) any other prescribed physical or occupational therapy; or
- (6) transferring semi-ambulatory or non-ambulatory residents.

(c) The facility shall not provide care to residents with conditions or care needs as stated in G.S. 131D-2(a1).

(d) The facility shall assure that participation by a registered nurse, occupational therapist or physical therapist in the on-site review and evaluation of the residents' health status, care plan and care provided includes:

- (1) assuring that licensed practical nurses and non-licensed personnel providing care and

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performing the tasks are competency validated according to Paragraph (e) of this Rule;

- (2) performing a physical assessment of the residents as related to their diagnosis and current condition;
- (3) evaluating the resident's progress to care being provided;
- (4) recommending changes in the care of the resident as needed; and
- (5) documenting the activities in Subparagraphs (1) through (4) of this Paragraph.

(e) The facility shall assure that licensed practical nurses and non-licensed personnel are trained and competency validated for personal care task specified in Paragraphs (a) and (b) of this Rule. Competency validation shall be completed prior to staff performing the personal care task and documentation shall be in the facility and readily available. Staff shall be competency validated by the following health professionals;

- (1) A registered nurse shall validate the competency of staff who perform personal care task specified in Paragraph (a) of this Rule. In lieu of a registered nurse, a registered respiratory therapist may validate the competency of staff who perform personal care task (6), (11), (15), (17) and (18) specified in Paragraph (a) of this Rule. In lieu of a registered nurse, a registered pharmacist may validate the competency of staff who perform personal care task (8) specified in Paragraph (a) of this Rule; and
- (2) A registered nurse, occupational therapist or physical therapist shall validate the competency of staff who performs personal care task specified in Paragraph (b) of this Rule.

(f) The facility shall assure that training on the care of residents with diabetes is provided to unlicensed staff prior to the administration of insulin as follows and documented;

- (1) Training shall be provided by a registered nurse or registered pharmacist; and
- (2) Training shall include at least the following:
 - (A) basic facts about diabetes and care involved in the management of diabetes;
 - (B) insulin action;
 - (C) insulin storage;
 - (D) mixing, measuring and injection techniques for insulin administration;
 - (E) treatment and prevention of hypoglycemia and hyperglycemia, including signs and symptoms;
 - (F) blood glucose monitoring; and
 - (G) universal precautions.

(g) The facility shall assure that staff who perform personal care tasks listed in Paragraphs (a) and (b) of this Rule are at least annually observed providing care to residents by a licensed registered nurse or other appropriate licensed health professional, as specified in Paragraph (d) of this Rule, who is employed by the facility or under contract or agreement, individually or through an agency, with the facility. Annual

competency validation shall be documented and readily available for review.

History Note: Authority G.S. 131D-2; 131D-4.3; 143B-153; 143B-165; S.L. 2002-0160; Temporary Adoption Eff. January 1, 1996; Eff. May 1, 1997; Temporary Amendment Eff. July 1, 2003.

~~10 NCAC 42D .1703~~10A NCAC 13F .0904 NUTRITION AND FOOD SERVICE

(a) ~~The requirements in 10 NCAC 42C .2303 shall control for this Subchapter, except that:~~

- (1) ~~Menus must be prepared at least two weeks in advance; and~~
- (2) ~~Item and quantity must be specified on the invoices or other appropriate receipts of food purchases.~~

(b) ~~In addition to the requirements in 10 NCAC 42C .2303, space must be provided for storage of dry, refrigerated and frozen food items to comply with sanitation regulations.~~

(a) Food Procurement and Safety:

- (1) The kitchen, dining and food storage areas shall be clean, orderly and protected from contamination.
- (2) All food and beverage being procured, stored, prepared or served by the facility shall be protected from contamination.
- (3) All meat processing shall occur at a USDA-approved processing plant.
- (4) There shall be at least a three-day supply of perishable food and a five-day supply of non-perishable food in the facility based on the menus, for both regular and therapeutic diets.

(b) Food Preparation and Service:

- (1) Sufficient staff, space and equipment shall be provided for safe and sanitary food storage, preparation and service.
- (2) Table service shall include a napkin and non-disposable place setting consisting of at least a knife, fork, spoon, plate and beverage containers. Exceptions may be made on an individual basis and shall be based on documented needs or preferences of the resident.
- (3) Hot foods shall be served hot and cold foods shall be served cold.
- (4) If residents require feeding assistance, food shall be maintained at serving temperature until assistance is provided.

(c) Menus:

- (1) Menus shall be prepared at least one week in advance with serving quantities specified and in accordance with the Daily Food Requirements in Paragraph (d) of this Rule.
- (2) Menus shall be maintained in the kitchen and identified as to the current menu day and cycle for any given day for guidance of food service staff.
- (3) Any substitutions made in the menu shall be of equal nutritional value, appropriate for

- therapeutic diets and documented to indicate the foods actually served to residents.
- (4) Menus shall be planned to take into account the food preferences and customs of the residents.
- (5) Menus as served and invoices or other appropriate receipts of purchases shall be maintained in the facility for 30 days.
- (6) Menus for all therapeutic diets shall be planned or reviewed and signed by a registered dietitian with the registered dietitian's registration number included.
- (7) The facility shall have a matching therapeutic diet menu for all physician-ordered therapeutic diets for guidance of food service staff.

(d) Daily Food Requirements:

- (1) Each resident shall be served a minimum of three nutritionally adequate, palatable meals a day at regular hours with at least 10 hours between the breakfast and evening meals.
- (2) Foods and beverages that are appropriate to residents' diets shall be offered or made available to all residents as snacks between each meal for a total of three snacks per day and shown on the menu as snacks.
- (3) Daily menus for regular diets shall include the following:
- (A) Homogenized whole milk, low fat milk, skim milk or buttermilk: One cup (eight ounces) of pasteurized milk at least twice a day. Reconstituted dry milk or diluted evaporated milk may be used in cooking only and not for drinking purposes due to risk of bacterial contamination during mixing and the lower nutritional value of the product if too much water is used;
- (B) Fruit: One serving of fruit (e.g., six ounces of juice: ½ cup of raw, canned or cooked fruit; one medium-size whole fruit; or ¼ cup dried fruit) at least twice a day. One serving shall be a citrus fruit or a single strength juice in which there is 100% of the recommended dietary allowance of vitamin C in each six ounces of juice. The second fruit serving shall be of another variety of fresh, dried or canned fruit;
- (C) Vegetables: One serving of vegetables (e.g., ½ cup of cooked or canned vegetable; six ounces of vegetable juice; or one cup of raw vegetable) at least three times a day. One of these shall be a dark green, leafy or deep yellow three times a week;
- (D) Eggs: One whole egg or appropriate substitute (e.g., two egg whites or ¼

- cup of pasteurized egg product) at least three times a week at breakfast;
- (E) Protein: two-three ounces of pure cooked meat two to three times a day. An appropriate substitute (e.g., four tablespoons of peanut butter, one cup of cooked dried peas or beans or two ounces of pure cheese) may be served three times a week but not more than once a day, unless requested by the resident;

Note: Bacon is considered to be fat and not meat for the purposes of this Rule.

- (F) Cereals and Breads: At least six servings of whole grain or enriched cereal and bread or grain products a day. Examples of one serving are as follows: one slice of bread; ½ of a bagel, English muffin or hamburger bun; one small muffin, roll, biscuit or piece of cornbread; ½ cup cooked rice or cereal (e.g., oatmeal or grits); ¾ cup ready-to-eat cereal; or one waffle, pancake or tortilla that is six inches in diameter. Cereals and breads offered as snacks can be included in meeting this requirement;
- (G) Fats: Include butter, oil, margarine or items consisting primarily of one of these (e.g., icing or gravy); and
- (H) Water and Other Beverages: Water shall be served to each resident at each meal, in addition to other beverages.

(e) Therapeutic Diets:

- (1) All therapeutic diet orders including thickened liquids shall be in writing from the resident's physician. Where applicable, the therapeutic diet order shall be specific to calorie, gram or consistency, such as for calorie controlled ADA diets, low sodium diets or thickened liquids, unless there are written orders which include the definition of any therapeutic diet identified in the facility's therapeutic menu approved by a registered dietitian.
- (2) Physician orders for nutritional supplements shall be in writing from the resident's physician and be brand specific, unless the facility has defined a house supplement in its communication to the physician, and shall specify quantity and frequency.
- (3) The facility shall maintain an accurate and current listing of residents with physician-ordered therapeutic diets for guidance of food service staff.
- (4) All therapeutic diets, including nutritional supplements and thickened liquids, shall be served as ordered by the resident's physician.

(f) Individual Feeding Assistance:

- (1) Sufficient staff shall be available for individual feeding assistance as needed.

(2) Residents needing help in eating shall be assisted upon receipt of the meal and the assistance shall be unhurried and in a manner that maintains or enhances each resident's dignity and respect.

(g) Variations from the required three meals or time intervals between meals to meet individualized needs or preferences of residents shall be documented in the resident's record.

History Note: Authority G.S. 131D-2; 143B-153; 143B-165; S.L. 2002-0160; Eff. January 1, 1977; Readopted Eff. October 31, 1977; Amended Eff. April 1, 1984; Temporary Amendment Eff. July 1, 2003.

10 NCAC 42D .170410A NCAC 13F .0905 ACTIVITIES PROGRAM

The requirements in 10 NCAC 42C .2304 shall control for this Subchapter.

(a) Each home shall develop a program of activities designed to promote the residents' active involvement with each other, their families, and the community. The program is to provide social, physical, intellectual, and recreational activities in a planned, coordinated, and structured manner, using the Activities Coordinator's Guide, a copy of which each facility is required to have. When there is a cluster of homes, one Activities Coordinator's Guide may be shared by the homes.

(b) The program shall be designed to promote active involvement by all residents but is not to require any individual to participate in any activity against his will.

(c) Each home shall assign a person to be the activities coordinator, who meets the qualifications specified in Rule .0404 of this Subchapter. The activities coordinator is responsible for responding to the residents' need and desire for meaningful activities, by:

(1) Reviewing upon admission personal information about each resident's interests and capabilities recorded on an individualized index card or the equivalent. This card is to be completed from, at least, the information recorded on the Resident Register, Form DSS-1865. It shall be maintained for use by the activities coordinator for developing activities and is to be updated as needed;

(2) Using the information on the residents' interests and capabilities to arrange for and provide planned individual and group activities for the residents. In addition to individual activities, there shall be a minimum of 10 hours of planned group activities per week. Homes designated for residents with HIV disease are exempt from the 10-hour requirement as long as the facility can demonstrate each resident's involvement in a structured volunteer program that provides the required range of activities;

(3) Preparing a monthly calendar of planned group activities which is to be in easily readable, large print, posted in a prominent location on

the first day of each month, and updated when there are any changes;

(4) Involving community resources, such as recreational, volunteer, religious, aging and developmentally disabled-associated agencies, to enhance the activities available to residents. The coordinator may use the home's aides in carrying out some activities with residents; and
 (5) Evaluating and documenting the overall effectiveness of the activities program at least every six months with input from the residents to determine what have been the most valued activities and to elicit suggestions of ways to enhance the program.

(d) A variety of group and individual activities shall be provided. The program is to include, at least, the following types of activities:

(1) Social and Recreational Activities;

(A) Opportunity shall be available for both individual and group social and recreational activities sufficiently diverse to accommodate the residents' varied interests and capabilities. These activities emphasize increasing self-confidence and stimulating interest and friendships;

(B) Individual activity includes one to one interactions in mutually enjoyable activity, such as buddy walks, card playing and horseshoes as well as activity by oneself, such as bird watching, nature walks, and card playing;

(C) Each resident shall have the opportunity to participate in at least one planned group social or recreational activity weekly. A group activity is one which involves a number of residents in physical and mental interaction. Each resident shall be encouraged to participate in an activity which best matches his physical, mental and emotional capability. Such activities may include group singing, dancing, bingo, and exercise classes;

(D) Each resident shall have the opportunity to participate in at least one outing every other month. A resident interested in involving himself in the community more frequently shall be encouraged and helped to do so. The coordinator is to contact volunteers and residents' families to assist in the effort to get residents involved in activities outside the home;

(E) If a resident cannot participate actively in community events, arrangements shall be made so that the more active residents can still

participate in such outings. If there is a question about a resident's ability to participate in an activity, the resident's physician shall be consulted to obtain a statement regarding the resident's capabilities; and

- (F) The activities planned and offered shall take into account possible cultural differences of the residents;
- (2) Diversional and Intellectual Activities:
 - (A) Opportunity for both individual and group diversional and intellectual activities sufficiently diverse to accommodate the residents' varied interests and capabilities shall be available. There shall be adequate supplies and supervision provided to enable each resident to participate;
 - (B) Individual activities emphasize individual accomplishments, creative expression, increased knowledge and the learning of new skills. Such activities may include sewing, crafts, painting, reading, creative writing, and wood carving;
 - (C) Each resident shall have the opportunity to participate in at least one planned group activity weekly that emphasizes group accomplishment, creative expression, increased knowledge, and the learning of new skills. Such activities may include discussion groups, drama, resident council meetings, book reviews, music appreciation, review of current events, and spelling bees; and
 - (D) The activities planned and offered shall take into account possible cultural differences of the residents.
- (3) Work-Type and Volunteer Service Activities: Each resident shall have the opportunity to participate in meaningful work-type and volunteer service activities in the home or in the community, but participation shall be on an entirely voluntary basis. Under no circumstances shall this activity be forced upon a resident. Residents shall not be assigned these tasks in place of staff. Examples of work-type and volunteer services activities range from bedmaking, personal ironing, and assisting another resident, to more structured activities such as general ironing, making or repairing toys for children, telephone reassurance, and gardening.

Temporary Amendment Eff. July 1, 2003.

~~10 NCAC 42D .170510A~~ NCAC 13F .0906 OTHER RESIDENT CARE AND SERVICES

The requirements in ~~10 NCAC 42C .2305~~ shall control for this Subchapter.

(a) Transportation. The administrator shall assure the provision of transportation for the residents to necessary resources and activities, including transportation to the nearest appropriate health facilities, social services agencies, shopping and recreational facilities, and religious activities of the resident's choice. The resident is not to be charged any additional fee for this service. Sources of transportation may include community resources, public systems, volunteer programs, family members as well as facility vehicles.

(b) Mail.

- (1) Residents shall receive their mail promptly and it shall be unopened unless there is a written, witnessed request authorizing management staff to open and read mail to the resident. This request shall be recorded on Form DSS-1865, the Resident Register or the equivalent.
- (2) Outgoing mail written by a resident shall not be censored.
- (3) Residents shall be encouraged and assisted, if necessary, to correspond by mail with close relatives and friends. Residents shall have access to writing materials, stationery and postage and, upon request, the home is to provide such items at cost. It is not the home's obligation to pay for these items.

(c) Laundry.

- (1) Laundry services shall be provided to residents without any additional fee.
- (2) It is not the home's obligation to pay for a resident's personal dry cleaning. The resident's plans for personal care of clothing are to be indicated on Form DSS-1865, the Resident Register.

(d) Telephone.

- (1) A telephone shall be available in a location providing privacy for residents to make and receive a reasonable number of calls of a reasonable length.
- (2) A pay station telephone is not acceptable for local calls.
- (3) It is not the home's obligation to pay for a resident's toll calls.

(e) Personal Lockable Space.

- (1) Personal lockable space shall be provided for each resident to secure his personal valuables. One key shall be provided free of charge to the resident. Additional keys are to be provided to residents at cost upon request. It is not the home's obligation to pay for additional keys.
- (2) While a resident may elect not to use lockable space, it shall still be available in the home since the resident may change his mind. This space shall be accessible only to the resident and the administrator or supervisor-in-charge.

History Note: Authority G.S. 131D-2; 143B-153; 143B-165; S.L. 2002-0160; Eff. January 1, 1977; Readopted Eff. October 31, 1977; Amended Eff. April 1, 1987; April 1, 1984;

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The administrator or supervisor-in-charge shall determine at admission whether the resident desires lockable space, but the resident may change his mind at any time.

(f) Visiting.

- (1) Visiting in the home and community at reasonable hours shall be encouraged and arranged through the mutual prior understanding of the residents and administrator.
(2) There shall be at least 10 hours each day for visitation in the home by persons from the community.
(3) A signout register shall be maintained for planned visiting and other scheduled absences which indicates the resident's departure time, expected time of return and the name and telephone number of the responsible party.
(4) If the whereabouts of a resident are unknown and there is reason to be concerned about his safety, the person in charge in the home shall immediately notify the resident's responsible person, the appropriate law enforcement agency and the county department of social services.

History Note: Authority G.S. 131D-2; 143B-153; 143B-165; S.L. 2002-0160; Eff. January 1, 1977; Readopted Eff. October 31, 1977; Amended Eff. April 1, 1987; April 1, 1984; Temporary Amendment Eff. July 1, 2003.

10 NCAC 42D .183010A NCAC 13F .0908 COOPERATION WITH CASE MANAGERS

10 NCAC 42C .3704 shall control for this Subchapter. The administrator shall cooperate with and assure the cooperation of facility staff with case managers in their provision of case management services to the appropriate residents.

History Note: Authority G.S. 131D-2; 131D-4.3; 143B-153; 143B-165; S.L. 2002-0160; Temporary Adoption Eff. January 1, 1996; Eff. May 1, 1997; Temporary Amendment Eff. July 1, 2003.

SECTION .1200 - POLICIES, RECORDS AND REPORTS

10 NCAC 42D .180910A NCAC 13F .1202 DISPOSAL OF RESIDENT RECORDS

The rules stated in 10 NCAC 42C .3102 shall control for this Subchapter.

- (a) All records may be purged of material more than three years old unless the home has been asked by the monitoring or licensing agency to keep it for a longer period.

- (b) After a resident has left the home or died, his records shall be put in order and filed in a safe place in the home for a period of three years and then may be destroyed.

History Note: Authority G.S. 131D-2; 143B-153; 143B-165; S.L. 2002-0160; Eff. January 1, 1977; Readopted Eff. October 31, 1977; Temporary Amendment Eff. July 1, 2003.

10 NCAC 42D .181010A NCAC 13F .1203 REPORT OF ADMISSIONS AND DISCHARGES

The rules stated in 10 NCAC 42C .3103 shall control for this Subchapter.

When there is an admission or discharge of a resident, the administrator or supervisor-in-charge shall notify the county department of social services by the fifth day of the month following admission or discharge. Notification shall be made by submitting the form for reporting admissions and discharges. The form does not need to be submitted if there have not been any admissions or discharges.

History Note: Authority G.S. 131D-2; 143B-153; 143B-165; S.L. 2002-0160; Eff. January 1, 1977; Readopted Eff. October 31, 1977; Temporary Amendment Eff. July 1, 2003.

10 NCAC 42D .181110A NCAC 13F .1204 POPULATION REPORT

The rules stated in 10 NCAC 42C .3104 shall control for this Subchapter.

The administrator or supervisor-in-charge shall submit by January 31 of each year an annual population report for the previous calendar year to the county department of social services. If the home closes during the year, the administrator or supervisor-in-charge shall report for the previous calendar year to date of closing.

History Note: Authority G.S. 131D-2; 143B-153; 143B-165; S.L. 2002-0160;

Eff. January 1, 1977; Readopted Eff. October 31, 1977; Temporary Amendment Eff. July 1, 2003.

10 NCAC 42D .181310A NCAC 13F .1206 ADVERTISING

The rules stated in 10 NCAC 42C .3200 regarding advertising shall control for this Subchapter.

The administrator may use acceptable methods of advertising provided:

- (1) The name used is as it appears on the license;
(2) Only the services and accommodations for which the home is licensed are used; and
(3) The home is listed under proper classification in telephone books, newspapers or magazines.

History Note: Authority G.S. 131D-2; 143B-153; 143B-165; S.L. 2002-0160; Eff. January 1, 1977; Readopted Eff. October 31, 1977; Temporary Amendment Eff. July 1, 2003.

SUBCHAPTER 13G - LICENSING OF FAMILY CARE HOMES

SECTION .0700 - ADMISSION AND DISCHARGE

10 NCAC 42C .250610A NCAC 13G.0705 DISCHARGE OF RESIDENTS

~~(a) A facility shall not initiate and carry out the discharge or transfer of residents except under conditions specified in this Rule. Discharge or transfer involves termination of residency in a facility and taking action to have the resident moved from the facility. The discharge or transfer of a resident by a facility shall meet one of the following conditions:~~

- ~~(1) he discharge or transfer is necessary for the resident's welfare because the resident's needs cannot be met in the facility;~~
- ~~(2) the discharge or transfer is appropriate because the resident's health has improved sufficiently so the resident no longer needs the services provided by the facility;~~
- ~~(3) the resident's condition is such that he is a danger to himself or poses a direct threat to his own health or safety;~~
- ~~(4) the safety of individuals in the facility would otherwise be endangered;~~
- ~~(5) the health of individuals in the facility would otherwise be endangered;~~
- ~~(6) the welfare of individuals in the facility would otherwise be endangered;~~
- ~~(7) the resident or responsible person has failed to pay the costs of services and accommodations according to the resident contract;~~
- ~~(8) the transfer or discharge is mandated under state law; or~~
- ~~(9) the facility ceases to operate.~~

~~(b) If a facility discharges or transfers a resident, the reason for discharge or transfer shall be documented in the resident's record. Documentation shall include, documentation by the resident's physician if discharge or transfer is necessary under conditions specified in Subparagraph (a) Parts (1) and (2) of this Rule or a physician if discharge or transfer is necessary under the condition specified in Paragraph (a), Parts (3) and (5) of this Rule.~~

~~(c) At least thirty days before discharging or transferring a resident, the following steps shall be taken:~~

- ~~(1) The facility shall notify the resident verbally and in writing and the responsible person or contact person in writing of the facility's decision to discharge or transfer the resident. The Adult Care Home Notice of Transfer/Discharge form shall serve as the written notice of discharge or transfer and be completed by the facility and given to the resident on the same day it is dated. A copy of this notice shall be mailed or sent by facsimile to the responsible person or contact person on the same day it is dated. Failure to use and complete this specific form shall invalidate the notice of discharge or transfer. This form may be obtained at no cost from the Division of~~

Medical Assistance, 2505 Mail Service Center, Raleigh, NC 27699-2505. Failure to use the latest version of this form does not invalidate the transfer or discharge unless the facility has been previously notified of change in the form and been provided a copy of the latest form.

- ~~(2) The facility shall notify the resident verbally and in writing and the responsible person or contact person in writing of the resident's right to appeal the facility's action of discharge or transfer to the Division of Medical Assistance. The Adult Care Home Hearing Request Form shall be given to the resident and a copy mailed or sent by facsimile to the responsible person or contact person simultaneously with the Adult Care Home Notice of Transfer/Discharge form as written notice of the right to appeal the facility's action. Failure to include this specific form with the Adult Care Home Notice of Transfer/Discharge form shall invalidate the notice of discharge or transfer. The Hearing Request Form may be obtained at no cost from the Division of Medical Assistance, P.O. Box 29529, Raleigh, NC 27626-0529. Failure to use the latest version of the Hearing Request Form does not invalidate the request for a hearing unless the facility has been previously notified of a change in the form and been provided a copy of the latest form.~~

- ~~(3) In cases where the resident has been adjudicated incompetent, the Adult Care Home Notice of Transfer/Discharge form and the Adult Care Home Hearing Request Form shall be mailed or sent by facsimile to the resident's legal representative on the same day they are dated.~~

- ~~(4) The facility shall maintain a copy of the completed Adult Care Home Notice of Transfer/Discharge form in the resident's record.~~

~~(d) Exceptions to the 30 day notice of discharge or transfer required in Paragraph (c) of this Rule are cases in which a resident is being discharged under conditions specified in Parts (1), (3), (4) and (5) of Paragraph (a) of this Rule.~~

~~(e) The facility shall assist residents in the discharge or transfer process to ensure safe and orderly discharge or transfer from the facility.~~

~~(f) The resident or the resident's responsible person may initiate an appeal of a facility's intent to discharge or transfer the resident by submitting a written request for a hearing to the Hearing Unit which is the Chief Hearing Officer and the Chief Hearing Officer's staff in the Division of Medical Assistance of the Department of Health and Human Services. The request for a hearing shall be submitted by mail, facsimile or hand delivery and must be received by the Hearing Unit within 11 calendar days from the date of the facility's notice of discharge or transfer. If the eleventh day falls on a Saturday, Sunday or legal holiday, the period during which an appeal may be requested shall run until the end of the next day which is not a Saturday, Sunday or legal holiday. Except in cases specified in Paragraph~~

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~~(d) of this Rule, the resident shall not be discharged or transferred before the final decision resulting from the appeal has been rendered.~~

~~(g) If an appeal hearing is requested, the following shall apply:~~

- ~~(1) Upon timely receipt of a request for a hearing according to Paragraph (f) of this Rule, the Hearing Unit shall promptly notify the facility in writing of the request.~~
- ~~(2) The facility, the resident and the resident's responsible person or contact person shall be notified by the Hearing Unit of the date, time and place of the hearing. The hearing shall be held within 30 calendar days of the Hearing Unit's receipt of a request for a hearing. If the 30th day falls on a Saturday, Sunday or legal holiday, the period during which a hearing may be held shall run until the end of the next day which is not a Saturday, Sunday or legal holiday. If the hearing is to be conducted in person, it shall be held in Raleigh, North Carolina. The hearing may also be conducted by telephone as indicated on the Hearing Request Form.~~
- ~~(3) Each party to an appeal hearing shall provide to all other parties to the hearing and to the Hearing Unit copies of all documents and records that the party intends to use at the hearing at least five working days prior to the scheduled hearing.~~
- ~~(4) The Hearing Officer, who is the person designated to preside over hearings between residents and adult care home providers regarding discharges and transfers, may:
(A) grant continuances;
(B) dismiss a request for a hearing if the resident or the resident's responsible person or whoever the resident has designated to represent him fails to appear at a scheduled hearing; or
(C) proceed to conduct a scheduled hearing if a facility representative fails to appear at a scheduled hearing.~~
- ~~(5) The Rules of Civil Procedure as contained in G.S. 1A-1 and the General Rules of Practice for the Superior and District Courts as authorized by G.S. 7A-34 and found in the Rules Volume of the North Carolina General Statutes shall not apply in any hearings held by a Division hearing officer unless another specific statute or rule provides otherwise. Division hearings are not hearings within the meaning of G.S. 150B and shall not be governed by the provisions of that Chapter unless otherwise stated in these rules. Parties may be represented by counsel or other representative at the hearing.~~
- ~~(6) The Hearing Officer's final decision shall uphold or reverse the facility's decision. Copies of the final decision shall be mailed by certified mail to the facility and the resident and the resident's responsible person.~~

~~(h) If a discharge or transfer is initiated by the resident or responsible person, the administrator may require up to a 14-day written notice from the resident or responsible person prior to the resident leaving the facility. Exceptions to the required notice are cases in which a delay in discharge or transfer would jeopardize the health or safety of the resident or others in the facility. The facility's requirement for a notice from the resident or responsible person shall be established in the facility's resident contract or house rules provided to the resident or responsible person according to Rule .2405 of this Subchapter.~~

~~(a) The discharge of a resident initiated by the facility shall be according to conditions and procedures specified in Paragraphs (a) through (g) of this Rule. The discharge of a resident initiated by the facility involves the termination of residency by the facility resulting in the resident's move to another location and the facility not holding the bed for the resident based on the facility's bed hold policy.~~

~~Note: The discharge requirements in this Rule do not apply when a resident is transferred to an acute inpatient facility for mental or physical health evaluation or treatment and the adult care facility's bed hold policy applies based on the expected return of the resident. If the facility decides to discharge a resident who has been transferred to an acute inpatient facility and there has been no physician-documented level of care change for the resident, the discharge requirements in this Rule would apply.~~

~~(b) The discharge of a resident shall be based on one of the following reasons:~~

- ~~(1) the discharge is necessary for the resident's welfare and the resident's needs cannot be met in the facility as documented by the resident's physician, physician assistant or nurse practitioner;~~
- ~~(2) the resident's health has improved sufficiently so the resident no longer needs the services provided by the facility as documented by the resident's physician, physician assistant or nurse practitioner;~~
- ~~(3) the safety of other individuals in the facility is endangered;~~
- ~~(4) the health of other individuals in the facility is endangered as documented by a physician, physician assistant or nurse practitioner;~~
- ~~(5) failure to pay the costs of services and accommodations by the payment due date according to the resident contract after receiving written notice of warning of discharge for failure to pay; or~~
- ~~(6) the discharge is mandated under G.S. 131D-2(a)(a1).~~

~~(c) The notices of discharge and appeal rights as required in Paragraph (e) of this Rule shall be made by the facility at least 30 days before the resident is discharged except that notices may be made as soon as practicable when:~~

- ~~(1) the resident's health or safety is endangered and the resident's needs cannot be met in the facility under Subparagraph (b)(1) of this Rule; or~~
- ~~(2) reasons under Subparagraphs (b)(2), (b)(3), (b)(4) and (b)(6) of this Rule exist.~~

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(d) The reason for discharge shall be documented in the resident's record. Documentation shall include one or more of the following as applicable to the reasons under Paragraph (b) of this Rule:

- (1) documentation by physician, physician assistant or nurse practitioner as required in Paragraph (b) of this Rule;
- (2) the condition or circumstance that endangers the health or safety of the resident being discharged or endangers the health or safety of individuals in the facility, and the facility's action taken to address the problem prior to pursuing discharge of the resident;
- (3) written notices of warning of discharge for failure to pay the costs of services and accommodations; or
- (4) the specific health need or condition of the resident that the facility determined could not be met in the facility pursuant to G.S. 131D-2(a)(1)(4) and as disclosed in the resident contract signed upon the resident's admission to the facility.

(e) The facility shall assure the following requirements for written notice are met before discharging a resident:

- (1) The Adult Care Home Notice of Discharge with the Adult Care Home Hearing Request Form shall be hand delivered, with receipt requested, to the resident on the same day the Adult Care Home Notice of Discharge is dated. These forms may be obtained at no cost from the Division of Medical Assistance, 2505 Mail Service Center, Raleigh, NC 27699-2505;
- (2) A copy of the Adult Care Home Notice of Discharge with a copy of the Adult Care Home Hearing Request Form shall be hand delivered, with receipt requested, or sent by certified mail to the resident's responsible person or legal representative on the same day the Adult Care Home Notice of Discharge is dated;
- (3) Failure to use and simultaneously provide the specific forms according to Paragraphs (e)(1) and (e)(2) of this Rule shall invalidate the discharge. Failure to use the latest version of these forms shall not invalidate the discharge unless the facility has been previously notified of a change in the forms and been provided a copy of the latest forms by the Department of Health and Human Services; and
- (4) A copy of the completed Adult Care Home Notice of Discharge, the Adult Care Home Hearing Request Form as completed by the facility prior to giving to the resident and a copy of the receipt of hand delivery or the notification of certified mail delivery shall be maintained in the resident's record.

(f) The facility shall provide assistance in preparing for a safe and orderly discharge as evidenced by:

- (1) notifying staff in the county department of social services responsible for placement services;

- (2) explaining to the resident and responsible person or legal representative why the discharge is necessary;
- (3) informing the resident and responsible person or legal representative about an appropriate discharge destination; and
- (4) offering the following material to the caregiver with whom the resident is to be placed and providing this material as requested prior to or upon discharge of the resident:
 - (A) a copy of the resident's most current FL-2;
 - (B) a copy of the resident's most current assessment and care plan;
 - (C) a copy of the resident's current physician orders;
 - (D) a list of the resident's current medications;
 - (E) the resident's current medications; and
 - (F) a record of the resident's vaccinations and TB screening.

(g) If an appeal hearing is requested:

- (1) the facility shall provide to the resident or legal representative or the resident and the responsible person, and the Hearing Unit, copies of all documents and records that the facility intends to use at the hearing at least five working days prior to the scheduled hearing; and
- (2) the facility shall not discharge the resident before the final decision resulting from the appeal has been rendered, except in those cases of discharge specified in Paragraph (c)(2) of this Rule.

(h) If a discharge is initiated by the resident or responsible person, the administrator may require up to a 14-day written notice from the resident or responsible person prior to the resident leaving the facility. The facility's requirement for a notice from the resident or responsible person shall be established in the resident contract or the house rules provided to the resident or responsible person upon admission.

History Note: Authority G.S. 131D-2; 131D-4.5; 143B-165; S.L. 99-0334; 2002-0160; Temporary Adoption Eff. December 1, 1999; Eff. April 1, 2001; Temporary Amendment Eff. July 1, 2003.

SECTION .0900 - RESIDENT CARE AND SERVICES

~~10 NCAC 42C .230310A~~ NCAC 13G.0904 NUTRITION AND FOOD SERVICE

(a) ~~Preparation and Serving of Food:~~

- ~~(1) Sufficient staff, space, and equipment must be provided for safe, sanitary food preparation and service, including individual assistance to residents as needed;~~
- ~~(2) The kitchen, dining, and food storage areas must be clean, orderly, and protected from possible contamination;~~

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- (3) All meat processing must occur at a North Carolina Department of Agriculture approved processing plant;
- (4) Table service, which means the place where the resident is served food, must include an appropriate place setting. Typically, the place setting is to include a minimum of a knife, fork, teaspoon, glass, napkin and a plate;
- (5) Hot food shall be served hot and cold food served cold and in a consistency to meet individual needs. If residents require assistance in eating, food shall be maintained at serving temperature until assistance is provided.
- (b) Storage of Food:
- (1) All food being stored, prepared, and served must be protected from contamination;
- (2) Any home canning of fruits or vegetables must be processed using the pressure method; and
- (3) At least one week's supply of food must be in the home.
- (c) Menu Planning:
- (1) Menus must be planned in accordance with the requirements cited in Paragraph (d) of this Rule regarding daily service. Menus must be in writing with serving quantities specified. The menus are to be prepared at least one week in advance;
- (2) Menus must be dated and posted in the kitchen for the guidance of the food service staff;
- (3) Any substitutions made in the menu must be of equal nutritional value and must be recorded before being served to indicate the foods actually served to residents;
- (4) Meals shall be planned taking into account the food preferences and customs of the residents. Meat substitutes must be provided to residents who choose to be vegetarians or who by religious or cultural preferences do not eat meat. However, an administrator may not impose vegetarian practices, or other religious or cultural food practices on a resident;
- (5) A copy of the NCDA Diet Manual must be in the home for use in its food service. Where there is a cluster of homes, one diet manual may be shared by the homes;
- (6) Menus as served and invoices or other appropriate receipts of purchases must be kept on file by the month for a year and are subject to periodic review by the monitoring and licensing agencies.
- (d) Daily Service:
- (1) Each resident is to be served a minimum of three nutritionally adequate, palatable meals a day at regular hours with at least 1 hour between the breakfast and the evening meal. Variations from the required three meals, menus and specified time intervals to meet individualized needs of residents in an HIV-designated facility shall be planned or reviewed by a physician and registered dietitian and documented;
- (2) Suitable foods or liquids (e.g., fruit, milk, juices) must be offered between meals and shown on the menu as a snack;
- (3) Daily menus must include the following:
- (A) Homogenized or low fat milk or buttermilk. One cup (8 ounces) must be offered to each resident at least twice a day. Because milk is an important source of calcium and vitamin D, the resident must be encouraged to consume two cups (16 ounces) of milk daily as a beverage or as part of a meal (e.g., with dry cereal). Reconstituted dry milk or diluted evaporated milk may be used only in cooking and not for drinking purposes due to the risk of bacterial contamination during mixing and the lower nutritional value of the product if too much water is used;
- (B) Fruit. Two one-half cup servings (8 ounces). A one-half cup (4 ounces) of citrus fruit or juice, and a one-half cup (4 ounces) of another variety of fresh, dried, or canned fruit must be served. Citrus fruits include oranges and grapefruits. One orange or one-half grapefruit is considered a serving. One cup of tomato juice or tomatoes may be used instead of citrus. Single strength canned or frozen fruit juices which are vitamin C fortified may be substituted for a citrus fruit or juice if it is noted on the label that there is 100 percent of the recommended dietary allowance of vitamin C in each six ounces of juice;
- (C) Vegetables. Two one-half cup servings (8 ounces). One of these must be a dark green leafy or deep yellow vegetable every other day or three times a week;
- (D) Eggs. At least three times a week unless limited by physician's orders;
- (E) Fats. Include butter, oil, or margarine. Restrict the use of seasoning with meat fats when there are older residents since older people find these difficult to digest;
- (F) Protein. At least two ounces of cooked meat must be served at both the noon and evening meal except a meat substitute equal to two ounces of cooked meat may be served three times a week but not more than once a day. Examples of adequate meat substitutes are two eggs, two ounces of pure cheese, and one cup of dry

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beans or peas; Note: Bacon is considered a fat instead of a meat.

(G) ~~Cereals and Breads. At least four servings, whole grain or enriched (such as oatmeal, enriched rice, corn meal, enriched prepared cereals or bread). Examples of one serving of bread are one slice, one biscuit, one roll, and one square of corn bread. One serving of cereal equals one half cup cooked or three fourths cup dry cereal. Cereal for the evening meal is not, by itself, acceptable due to the lack of variety and lack of needed nutrients; and~~

(H) ~~Water and Other Beverages. Water must be offered at each meal in addition to other beverages. Six to eight cups of liquids are needed daily to keep the body functioning properly;~~

(4) ~~Sandwiches shall not be served alone for any meal; and~~

(5) ~~Generally the energy intake for persons aged 51-75 should be 2400 calories for males and 1800 calories for females according to the 1980 recommended dietary allowances of the National Research Council, National Academy of Sciences.~~

(e) Modified Diets:

(1) ~~All modified diet orders must be in writing from the resident's physician. Modified diet orders must be calorie or gram specific unless standing orders, which include the definition of any modified diets, have been obtained from the physician and are on file in the home.~~

(2) ~~Menus for these modified diets must be planned or reviewed and signed (including registration number) by a registered dietitian;~~

(3) ~~The administrator is responsible for maintaining an accurate and current listing of residents for whom modified diets have been prescribed and the modified diet ordered, for use by food service personnel;~~

(4) ~~The administrator shall ask a physician or registered dietitian for answers to questions about the diets of residents; and~~

(5) ~~The administrator is responsible for assisting residents who need modified diets in understanding and accepting these diets.~~

(a) Food Procurement and Safety:

(1) The kitchen, dining and food storage areas shall be clean, orderly and protected from contamination.

(2) All food and beverage being procured, stored, prepared or served by the facility shall be protected from contamination.

(3) All meat processing shall occur at a USDA-approved processing plant.

(4) There shall be at least a three-day supply of perishable food and a five-day supply of non-

perishable food in the facility based on the menus, for both regular and therapeutic diets.

(b) Food Preparation and Service:

(1) Sufficient staff, space and equipment shall be provided for safe and sanitary food storage, preparation and service.

(2) Table service shall include a napkin and non-disposable place setting consisting of at least a knife, fork, spoon, plate and beverage containers. Exceptions may be made on an individual basis and shall be based on documented needs or preferences of the resident.

(3) Hot foods shall be served hot and cold foods shall be served cold.

(4) If residents require feeding assistance, food shall be maintained at serving temperature until assistance is provided.

(c) Menus:

(1) Menus shall be prepared at least one week in advance with serving quantities specified and in accordance with the Daily Food Requirements in Paragraph (d) of this Rule.

(2) Menus shall be maintained in the kitchen and identified as to the current menu day and cycle for any given day for guidance of food service staff.

(3) Any substitutions made in the menu shall be of equal nutritional value, appropriate for therapeutic diets and documented to indicate the foods actually served to residents.

(4) Menus shall be planned to take into account the food preferences and customs of the residents.

(5) Menus as served and invoices or other appropriate receipts of purchases shall be maintained in the facility for 30 days.

(6) Menus for all therapeutic diets shall be planned or reviewed and signed by a registered dietitian with the registered dietitian's registration number included.

(7) The facility shall have a matching therapeutic diet menu for all physician-ordered therapeutic diets for guidance of food service staff.

(d) Daily Food Requirements:

(1) Each resident shall be served a minimum of three nutritionally adequate, palatable meals a day at regular hours with at least 10 hours between the breakfast and evening meals.

(2) Foods and beverages that are appropriate to residents' diets shall be offered or made available to all residents as snacks between each meal for a total of three snacks per day and shown on the menu as snacks.

(3) Daily menus for regular diets shall include the following:

(A) Homogenized whole milk, low fat milk, skim milk or buttermilk: One cup (8 ounces) of pasteurized milk at least twice a day. Reconstituted dry milk or diluted evaporated milk may

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be used in cooking only and not for drinking purposes due to risk of bacterial contamination during mixing and the lower nutritional value of the product if too much water is used.

(B) Fruit: One serving of fruit (e.g., six ounces of juice: 1/2 cup of raw, canned or cooked fruit; one medium-size whole fruit; or 1/4 cup dried fruit at least twice a day. One serving shall be a citrus fruit or a single strength juice in which there is 100% of the recommended dietary allowance of vitamin C in each six ounces of juice. The second fruit serving shall be of another variety of fresh, dried or canned fruit;

(C) Vegetables: One serving of vegetables (e.g., 1/2 cup of cooked or canned vegetable; six ounces of vegetable juice; or one cup of raw at least three times a day. One of these shall be a dark green, leafy or deep yellow three times a week;

(D) Eggs: One whole egg or appropriate substitute (e.g., two egg whites or 1/4 cup of pasteurized egg product) at least three times a week at breakfast;

(E) Protein: two-three ounces of pure cooked meat two to three times a day. An appropriate substitute (e.g., four tablespoons of peanut butter, one cup of cooked dried peas or beans or two ounces of pure cheese) may be served three times a week but not more than once a day, unless requested by the resident;

Note: Bacon is considered to be fat and not meat for the purposes of this Rule.

(F) Cereals and Breads: At least six servings of whole grain or enriched cereal and bread or grain products a day. Examples of one serving are as follows: one slice of bread; 1/2 of a bagel, English muffin or hamburger bun; one small muffin, roll, biscuit or piece of cornbread; 1/2 cup cooked rice or cereal (e.g., oatmeal or grits); 3/4 cup ready-to-eat cereal; or one waffle, pancake or tortilla that is six inches in diameter. Cereals and breads offered as snacks can be included in meeting this requirement;

(G) Fats: Include butter, oil, margarine or items consisting primarily of one of these (e.g., icing or gravy); and

(H) Water and Other Beverages: Water shall be served to each resident at each meal, in addition to other beverages.

(e) Therapeutic Diets:

(1) All therapeutic diet orders including thickened liquids shall be in writing from the resident's physician. Where applicable, the therapeutic diet order shall be specific to calorie, gram or consistency, such as for calorie controlled ADA diets, low sodium diets or thickened liquids, unless there are written orders which include the definition of any therapeutic diet identified in the facility's therapeutic menu approved by a registered dietitian.

(2) Physician orders for nutritional supplements shall be in writing from the resident's physician and be brand specific, unless the facility has defined a house supplement in its communication to the physician, and shall specify quantity and frequency.

(3) The facility shall maintain an accurate and current listing of residents with physician-ordered therapeutic diets for guidance of food service staff.

(4) All therapeutic diets, including nutritional supplements and thickened liquids, shall be served as ordered by the resident's physician.

(f) Individual Feeding Assistance:

(1) Sufficient staff shall be available for individual feeding assistance as needed.

(2) Residents needing help in eating shall be assisted upon receipt of the meal and the assistance shall be unhurried and in a manner that maintains or enhances each resident's dignity and respect.

(g) Variations from the required three meals or time intervals between meals to meet individualized needs or preferences of residents shall be documented in the resident's record.

History Note: Authority G.S. 131D-2; 143B-153; 143B-165; S.L. 2002-0160;

Eff. January 1, 1977;

Amended Eff. October 1, 1977; April 22, 1977;

Readopted Eff. October 31, 1977;

Amended Eff. August 3, 1992; July 1, 1990; September 1, 1987; April 1, 1987;

Temporary Amendment Eff. July 1, 2003.

Rule-making Agency: Secretary of Department of Health and Human Services - DMHDDSAS

Rule Citation: 10A NCAC 26C .0501-.0504; 27G .0506, .0601-.0608

Effective Date: July 1, 2003

Findings Reviewed and Approved by: Julian Mann

Authority for the rulemaking: G.S. 150B-21.1

Reason for Proposed Action: *Section 4.6 of Session Law 2002-164 amended G.S. 150B-21.1 by adding a new subsection (a10) to read: Notwithstanding the provisions of subsection (a) of this section, the Department of Health and Human Services may adopt temporary rules concerning placement of individuals in facilities licensed under Article 2 of Chapter 122C of the General Statutes and the enrollment of providers of services to such individuals in the Medicaid program. The legislation further states that: When the Department adopts a temporary rule pursuant to this subsection, the Department shall submit a reference to this subsection as the Department's statement of need to the Codifier of Rules. Notwithstanding any other provision of this Chapter, the Codifier of Rules shall publish in the North Carolina Register a temporary rule received from the Department in accordance with this subsection. The strikethroughs and underlines indicate the changes from the proposed temporary rule text published May 1, 2003. 10A NCAC 27G .0607 and .0608 were previously published as 10A NCAC 27G .0605 and .0606. Rule citation references reflect the reorganization of Title 10 and 15A of the North Carolina Administrative Code to Title 10A. Rules governing the subject matter contained in these temporary rules were located in 10 NCAC 14V. The Department of Health and Human Services held a Public Hearing Wednesday, May 7, 2003, at Haywood Gym, located on the Dorothea Dix Hospital campus in Raleigh, NC.*

Comment Procedures: *Written comments should be submitted to Cindy Kornegay, 3018 Mail Service Center, Raleigh, NC 27699-3018. Phone: (919) 733-7011, fax: (919) 733-9455, email: cindy.kornegay@ncmail.net. Comments will be accepted through August 1, 2003.*

CHAPTER 26 – MENTAL HEALTH: GENERAL

SUBCHAPTER 26C – OTHER GENERAL RULES

SECTION .0500 – SUMMARY SUSPENSION AND REVOCATION

10A NCAC 26C .0501 SCOPE

This Section sets forth rules governing summary suspension and revocation of ~~privilege authorization to receive provide publicly funded~~ public funding for providing mental health, developmental disabilities and substance abuse services (services)-services. As used in the rules in this Section, publicly funded mental health, developmental disabilities and substance abuse services are hereafter referred to as services.

History Note: Authority G.S. 122C-112.1; 143B-139.1; 150B-21.1; Temporary Adoption Eff. July 1, 2003.

10A NCAC 26C .0502 DEFINITIONS

As used in the rules in this Section, the following terms have the meanings specified:

- (1) "Authorization to receive public funding for providing services" means approval from the Department to receive funding through one or more of the following mechanisms:

- (a) enrollment of a provider with Medicaid, as defined in 42 C.F.R. 440.90, 42 C.F.R. 440.130(D), and 42 C.F.R. 440.180 and SL 2002-164; or
- (b) compliance with contract or funding requirements for state or federal funds, as defined in 10A NCAC 27A, Sections .0100 through .0200.
- ~~(1)~~(2) "Funding authority" means the state agency that is responsible for administering the funding source—state or federal funds, or the area authority or county program that is responsible for administering local funds.
- ~~(2)~~ "Statutes, rules or policies" means the North Carolina General Statutes, North Carolina Administrative Code or policies of the Division of Mental Health, Developmental Disabilities and Substance Abuse Services (DMH/DD/SAS).
- (3) "Provider" means any person or entity authorized to provide publicly funded services.
- ~~(4)~~ "Statutes or rules" means the North Carolina General Statutes, North Carolina Administrative Code.
- ~~(4)~~(5) "Substantial failure to comply" means—means evidence of one or more of the following:
 - ~~(a)~~ the provider has a criminal conviction, that could potentially impact the health, safety or welfare of individuals receiving services;
 - (a) the provider has not addressed issues that endanger the health, safety or welfare of individuals receiving services;
 - ~~(b)~~ the provider has failed to submit, revise or implement a plan of correction;
 - (b) the provider has been convicted of a crime specified in G.S. 122C-80; or
 - ~~(c)~~ the provider has not made available and assessable all sources of information necessary to complete the monitoring processes set out in G.S. 122C-112.1; failed to cooperate with the monitoring/auditing process or comply with investigation proceedings; or
 - (d) the provider has not submitted required documentation;
 - ~~(e)~~ the provider has altered documents to avoid sanctions;
 - (f) the provider has not submitted, revised or implemented a plan of correction in the specified timeframes; or
 - ~~(g)~~ the provider has not removed the cause of a summary suspension in the specified timeframes.
 - ~~(d)~~ the provider has not addressed issues that endanger the health, safety or

~~welfare of individuals receiving services.~~

History Note: Authority G.S. 122C-112.1; 143B-139.1; 150B-21.1; Temporary Adoption Eff. July 1, 2003.

10A NCAC 26C .0503 SUMMARY SUSPENSION

(a) ~~The DMH/DD/SAS shall issue an a written order of summary suspension and include the findings in its order when it finds public health, safety or welfare considerations require emergency action. agency-wide, site-limited or service-specific summary suspension of state or federal mental health, developmental disabilities and substance abuse services funds and shall refer findings concerning licensed providers for investigation by the licensing agency, when it determines that a client's health, safety or welfare is in immediate jeopardy, as defined in 10A NCAC 27G .0602(5). Where funding is authorized by other public sources, the DMH/DD/SAS shall refer its findings to the funding authority and shall refer findings concerning licensed providers for investigation by the licensing agency, when it determines that a client's health, safety or welfare is in immediate jeopardy. The DMH/DD/SAS shall include its findings in the order or referral.~~

~~(b) A summary suspension order shall suspend privileges to provide the services necessary to protect the public interest. An order of summary suspension shall be effective on the date specified in the order or on the date of the first attempt to deliver notification at the last known address of the provider, whichever is later.~~

~~(b) An order of summary suspension shall be effective on the date specified in the order or on the date of the first attempt to deliver notification at the last known address of the provider, whichever is later.~~

~~(c) The provider may contest the order by filing an appeal or grievance based on the appeal or grievance policy of the funding authority. The order for summary suspension shall be in full force and effect during any appeal or grievance process.~~

~~(d)(c) The order shall specify a date by which the provider shall remove the cause for the emergency action action and authorization for funding shall resume. If the provider fails to meet that deadline, the DMH/DD/SA shall take action to recommend revocation of privileges to provide services.~~

~~(d) The provider may contest the order by filing an appeal or grievance with DMH/DD/SAS or by requesting a contested case hearing pursuant to G.S. 150B. The order for summary suspension shall be in full force and effect during any appeal or grievance process.~~

History Note: Authority G.S. 122C-112.1; 143B-139.1; 150B-21.1; Temporary Adoption Eff. July 1, 2003.

10A NCAC 26C .0504 REVOCATION

(a) The DMH/DD/SAS shall revoke authorization to receive funding to provide services utilizing state or federal mental health, developmental disabilities and substance abuse services funds and make a recommendation to DMA to revoke enrollment for Medicaid, when it finds that there has been substantial failure to comply with statutes or rules. Where funding is authorized by other public sources, the

DMH/DD/SAS shall refer its findings to the funding authority. Regardless of funding authority, the DMH/DD/SAS shall refer findings concerning licensed providers for investigation by the licensing agency when it determines there has been substantial failure to comply with statutes or rules. The DMH/DD/SAS shall include its findings in the revocation order, recommendation or referral, recommend the revocation of the privilege to provide publicly funded services when it finds there has been substantial failure to comply with statutes, rules or policies.

(b) Before ~~revoking authorization, making a recommendation to the Division of Medical Assistance (DMA) for revocation, or making a referral to another funding authority or licensing agency,~~ the DMH/DD/SAS shall provide written notice to the provider stating that continued failure to comply with statutes or rules will result in the revocation, recommendation and referral, ~~recommendation for revocation of the privilege to provide services.~~

(c) The DMH/DD/SAS shall ~~provide written notice of intent to recommend revocation to the provider, give the provider written notice of the revocation order, the recommendation to DMA or referral of findings to the funding authority or licensing agency, as applicable.~~ The written notice shall include the reasons for the ~~proposed action action,~~ and the ~~grievance or appeal grievance/appeal process, process or contested case procedures pursuant to G.S. 150B.~~

(d) The revocation notice shall be effective on the date specified in the notice or on the date of the first attempt to deliver notification at the last known address of the provider, whichever is later.

~~(d)(e) The DMH/DD/SAS shall provide to DMA or other funding authority a written notice of the revocation order and a recommendation to revoke Medicaid enrollment. The DMH/DD/SAS shall also provide a copy of the notice and recommendation to the licensing agency, as applicable. for revocation to the funding authority or licensing agency, as applicable.~~

(f) The provider may contest the order by filing an appeal or grievance with DMH/DD/SAS or by requesting a contested case hearing pursuant to G.S. 150B. The revocation order shall be in full force and effect during any appeal or grievance process.

(e) If the provider files a grievance or appeal, the revocation shall not take place until the completion of the grievance or appeal process. If the provider does not file a grievance or appeal, the funding authority shall specify the effective date of the revocation.

History Note: Authority G. S. 122C-112.1; 143B-139.1; 150B-21.1; Temporary Adoption Eff. July 1, 2003.

CHAPTER 27 – MENTAL HEALTH: HOSPITALS

SUBCHAPTER 27G - RULES FOR MENTAL HEALTH, DEVELOPMENTAL DISABILITIES AND SUBSTANCE ABUSE SERVICES

SECTION .0500 – AREA PROGRAM REQUIREMENTS

10A NCAC 27G .0506 COMMUNICATION PROCEDURES FOR OUT OF HOME COMMUNITY

PLACEMENT

~~(a) In order to make service planning decisions, when an area authority or county program has placement responsibility, the area authority or county program shall coordinate a child and family team prior to the placement of a child out of the home community. Participation shall include the parent/legal guardian and other involved agencies.~~

(a) The purpose of this Rule is to address communication procedures concerning out of the home community placements for children and adolescents. This includes children and adolescents served through the area authority or county program developmental disabilities, mental health and substance abuse services system and those children and adolescents residing in ICF-MR facilities in their catchment areas.

(b) Area authority or county program representative(s) shall meet with the parent(s) or legal guardian and other representatives involved in the care and treatment of the child or adolescent, including local Department of Social Services (DSS), Local Education Agency (LEA) and criminal justice agency, to make service planning decisions prior to the placement of the child and adolescent out of the home community. The area authority or county program may use existing child and family teams for this purpose.

~~(b)(c)~~ (c) The home community area authority or county program shall be responsible for notification of placement. The notification of placement shall be made via e-mail, fax or hard copy within three business days after out of home placement occurs. In case of an emergency, notification may be by telephone with written notification occurring the next day. The following entities shall be notified:

- ~~(1) child and family team;~~
- (1) legal guardian;
- (2) other representatives involved in the care and treatment of the child or adolescent;
- ~~(2)(3) host community provider; and~~
- (3)(4) host community agencies/representatives (may include the court counselor, county Department of Social Services (DSS), DSS, regional Regional Children's Developmental Services Agency (CDSA) or the LEA, local education agency (LEA).

~~In case of an emergency, notification may be by telephone with written notification occurring the next working day.~~

(d) Notification shall be completed on a form provided by the Secretary, to include the following information:

- (1) child or adolescent information: name, date of birth, grade, identification number, social security number, date of placement out of home community;
- (2) parent/legal guardian information: name, address, telephone number;
- (3) home and host DSS information: county; contact person name, address, telephone number;
- (4) home and host area authority/county program information: name of program; contact person name, address, telephone number;
- (5) home and host school information: school name, address, telephone number, principal, special education program administrator; and

- (6) person completing notification form information: name, date form completed, agency, address and telephone number.

History Note: Authority G.S. 122C-113; 122C-141(b); 143B-139.1; 150B-21.1; Temporary Adoption Eff. July 1, 2003.

SECTION .0600 - AREA AUTHORITY OR COUNTY PROGRAM MONITORING OF FACILITIES AND SERVICES

10A NCAC 27G .0601 SCOPE

This Section governs area authority or county program monitoring of the provision of mental health, developmental disabilities or substance abuse services (services) in the area authority or county program's catchment area. Area authority or county program monitoring shall include:

- (1) receiving and reviewing critical incident reports and identifying trends based on such reports;
- (2) receiving, mediating, investigating or referring complaints concerning the provision of services; or
- (3) monitoring of providers of services to improve the quality of care received by clients.

History Note: Authority G.S. 122C-112.1; G.S. 143B-139.1; Temporary Adoption Eff. July 1, 2003

10A NCAC 27G .0602 DEFINITIONS

In addition to the terms defined in G.S. 122C-3 and Rules .0103 and .0104 of this Subchapter, the following terms shall apply:

- (1) "Complaint investigation" means the process of determining if an allegation made against a provider concerning the quality of services is substantiated.
- (2) "Complaint mediation" means the process of mediating and resolving a complaint concerning the quality of services.
- (3) "Critical incident" (incident) means an occurrence which has led or may result in a situation that is contrary to a client's welfare. Critical incidents include:
 - (a) any accident or injury, including self-injurious behavior, which requires treatment by a physician. First aid provided by a nurse or other facility staff would not be included in this category;
 - (b) any medication error, including lack of administration of a prescribed medication, which causes the client discomfort or places his or her health or safety in jeopardy;
 - (c) use of any hazardous substance which requires treatment by a physician. First aid provided by a nurse or other facility staff would not be included in this category;

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- (d) any client elopement (escape, run away from or abscond) lasting more than three hours;
 - (e) any client death;
 - (f) suspension or expulsion of a client from services;
 - (g) any case of abuse, neglect or exploitation against a client which is under investigation or has been substantiated by a county Department of Social Services (DSS) or the DFS Health Care Personnel Registry Section;
 - (h) any suicide attempt which results in injury or places the client in jeopardy;
 - (i) the arrest of a client for violations of state, municipal, ~~county~~, county or federal law; or
 - (j) any fire or equipment failure that places the health or safety of a client in jeopardy.
- (4) "ICF/MR" means a facility certified for Medicaid as an Intermediate Care Facility for the Mentally Retarded.
- (5) "Jeopardy" means a situation which has caused death, or may cause death or permanent impairment to a client.
- (6) "Monitor" or "Monitoring" means the interaction between the area authority or county program and a provider of mental health, developmental disability or substance abuse services to assure the health, safety and well being of clients receiving services. Monitoring includes technical ~~assistance~~ assistance.
- (7) "Provider category" means the type of facility in which a client receives services or resides. The provider category determines the extent of monitoring that a provider receives and is determined as follows:
- (a) Category A - facilities licensed pursuant to G.S. 122C, Article 2, except for hospitals; these include 24-hour residential facilities, day treatment and outpatient services;
 - (b) Category B - community based providers not requiring State licensure;
 - (c) Category C - hospitals, state-operated facilities, nursing homes, adult care homes, family care homes, foster care homes or child care facilities; and
 - (d) Category D - individuals providing only outpatient or day services and are licensed or certified to practice in the State of North Carolina.
- (8) "Quality indicators" means the set of statutes and rules that affect the quality of services provided to clients. These statutes and rules determine the scope and content of actions that may be addressed through a plan of correction.
- Monitoring of quality indicators shall be documented on a form provided by the Secretary. Quality indicators include the following:
- (a) compliance with the quality improvement and quality assurance requirements specified in Rule .0201(a)(7) of this Subchapter;
 - (b) compliance with the personnel and staff competency requirements specified in Rules .0202, .0203 and .0204 of this Subchapter;
 - (c) compliance with the assessment and service plan requirements specified in Rule .0205 of this Subchapter;
 - (d) compliance with the client services requirements specified in Rule .0208 of this Subchapter;
 - (e) compliance with the medication requirements specified in Rule .0209(a) and (c) of this Subchapter;
 - (f) compliance with client rights statutes specified in G.S. 122C, Article 3 and the rules promulgated under those statutes; and
 - (g) compliance with confidentiality rules specified in 10A NCAC 26B.
- (9) "Routine monitoring" means monitoring ~~which~~ that is performed to determine compliance with quality indicators.
- (10) "Service coordination" means the process ~~which~~ that an area authority or county program coordinates services for clients.
- (11) "Technical assistance" means the dissemination of skills, knowledge and experience to promote improvement in the quality of care received by clients. Technical assistance may include training, referrals, on-site visits, peer-to-peer interaction or the promotion of tools providers can utilize to improve the quality of services or perform self-assessment of the quality of services provided.

History Note: Authority G.S. 122C-112.1; G.S. 143B-139.1; Temporary Adoption Eff. July 1, 2003

10A NCAC 27G .0603 CRITICAL INCIDENT REPORTING

- (a) All Category A and Category B providers shall report to the area authority or county program responsible for the catchment area where services are being provided, a critical incident within 72 hours of the critical incident. The report shall be submitted on a form provided by the Secretary.
- (b) The critical incident report may be submitted via mail, in person, ~~facsimile~~, facsimile or electronic mail. The report shall include the following information:
 - (1) reporting provider: name, address, county, license number (if applicable), name and title of person preparing report, first person to learn of the incident and first staff to receive report

of incident, facility telephone number, and date and time report prepared;

- (2) client information: name, ~~client record~~ social security number, age, date of birth, unit/ward (if applicable), diagnoses, whether the client has been treated by a physician for the incident and the date of the treatment;
- (3) circumstances of incident: place where incident occurred, cause of incident (if known), and if the client was restrained or in seclusion at the time of the incident;
- (4) investigation of incident: any investigation the provider has done to determine the cause of the incident and any corrective measures the provider has put in place or plans to put in place as a result of the incident; and
- (5) other information: list of other authorities such as law enforcement, county DSS or DFS Health Care Personnel Registry Section that have been notified, have investigated or are in the process of investigating the incident or events related to the incident.

(c) If the provider is unable to obtain any information sought, or if any such information is not yet available, the provider shall explain on the form.

(d) The provider shall maintain documentation regarding critical incidents. The provider shall:

- (1) notify the area authority or county program whenever it has reason to believe that information provided may be erroneous, misleading, or otherwise unreliable;
- (2) submit to the area authority or county program information required on the critical incident form that was previously unavailable; and
- (3) provide, upon request by the area authority or county program, other information the provider may obtain regarding the critical incident, including hospital records and reports by other authorities.

(e) The area authority or county program shall review, not less than quarterly, critical incident reports to identify trends based on such reports. Trends may include the type, frequency and severity of critical incidents related to a provider. A report prepared by the area authority or county program containing the review and identification of trends shall be provided to DMH/DD/SAS not less than quarterly.

(f) If the circumstances surrounding a critical incident reveal that a disabled adult of a Category A or Category B provider may be abused, neglected or exploited and in need of protective services, the area authority or county program shall initiate the procedures outlined in ~~G.S. 108A-6~~ G.S. 108A, Article 6.

(g) If the circumstances surrounding a critical incident reveal that a juvenile of a Category A or Category B provider may be abused, neglected or exploited and in need of protective services, the area authority or county program shall initiate the procedures outlined in ~~G.S. 7B-3~~ G. S. 7B, Article 3.

History Note: Authority G.S. 122C-112.1; G.S. 143B-139.1; Temporary Adoption Eff. July 1, 2003.

10A NCAC 27G .0604 AREA AUTHORITY OR

COUNTY PROGRAM RESPONSE TO COMPLAINTS

The area authority or county program shall respond to complaints regarding the provision of services within its catchment area. The area authority or county program shall mediate complaints involving the provision of services for any provider category.

History Note: Authority G.S. 122C-112.1; G.S. 143B-139.1; Temporary Adoption Eff. July 1, 2003.

10A NCAC 27G .0605 COMPLAINTS PERTAINING TO CATEGORY A OR CATEGORY B PROVIDERS EXCLUDING ICF/MR FACILITIES

Complaints received by an area authority or county program pertaining to Category A or Category B providers excluding ICF/MR facilities shall be processed as follows:

- (1) The area authority or county program shall ask the complainant to communicate the complaint to the provider to allow the provider an opportunity to resolve the complaint.
- (2) If the complainant does not wish to communicate the complaint to the provider or the complaint remains unresolved, the area authority or county program shall ask the complainant for permission to mediate the complaint.
- (3) If the complainant refuses to give permission for the area program or county authority to mediate the complaint, the area authority or county program shall initiate an investigation of the complaint without naming the complainant.
- (4) When complaint mediation has been achieved, the area authority or county program shall document any resolution.
- (5) When the area authority or county program initiates investigation of the complaint, efforts shall be made to protect the complainant's identity.
- (6) The area authority or county program shall notify DFS whenever it investigates a complaint for a Category A provider. DFS may participate with the area authority or county program during any phase of the investigation. The area authority or county program shall notify DMH/DD/SAS whenever it investigates a complaint for a Category B provider. DMH/DD/SAS may participate with the area authority or county program during any phase of the investigation.
- (7) When investigating a complaint, the area authority or county program shall make contact with the provider. The area authority or county program shall state the purpose of the contact and inform the provider that the area authority or county program is in receipt of a complaint concerning the provider.
- (8) During the course of a complaint investigation or complaint mediation, the area authority or county program may provide technical

- assistance to the provider in an attempt to offer solutions to address and resolve the complaint.
- (9) Upon completion of the complaint investigation, a report shall be submitted to the provider within 10 working days of the date of completion of the investigation.
- (10) If the complaint report identifies any deficiencies in the quality indicators, the provider shall submit to the area authority or county program a plan of correction for each identified deficiency. The provider shall be allowed 10 working days to submit a plan of correction from the date the provider initially received the deficiency report from the area authority or county program. The plan of correction must specify the following:
- (a) the measures that will be put in place to correct the deficiency;
 - (b) the systems ~~who~~ that will be put in place to prevent a re-occurrence of the deficiency;
 - (c) the individual or individuals who will monitor the corrective action; and
 - (d) the date the deficiency will be corrected which shall be no later than 60 days from the date the investigation was concluded.
- (11) The area authority or county program shall conduct monitoring to follow-up cited deficiencies no later than 90 days from the date the investigation was concluded. An area authority or county program may provide technical assistance to a provider with identified deficiencies. The area authority or county program shall submit reports of monitoring for Category A providers to DFS and for Category B providers to DMH/DD/SAS within 30 days completion of the monitoring.
- (12) Monitoring shall be conducted in accordance with ~~Rule .0605~~ Rule .0607 of this Subchapter.
- (13) The area authority or county program may refer the monitoring of a Category A provider to DFS, or a Category B provider to DMH/DD/SAS based on the following factors:
- (a) the provider's failure to submit a plan of correction for deficiencies within the timeframe designated in the deficiency report;
 - (b) the provider's failure to correct deficiencies after technical assistance has been provided by the area authority or county program; or
 - (c) the possibility that continuation of uncorrected deficiencies may be detrimental to the client or place the client's psychological or physical health or safety in jeopardy.

10A NCAC 27G .0606 COMPLAINTS PERTAINING TO CATEGORY C, CATEGORY D PROVIDERS OR ICF/MR FACILITIES

(a) Complaints received by an area authority or county program pertaining to Category A, Category B providers or ICF/MR facilities shall be processed as follows:

- ~~(A)~~(1) The area authority or county program may mediate complaints for Category C, or Category D providers or ICF/MR facilities.
- ~~(B)~~(2) The area authority or county program shall ask the complainant to communicate the complaint to the provider to allow the provider an opportunity to resolve the complaint.
- ~~(C)~~(3) If the complainant does not wish to communicate the complaint to the provider or the complaint remains unresolved, the area authority or county program shall ask the complainant for permission to mediate the complaint.
- ~~(D)~~(4) If the complainant refuses to give permission for the area authority or county program to mediate the complaint, the area authority or county program shall refer the complaint for investigation to the State or local government agency responsible for the regulation and oversight of the provider.
- ~~(E)~~(5) If the complaint is mediated, the area authority or county program shall document any resolution.
- ~~(F)~~(6) During the course of complaint mediation, the area authority or county program may provide technical assistance to the provider in an attempt to offer solutions to address and resolve the complaint.
- ~~(G)~~(7) If mediation is unsuccessful, the area authority or county program shall refer the complaint for investigation to the State or local government agency responsible for the regulation and oversight of the provider. The area authority or county program shall send a letter to the complainant informing them of the referral and the contact person at the agency the complaint was referred.

~~(e)~~(b) If the circumstances identified during a complaint reveal that a disabled adult may be abused, neglected or exploited and in need of protective services, the area authority or county program shall initiate the procedures outlined in ~~G.S. 108A-6~~ G.S. 108A, Article 6.

~~(d)~~(c) If the circumstances identified during a complaint reveal that a juvenile may be abused, neglected or exploited and in need of protective services, the facility shall initiate the procedures outlined in ~~G.S. 7B-3~~ G.S. 7B, Article 3.

History Note: Authority G.S. 122C-112.1; G.S. 143B-139.1; Temporary Adoption Eff. July 1, 2003

10A NCAC 27G .0607 ROUTINE MONITORING

(a) The area authority or county program may conduct routine monitoring for any Category A or Category B provider based on the following factors:

History Note: Authority G.S. 122C-112.1; G.S. 143B-139.1; Temporary Adoption Eff. July 1, 2003.

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- (1) number and severity of critical incident reports received from a provider;
- (2) number and severity of complaints received or investigated concerning a provider;
- (3) results of State inspections conducted by DFS or DMH/DD/SAS;
- (4) concerns about compliance with quality indicators while the area authority or county program is providing service coordination;
- (5) addition of a new service which the provider has not provided in the past; or
- (6) whether the provider is accredited by the Joint Commission on the Accreditation of Healthcare Organizations, the Council on Accreditation, the Commission on Accreditation of Rehabilitation ~~Facilities~~, Facilities or the Council on Quality and Leadership, or has been reviewed by the North Carolina Council of Community Programs.

(b) The area authority or county program shall notify DFS when it conducts routine monitoring for a Category A provider. DFS may participate with the area authority or county program during any phase of the monitoring. The area authority or county program shall notify DMH/DD/SAS when it conducts routine monitoring for a Category B provider. DMH/DD/SAS may participate with the area authority or county program during any phase of the monitoring.

(c) When an area authority or county program has notified another area authority or county program pursuant to Rule .0505 of this Subchapter, the notifying area authority or county program may request that the area authority or county program conduct routine monitoring of their client's provider to assure compliance with quality indicators.

(d) When routine monitoring occurs, a monitoring report shall be submitted to the provider within 10 working days of the completion of on-site monitoring.

(e) If the routine monitoring identifies deficiencies in quality indicators, the provider shall submit to the area authority or county program a plan of correction for each identified deficiency. The provider shall be allowed 10 working days to submit a plan of correction from the date the provider initially received the deficiency report from the area authority or county program. The plan of correction shall specify the following:

- (1) the measures that will be put in place to correct the deficiency;
- (2) the systems that will be put in place to prevent a re-occurrence of the deficiency;
- (3) the individual or individuals ~~that~~ who will monitor the corrective action; and
- (4) the date the deficiency will be corrected which shall be no later than 60 days from the date the routine monitoring was concluded.

(f) The area authority or county program shall follow-up on cited deficiencies no later than 90 days from the date the routine monitoring was concluded. An area authority or county program may provide technical assistance to a provider with identified deficiencies. The area authority or county program shall submit reports of routine monitoring for Category A providers to DFS and for Category B providers to DMH/DD/SAS within 30 days completion of the routine monitoring.

(g) The area authority or county program may refer the monitoring of a Category A provider to DFS, or a Category B provider to DMH/DD/SAS based on the following factors:

- (1) the provider's failure to submit a plan of correction for deficiencies within the timeframe designated in the deficiency report;
- (2) the provider's failure to correct deficiencies after technical assistance has been provided by the area authority or county program; or
- (3) the possibility that continuation of uncorrected deficiencies may be detrimental to the client or place the client's psychological or physical health or safety in jeopardy.

(h) If the circumstances identified during monitoring reveal that a disabled adult may be abused, neglected or exploited and in need of protective services, the area authority or county program shall initiate the procedures outlined in ~~GS. 108A-6~~. G.S. 108A, Article 6.

(i) If the circumstances identified during monitoring reveal that a juvenile may be abused, neglected or exploited and in need of protective services, the area authority or county program shall initiate the procedures outlined in ~~G.S. 7B-3~~. G.S. 7B, Article 3.

History Note: Authority G.S. 122C-111; 143B-139.1; Temporary Adoption Eff. July 1, 2003.

10A NCAC 27G .0608 REPORTING REQUIREMENTS
The area authority or county program shall report to DMH/DD/SAS annually, beginning July 1, 2003, the following information:

- (1) the number of complaints mediated according to provider category;
- (2) the number of complaints investigated and the number of complaints substantiated for Category A and Category B providers; and
- (3) the number of on-site monitoring visits completed for Category A and Category B providers.

History Note: Authority G.S. 122C-112.1; 143B-139.1; Temporary Adoption Eff. July 1, 2003.

TITLE 15A – DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

Rule-making Agency: *NC Marine Fisheries Commission*

Rule Citation: *15A NCAC 03S .0101-.0102*

Effective Date: *July 1, 2003*

Findings Reviewed and Approved by: *Beecher R. Gray*

Authority for the rulemaking: *G.S. 113-226, 143B-289.52(d), 150B-21.1(a)(2), (3)*

Reason for Proposed Action: *In early March Congress authorized a \$35 million federal aid package for shrimpers impacted by excessive foreign imports along the South Atlantic and Gulf coasts. Each state must develop a system to distribute*

its share of the funds expeditiously, since the money will only be available for a short period of time. Adherence to notice and hearing requirements would prevent North Carolina from implementing rules for the system to distribute the funds in a timely manner and the funds may no longer be available.

Comment Procedures: *Comments should be submitted to Belinda Loftin, P.O. Box 769, Morehead City, NC 28557. Phone: (252) 726-7021, fax: (252) 726-0254, email: Belinda.loftin@ncmail.net.*

CHAPTER 03 - MARINE FISHERIES

SECTION .0100 - ECONOMIC ASSISTANCE PROGRAMS

15A NCAC 03S .0101 GENERAL

This subchapter establishes the process for determining eligibility and distributing federal or state funds for economic assistance to the fishing industry.

History Note: Authority G.S. 113-226, 143B - 289.52(d), 150B - 21.1 (a)(2), (3); Temporary Adoption Eff. July 1, 2003.

15A NCAC 03S .0102 GRANTS TO COMMERCIAL SHRIMPING INDUSTRY FOR ECONOMIC LOSSES DUE TO FOREIGN IMPORTED SHRIMP

(a) Eligibility

- (1) Only commercial fishing vessel owners whose vessels landed Penaeid shrimp (white, pink, or brown) in North Carolina during calendar year 2002 and who held a valid, current Commercial Fishing Vessel Registration (CFVR) during that year are eligible for compensation under this program to offset economic losses due to the importation of foreign shrimp. For the purposes of this Section, vessel owner is defined as a person holding a valid, current North Carolina CFVR for a specific vessel reporting shrimp landings in North Carolina.
- (2) The Division of Marine Fisheries shall determine which commercial fishing vessels are eligible for economic assistance under this program based upon verified shrimp landings in the state in 2002 as reported on North Carolina Trip Tickets. For the purposes of this Section, verified landings are those legally made in North Carolina as recorded by North Carolina Trip Tickets which correspond to a specific vessel and reported landing dates.
- (3) Where ownership of a vessel was transferred in 2002, each CFVR holder will be credited with landings under this program based upon registration of the transferred vessel at the start of the day in which the landings were reported.

(b) Process

- (1) Each vessel owner determined by the Division of Marine Fisheries to be eligible for economic assistance under this program shall be notified

by certified mail, return receipt requested, of his eligibility and of the total verified shrimp landings credited to him for the purpose of this program.

- (2) Any vessel owner claiming shrimp landings who does not receive an eligibility notification letter shall contact the Morehead City office of the Division of Marine Fisheries within the time period specified in the published legal notice setting forth the economic assistance award determination period.
- (3) Each eligible vessel owner shall have 14 calendar days from the date of receipt of the certified letter indicated in Subparagraph (b)(1) of this Rule to return the form that is attached to the eligibility notification letter to the Division of Marine Fisheries completed and signed, indicating a decision whether or not to participate in the program.
- (4) Failure to return a completed and signed response form to the Division of Marine Fisheries within 14 calendar days of receipt shall be considered a decision by the eligible vessel owner to forego participation in the economic assistance program.
- (5) If a vessel owner claims additional shrimp landings, beyond those identified by the Division of Marine Fisheries, upon which to base his level of economic assistance, he must provide copies of North Carolina trip tickets with the signed response form to document his claim. The Division of Marine Fisheries will evaluate such claims, and the vessel owner's landings will be adjusted accordingly if the claims are deemed valid.
- (6) The amount of the economic assistance each commercial fishing vessel owner is eligible for shall be calculated by the Division of Marine Fisheries based upon each vessel owner's proportional contribution, in percentage, to the total weight of landed shrimp reported in 2002 on North Carolina Trip Tickets.
- (7) No funds shall be disbursed until all landings disputes submitted in this program are resolved by the Division of Marine Fisheries, in order to ensure that all funds available for economic assistance are disbursed to eligible program participants. The total amount of funds designated for individual economic assistance shall be divided proportionally among eligible commercial fishing vessel owners who elect to participate in the program in a manner that will exhaust all funds for this purpose.
- (8) The Grants to Commercial Shrimping Industry for Economic Losses Due to Foreign Imported Shrimp Program shall terminate upon depletion of funds appropriated by the United States Congress to North Carolina for this purpose.

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(9) The Division of Marine Fisheries shall reserve a contingency fund of an amount to be determined by the Fisheries Director, for use in settling appeals of the final decision on economic assistance awards. Any unused funds appropriated for this program which may be held in reserve by the Division of Marine Fisheries for appeals resolution or administrative purposes will, at the conclusion of the economic assistance portion of the program, be transferred to the North Carolina Department of Agriculture for use, in addition to any other funds transferred for this purpose, for marketing of domestically harvested shrimp.

*History Note: Authority G.S. 113-226, 143B - 289.52(d), 150B - 21.1 (a)(2), (3);
Temporary Adoption Eff. July 1, 2003.*

TITLE 21 – OCCUPATIONAL LICENSING BOARDS

CHAPTER 29 - LOCKSMITH LICENSING BOARD

Rule-making Agency: *NC Locksmith Licensing Board*

Rule Citation: *21 NCAC 29 .0603-.0616*

Effective Date: *May 28, 2003*

Findings Reviewed and Approved by: *Beecher R. Gray*

Authority for the rulemaking: *G.S. 74F*

Reason for Proposed Action: *The Locksmith Licensing Board must have rules for the conduct of hearing for persons whose request for a license is denied.*

Comment Procedures: *Comments from the public shall be directed to Jim Scarborough, PO Box 10972, Raleigh, NC 27605 and phone (919) 838-8782.*

SECTION .0600 - ADMINISTRATIVE LAW PROCEDURES

21 NCAC 29 .0603 RIGHT TO HEARING

When the Board acts or proposes to act, other than in rule-making or declaratory ruling proceedings, in a manner which will affect the rights, duties, privileges or a license of a specific, identifiable person, such person has the right to an administrative hearing. When the Board proposes to act in such a manner, it shall give such person notice of their right to a hearing by mailing, by certified mail, to them at their last known address, a notice of the proposed action and a notice of a right to a hearing.

*History Note: Authority G.S. 74F-6; 150B-11; 150B-38;
Temporary Adoption Eff. May 28, 2003.*

21 NCAC 29 .0604 REQUEST FOR HEARING

(a) Any time an individual believes their rights, duties, or privileges have been affected by the Board's administrative action, but has not received notice of a right to an administrative hearing pursuant to Rule .0603 of this Section, that individual may file a formal request for a hearing.

(b) Before an individual may file a request he must first exhaust all reasonable efforts to resolve the issue informally with the Board.

(c) Subsequent to such informal action, if still dissatisfied, the individual shall submit a request to the Board's office, with the request bearing the notation: REQUEST FOR ADMINISTRATIVE HEARING. The request shall contain the following information:

- (1) Name and address of the Petitioner;
- (2) A concise statement of the action taken by the Board which is challenged;
- (3) A concise statement of the way in which the Petitioner has been aggrieved; and
- (4) A clear and specific statement of request for a hearing.

(d) A request for administrative hearing must be submitted to the Board's office within 60 days of receipt of notice of the action taken by the Board which is challenged. The request will be acknowledged promptly and, if Petitioner is a person aggrieved, a hearing will be scheduled.

*History Note: Authority G.S. 74F-6; 150B-11; 150B-38;
Temporary Adoption Eff. May 28, 2003.*

21 NCAC 29 .0605 GRANTING OR DENYING HEARING REQUEST

(a) The Board will decide whether to grant a request for a hearing.

(b) The denial of request for a hearing will be issued immediately upon decision and in no case later than 60 days after the submission of the request. Such denial shall contain a statement of the reasons leading the Board to deny the request.

(c) Approval of a request for a hearing will be signified by the issuing of a notice as required by G.S. 150B-38(b).

*History Note: Authority G.S. 74F-6; 150B-11; 150B-38;
Temporary Adoption Eff. May 28, 2003.*

21 NCAC 29 .0606 NOTICE OF HEARING

(a) The Board shall give the party or parties in a contested case a notice of hearing not less than 15 days before the hearing. Said notice shall contain the following information, in addition to the items specified in G.S. 150B-38(b):

- (1) the name, position, address and telephone number of a person at the offices of the Board to contact for further information or discussion;
- (2) the date, time, and place for a pre-hearing conference, if any; and
- (3) any other information deemed relevant to informing the parties as to the procedure of the hearing.

(b) If the Board determines that the public health, safety or welfare requires such action, it may issue an order summarily suspending a license or permit. Upon service of the order, the licensee or permit holder to whom the order is directed shall

immediately cease the practice of locksmithing in North Carolina. The Board shall promptly give notice of hearing pursuant to G.S. 150B-38 following service of the order. The suspension shall remain in effect pending issuance by the Board of a final agency decision pursuant to G.S. 150B-42.

History Note: Authority G.S. 74F-6; 150B-3(c); 150B-11; 150B-38; Temporary Adoption Eff. May 28, 2003.

21 NCAC 29 .0607 WHO SHALL HEAR CONTESTED CASES

All administrative hearings will be conducted by the Board, a panel consisting of a majority of the members of the Board, or an administrative law judge designated to hear the case pursuant to G.S. 150B-40(e).

History Note: Authority G.S. 74F-6; 150B-11; 150B-38; 150B-40; Temporary Adoption Eff. May 28, 2003.

21 NCAC 29 .0608 INFORMAL PROCEDURES

The Board and the party or parties may agree in advance to simplify the hearing by decreasing the number of issues to be contested at the hearing; accepting the validity of certain proposed evidence; accepting the findings in some other case with relevance to the case at hand; or agreeing to such other matters as may expedite the hearing.

History Note: Authority G.S. 74F-6; 150B-11; 150B-41; Temporary Adoption Eff. May 28, 2003.

21 NCAC 29 .0609 PETITION FOR INTERVENTION

(a) A person desiring to intervene in a contested case must file a written petition with the Board's office. The request should bear the notation: PETITION TO INTERVENE IN THE CASE OF (Name of case).

(b) The petition must include the following information:

- (1) The name and address of petitioner;
- (2) The business or occupation of petitioner, where relevant;
- (3) A full identification of the hearing in which petitioner is seeking to intervene;
- (4) The statutory or non-statutory grounds for intervention;
- (5) Any claim or defense in respect of which intervention is sought; and
- (6) A summary of the arguments of evidence petitioner seeks to present.

(c) The person desiring to intervene shall serve copies of the petition on all parties to the case.

(d) If the Board determines to allow intervention, notice of that decision will be issued promptly to all parties, and to the petitioner. In cases of discretionary intervention, such notification will include a statement of any limitations of time, subject matter, evidence or whatever else is deemed necessary, which are imposed on the intervenor.

(e) If the Board's decision is to deny intervention, the petitioner will be notified promptly. Such notice will be in writing,

identifying the reasons for the denial, and will be issued to the petitioner and all parties.

History Note: Authority G.S. 74F-6; 150B-11; 150B-38; Temporary Adoption Eff. May 28, 2003.

21 NCAC 29 .0610 TYPES OF INTERVENTION

(a) Intervention of Right. A petition to intervene as of right, as provided in the North Carolina Rules of Civil Procedure, Rule 24, will be granted if the petitioner meets the criteria of that rule and the petition is timely.

(b) Permissive Intervention. A petition to intervene permissibly as provided in the North Carolina Rules of Civil Procedure, Rule 24, will be granted if the petitioner meets the criteria of that rule and the Board determines that:

- (1) There is sufficient legal or factual similarity between the petitioner's claimed rights, privileges, or duties and those of the parties to the hearing; and
- (2) Permitting intervention by the petitioner as a party would aid the purpose of the hearing.

(c) The Board may allow discretionary intervention, with whatever limits and restrictions are deemed appropriate.

History Note: Authority G.S. 74F-6; 150B-11; 150B-38; Temporary Adoption Eff. May 28, 2003.

21 NCAC 29 .0611 DISQUALIFICATION OF BOARD MEMBERS

(a) Self-disqualification. If for any reason a board member determines that personal bias or other factors render that member unable to hear a contested case and perform all duties in an impartial manner, that board member shall voluntarily decline to participate in the hearing or decision.

(b) Petition for Disqualification. If for any reason any party in a contested case believes that a board member is personally biased or otherwise unable to hear a contested case and perform all duties in an impartial manner, the party may file a sworn, notarized affidavit with the Board. The title of such affidavit should bear the notation: AFFIDAVIT OF DISQUALIFICATION OF BOARD MEMBER IN THE CASE OF (Name of case).

(c) Contents of Affidavit. The affidavit must state all facts the party deems to be relevant to the disqualification of the Board member.

(d) Timeliness of Affidavit. An affidavit of disqualification will be considered timely if filed 10 days before commencement of the hearing. Any other affidavit will be considered timely provided it is filed at the first opportunity after the party becomes aware of facts which give rise to a reasonable belief that a board member may be disqualified under this Rule. Where a petition for disqualification is filed less than 10 days before or during the course of a hearing, the hearing shall continue with the challenged board member sitting. Petitioner shall have the opportunity to present evidence supporting his petition, and the petition and any evidence relative thereto presented at the hearing shall be made a part of the record. The Board, before rendering its decision, shall decide whether the evidence justifies disqualification. In the event of disqualification, the disqualified member will not participate in further deliberation or decision of the case.

TEMPORARY RULES

(e) Procedure for Determining Disqualification:

- (1) The Board will appoint a board member to investigate the allegations of the affidavit.
- (2) The investigator will report their findings and recommendations to the Board.
- (3) The Board shall decide whether to disqualify the challenged individual.
- (4) The person whose disqualification is to be determined will not participate in the decision but may be called upon to furnish information to the other members of the Board.
- (5) When a board member is disqualified prior to the commencement of the hearing or after the hearing has begun, such hearing will continue with the remaining members sitting provided that the remaining members still constitute a majority of the Board.
- (6) If three or more members of the Board are disqualified pursuant to this Rule, the Board shall petition the Office of Administrative Hearings to appoint an Administrative Law Judge to hear the contested case pursuant to G.S. 150B-40(e).

History Note: Authority G.S. 74F-6; 150B-11; 150B-38; 150B-40;
Temporary Adoption Eff. May 28, 2003.

21 NCAC 29 .0612 FAILURE TO APPEAR

Should a party fail to appear at a scheduled hearing, the Board, or the designated Administrative Law Judge, may proceed with the hearing and make its decision in the absence of the party, provided that the party has been given proper notice. The Board or the Administrative Law Judge may order a continuance in order to give the party another opportunity to appear.

History Note: Authority G.S. 74F-6; 150B-11; 150B-38; 150B-40;
Temporary Adoption Eff. May 28, 2003.

21 NCAC 29 .0613 SUBPOENAS

(a) Requests for subpoenas for the attendance and testimony of witnesses or for the production of documents, either at a hearing or for the purposes of discovery, shall be made in writing to the Board and shall identify any document sought with specificity, and shall include the full name and home or business address of all persons to be subpoenaed and, if known, the date, time, and place for responding to the subpoena. The Board shall issue the requested subpoenas within three days of receipt of the request.

(b) Subpoenas shall contain the caption of the case; the name and address of the person subpoenaed; the date, hour and location of the hearing in which the witness is commanded to appear; a particularized description of the books, papers, records or objects the witness is directed to bring with him to the hearing, if any; the identity of the party on whose application the subpoena was issued; the date of issue; the signature of the presiding officer or his designee; and a "return of service." The "return of service" form as filled out, shows the name and capacity of the person serving the subpoena, the date on which the subpoena was delivered to the person directed to make service, the date on which service was made, the person on

whom service was made, the manner in which service was made, and the signature of the person making service.

(c) Subpoenas shall be served by the sheriff of the county in which the person subpoenaed resides, when the party requesting such subpoena prepays the sheriff's service fee. The subpoena shall be issued in duplicate, with a "return of service" form attached to each copy. A person serving the subpoena shall fill out the "return of service" form for each copy and properly return one copy of the subpoena, with the attached "return of service" form completed, to the Board.

(d) Any person receiving a subpoena from the Board may object thereto by filing a written objection to the subpoena with the Board's office.

(e) Such objection shall include a concise, but complete, statement of reasons why the subpoena should be revoked or modified. These reasons may include lack of relevancy of the evidence sought, or any other reason sufficient in law for holding the subpoena invalid, such as that the evidence is privileged, that appearance or production would be so disruptive as to be unreasonable in light of the significance of the evidence sought, or other undue hardship.

(f) Any such objection to a subpoena must be served on the party who requested the subpoena simultaneously with the filing of the objection with the Board.

(g) The party who requested the subpoena, in such time as may be granted by the Board, may file a written response to the objection. The written response shall be served by the requesting party on the objecting witness simultaneously with filing the response with the Board.

(h) After receipt of the objection and response thereto, if any, the Board shall issue a notice to the party who requested the subpoena and the party challenging the subpoena, and may notify any other party or parties of an open hearing, to be scheduled as soon as practicable, at which time evidence and testimony may be presented, limited to the narrow questions raised by the objection and response.

(i) Promptly after the close of such hearing, a majority of the Board members with voting authority, or an administrative law judge assigned to the case pursuant to G.S. 150B-40(e), will rule on the challenge and issue a written decision. A copy of the decision will be issued to all parties and made a part of the record.

History Note: Authority G.S. 74F-6; 150B-11; 150B-38; 150B-40;
Temporary Adoption Eff. May 28, 2003.

21 NCAC 29 .0614 WITNESSES

Any party may be a witness and may present witnesses on the party's behalf at the hearing. All oral testimony at the hearing shall be under oath or affirmation and shall be recorded. At the request of a party or upon the Board's own motion, the presiding officer may exclude witnesses from the hearing room so that they cannot hear the testimony of other witnesses.

History Note: Authority G.S. 74F-6; 150B-11; 150B-38; 150B-40;
Temporary Adoption Eff. May 28, 2003.

21 NCAC 29 .0615 FINAL DECISION

TEMPORARY RULES

In all cases heard by the Board, the Board will issue its decision within 60 days after its next regularly scheduled meeting following the close of the hearing. This decision will be the prerequisite "final agency decision" for the right to judicial review.

*History Note: Authority G.S. 74F-6; 150B-11; 150B-38; 150B-42;
Temporary Adoption Eff. May 28, 2003.*

21 NCAC 29 .0616 PROPOSALS FOR DECISIONS

(a) When an Administrative Law Judge conducts a hearing pursuant to G.S. 150B-40(e), a "proposal for decision" shall be rendered within 45 days of the hearing pursuant to the Rules of the Office of Administrative Hearings, 26 NCAC 03 .0126. Any party may file written exceptions to this "Proposal for Decision" and submit their own proposed findings of fact and conclusions of law. The exceptions and alternative proposals must be received within 10 days after the party has received the "Proposal for Decision" as drafted by the Administrative Law Judge.

(b) Any exceptions to the procedure during the hearing, the handling of the hearing by the Administrative Law Judge, rulings on evidence, or any other matter, must be written and refer specifically to pages of the record or otherwise precisely identify the occurrence to which exception is taken. The exceptions must be filed with the Board within 10 days of the

receipt of the proposal for decision. The written exceptions should bear the notation: EXCEPTIONS TO THE PROCEEDINGS IN THE CASE OF (Name of case).

(c) Any party may present oral argument to the Board upon request. The request must be included with the written exceptions.

(d) Upon receipt of request for further oral argument, notice will be issued promptly to all parties designating time and place for such oral argument.

(e) Giving due consideration to the proposal for decision and the exceptions and arguments of the parties, the Board may adopt the proposal for decision or may modify it as the Board deems necessary. The decision rendered will be a part of the record and a copy thereof given to all parties. The decision as adopted or modified becomes the "Final Agency Decision" for the right to judicial review. Said decision will be rendered by the Board within 60 days of the next regularly scheduled meeting following the oral arguments, if any. If there are no oral arguments presented, the decision will be rendered within 60 days of the next regularly scheduled board meeting following receipt of the written exceptions.

*History Note: Authority G.S. 74F-6; 150B-11; 150B-38; 150B-40;
Temporary Adoption Eff. May 28, 2003.*

CONTESTED CASE DECISIONS

This Section contains the full text of some of the more significant Administrative Law Judge decisions along with an index to all recent contested cases decisions which are filed under North Carolina's Administrative Procedure Act. Copies of the decisions listed in the index and not published are available upon request for a minimal charge by contacting the Office of Administrative Hearings, (919) 733-2698. Also, the Contested Case Decisions are available on the Internet at the following address: <http://www.ncoah.com/hearings>.

OFFICE OF ADMINISTRATIVE HEARINGS

*Chief Administrative Law Judge
JULIAN MANN, III*

*Senior Administrative Law Judge
FRED G. MORRISON JR.*

ADMINISTRATIVE LAW JUDGES

*Sammie Chess Jr.
Beecher R. Gray
Melissa Owens Lassiter*

*James L. Conner, II
Beryl E. Wade
A. B. Elkins II*

<u>AGENCY</u>	<u>CASE NUMBER</u>	<u>ALJ</u>	<u>DATE OF DECISION</u>	<u>PUBLISHED DECISION REGISTER CITATION</u>
<u>HEALTH AND HUMAN SERVICES</u>				
A list of Child Support Decisions may be obtained by accessing the OAH Website: www.ncoah.com/decisions .				
Linda Ann Tyson v. Div. of Facility Services, Health Care Personnel Registry Section	02 DHR 1103	Lassiter	05/12/03	
Ricky Roberts for Angela Roberts v. DHHS, Div. of Med. Assistance	02 DHR 1138	Lassiter	04/25/03	18:01 NCR 52
Wanda J. Vanhook v. DHHS, Div. of Med. Assistance	02 DHR 1459	Gray	04/24/03	
Jones Hill Day Care, Ola M Jones v. (CACPP) Child & Adult Care Food Program	02 DHR 1601	Lassiter	05/16/03	
Joanne F Ranta v. DHHS, Div. of Facility Services	02 DHR 1752	Mann	05/15/03	
Gregory Tabron v. DHHS, Div. of Facility Services	02 DHR 1789	Elkins	05/16/03	
Constance Basnight v. Pasquotank County DSS	03 DHR 0385	Lassiter	05/29/03	
<u>JUSTICE</u>				
<i>Alarm Systems Licensing Board</i>				
Gregory L Swicegood, Jr. v. Alarm System Licensing Board	03 DOJ 0503	Morrison	05/16/03	
<i>Sheriffs' Education & Training Standards Commission</i>				
Laura Dawn Watts v. Sheriffs' Education & Training Standards Comm.	02 DOJ 1926	Lassiter	05/22/03	
Allen Wilson York v. Sheriffs' Education & Training Standards Comm.	02 DOJ 2042	Elkins	05/16/03	
<u>DEPARTMENT OF PUBLIC INSTRUCTION</u>				
Charles Eugene Smith v. Department of Public Instruction	02 EDC 1082	Mann	05/26/03	
<u>ENVIRONMENT AND NATURAL RESOURCES</u>				
Lester Hill v. Person Co. Health Dept., DENR	00 EHR 1392	Gray	05/29/03	
John Burr v. Health Department, Mecklenburg County	01 EHR 1204	Gray	05/28/03	
Richard S Pacula v. CAMA-Coastal Area Mgmt. Assoc.	01 EHR 2269 ¹	Chess	05/14/03	
Richard S Pacula v. CAMA-Coastal Area Mgmt. Assoc.	02 EHR 1119 ¹	Chess	05/14/03	
<u>HUMAN RELATIONS FAIR HOUSING</u>				
Sara E. Parker v. Human Relations Fair Housing	02 HRC 0621	Gray	05/16/03	
<u>OFFICE OF STATE PERSONNEL</u>				
Dorris D Wright v. Cabarrus Co. Dept. of Social Services	00 OSP 1506	Gray	04/22/03	
Robert Banks Hinceman v. DHHS/Broughton Hospital	01 OSP 0827	Elkins	05/01/03	18:01 NCR 45
Wanda Gore v. Department of Correction	01 OSP 1286	Gray	05/16/03	
Robert L. Swinney v. Department of Transportation	02 OSP 1109	Gray	05/07/03	
Norman Burton v. Chatham County	02 OSP 1483 ²	Gray	05/12/03	
Norman Burton v. Chatham County	02 OSP 1625 ²	Gray	05/12/03	
Chester Michael Martin v. Cumberland Co. Dept. of Social Services	02 OSP 1797	Conner	05/09/03	
Steven Wayne McCartney v. Lumberton Correctional Institution	03 OSP 0026	Conner	05/29/03	

1 Combined Cases
2 Combined Cases

CONTESTED CASE DECISIONS

STATE OF NORTH CAROLINA
COUNTY OF BURKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
01 OSP 0827

ROBERT BANKS HINCEMAN Petitioner,)	
)	
)	
v.)	DECISION
)	
N.C. DHHS/BROUGHTON HOSPITAL Respondent.)	
)	

THE ABOVE-ENTITLED MATTER came on for hearing before the undersigned Administrative Law Judge, Augustus B. Elkins II, on February 4 and 5; May 29; and October 7, 2002 in Burke County, North Carolina. This case was heard pursuant to Petitioner filing a petition for a Contested Case Hearing in the Office of Administrative Hearings (OAH) on May 3, 2001. Respondent's Motion for Summary Judgment came on for hearing before the Honorable Dolores O. Smith, Administrative Law Judge, on the 6th day of November, 2001, in Newton, North Carolina. An Order denying summary judgment having been entered, this matter proceeded for hearing as cited above. The parties stipulated that each received timely notice of the hearing. All proposals and briefs in support of the parties' assertions were received and the record closed on April 1, 2003.

APPEARANCES

For the Petitioner: Phyllis A. Palmieri, Attorney at Law
P O Box 2812
Morganton, NC 28680-2812

For the Respondent: Angel Gray
Assistant Attorney General
John Umstead Hospital
Administration Building
1003 12th Street
Butner, NC 27509

WITNESSES

Testimony was offered from the following witnesses: Petitioner Robert Banks Hinceman; Rene Brackett; Susan Merrill; Rick Fox; Richard Ramsuer; Seth Hunt; Barbara Meyers; Mary Ragsdale, and Vivian Streater.

EXHIBITS

The Petitioner offered twenty-eight (28) exhibits which were accepted without objection. The Respondent offered nine (9) exhibits which were admitted without objection.

ISSUE

Whether the Petitioner, a white male, was unlawfully discriminated against on the basis of his race when he was denied a transfer from a first shift Nurse Supervisor A position in Division A to a third shift Nurse Supervisor A position in Division P when an African American female was selected for this position?

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents and exhibits received and admitted into evidence, and the entire record in this proceeding, the Undersigned makes the following findings of fact. In making the findings of fact, the Undersigned has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including but not limited to the demeanor of the witness, any interests, bias, or prejudice the witness may have, the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable, and whether the testimony is consistent with all other believable evidence in the case.

CONTESTED CASE DECISIONS

FINDINGS OF FACT

1. Petitioner Robert Banks Hinceman, Sr., a resident of Burke County North Carolina, was employed at Broughton Hospital in Morganton, NC, from 9/29/75 through 2002. (T. of Robert Hinceman, Tape 1 of 2, Side A, 2/4/02). Petitioner is a white male.
2. In November, 2000, Broughton Hospital posted an opening for the third shift Nurse Supervisor A position on Division P, (Petitioner's Exhibit 5) and on November 11, 2000, Petitioner applied for lateral transfer to the position of Nurse Supervisor A (NSA). The description of job vacancy states: This position is responsible for supervising RN/LPN/CNA staff on third shift (11:15 PM-7:15AM) in a 142-bed psychiatric rehabilitation division in a regional state psychiatric hospital. The posting did not state that prior experience on such a division was preferred or required. (Pet. Ex. 5, Vacancy #55130).
3. The knowledge, skills, and abilities required for the position are described in the posting as an ability to take charge functioning with autonomy; knowledge of quality improvement, survey process, and developing policies and procedures; strong team work skills and ability to function as a team member in a multi disciplinary treatment approach; good supervisory skills and experience; supervisory experience in a psychiatric nursing setting helpful; good communication skills with patients and staff; knowledge of scheduling minimums for staff coverage with experience in facilitating flex time and self schedule(*sic*); and, ability to deal with staff conflicts/problems. (PE 5, Vacancy #55130).
4. The job posting stated that an individual with a Bachelor of Science in Nursing needed to have eighteen months of nursing experience with twelve months experience in a charge nurse role, or if an individual had an Associate Degree in Nursing he or she must have three years of experience in nursing and eighteen months of experience in a charge nurse role. (Petitioner's Exhibit 5).
5. The job description of the NSA vacancy did not indicate that there was a preference for persons with experience on Division P. (PE 4). Division P is the long-term psychiatric rehabilitation division at Broughton Hospital. (T p. 141).
6. Petitioner was qualified for this position because he was working as a Nurse Supervisor A at the time of his application for the transfer. (PE 15, p.2).
7. After receiving applications, Renee Brackett, Division P Director, Rick Fox, Division P Nurse Manager, and Susan Merrill, Assistant Director of Nursing formed a panel to interview applicants. (T pp.143, 183, 482).
8. Broughton Hospital protocol "generally always" involves collaboration between Professional Department Directors (PDD) (clinical tract) and Division Directors (DD) (management tract) in making hiring decisions. Mr. Fox and Ms. Brackett were on the panel representing the Division Director. Ms. Merrill was on the panel representing the Professional Department Director, the Director of Nursing. In the decision-making process, it is the practice of Division P that when they select a supervisory nursing person, that they involve the Central Nursing Office. The interviewers discuss all applicants and "hopefully come to consensus." (T pp.149, 185, 402, 405-406, 493-494). A March 18, 1996 Memorandum from Seth P. Hunt, Broughton Hospital Director states that "it is the responsibility of the PDD and the DD to reach a consensus." It in essence states that a selection is approved when a consensus has been reached. (Resp. Ex. 9).
9. Mr. Fox and Ms. Merrill together interviewed 7 applicants for the Nurse Supervisor A position. All applicants were asked the same set of questions during the interviews. (T p.146). Of the applicants interviewed, 3 were white females, 3 were white males, and 1 was an African American female. (T p.183, Petitioner's Exhibits 25 & 27). Ms. Brackett sat in on some of the interviews including the interview of the African American female, Patricia Gail Harbison. However, Ms. Brackett was called away to attend to an emergency and "had to pull off the interview panel." She did not take part in Petitioner's interview. (T p.143).
10. After concluding the interviews, the field of acceptable candidates was narrowed to two, the Petitioner and Ms. Harbison. (T pp.235, 488). Petitioner was selected for the job by Rick Fox, Nurse Manager on Division P. (T. of Renee Brackett, Tape 1 of 3, Side A, 2/05/02). Ms. Merrill was in favor of offering the position to Ms. Harbison. Ms. Brackett favored Petitioner and though she only interviewed 3 of the 7 applicants and stated she withdrew from the panel, she latter testified that she remained on the interview team. (T p.150).
11. At the time of the interviews, Petitioner had fourteen years and 10 months of nursing experience with the State and Petitioner was working on first shift as a Nurse Supervisor A on Division A. Petitioner has an Associate Degree in Nursing. Moving to the third shift Supervisor A position on Division P would have been a lateral transfer for Petitioner, although he would receive a shift pay differential. (Petitioner's Exhibit 6). Mr. Fox was in favor of offering the position to Petitioner due to Petitioner's experience as a Nurse Supervisor A in another division. Mr. Fox was also concerned that he was a relatively new

Nurse Manager, was still learning his job, and Fox was concerned that he may not have the time to give Ms. Harbison the oversight she may have needed. (T pp.184, 486-487).

12. At the time of the interviews, Ms. Harbison had fourteen years and 11 months of nursing experience with the State and was working as a Nurse B on Division P. Ms. Harbison has a Bachelor of Science in Nursing degree. The Nurse Supervisor A position would have been a promotional opportunity for her. (Petitioner's Exhibit 9). Ms. Merrill was in favor of offering the position to Ms. Harbison because of Ms. Harbison's greater nursing education. Ms. Harbison had a Bachelor of Science in Nursing while Petitioner only had an Associates Degree in Nursing. Ms. Merrill also felt Ms. Harbison performed better during the interview than did Petitioner, especially on question 10 of the interview questions which asked the applicant to describe his/her method for facilitating effective communication between staff. (T pp.228-231).
13. After discussion, Mr. Fox and Ms. Merrill could not come to an agreement as to which candidate to offer the position. They brought in Ms. Brackett to help with the decision. (T pp.184, 236). Ms. Brackett agreed with Mr. Fox and wished to hire Petitioner to fill the Nurse Supervisor A position. Ms. Brackett was in favor of offering the position to Petitioner because of Petitioner's prior experience as a Nurse Supervisor A and her desire to hire someone who could "hit the ground running." (T pp.150, 188). Both Fox and Brackett were familiar with the work of both Harbison and Petitioner. Brackett believed Petitioner to be the better candidate because of his experience. Brackett admitted that Harbison demonstrated skills and strengths in her position in P Division but she (Harbison) did not have the nurse supervisor experience that Mr. Hinceman had. (T. Renee Brackett, Tape 1 of 3, Side A, 2/05/02).
14. Ms. Brackett testified that Ms. Harbison had applied for another Nurse Supervisor A position in Division P approximately one year prior to her application for the disputed NSA position, and that a white female employee had been selected over Ms. Harbison. That individual selected, like Ms. Harbison, was a lead nurse who received a promotion to a Nurse Supervisor A position. (T pp.174-178). At the time of that prior application, Harbison had her BSN. The position was awarded to another employee who did not have a BSN and whose years of service were slightly less than Harbison's. (T of Renee Brackett, Tape 2 of 3, Side A 2/5/02).
15. Ms. Brackett testified that since the time of the previous posting, Ms. Harbison had been working as a float nurse on S ward, a ward where Broughton was having trouble with patients and staff and that Ms. Harbison had done a great job with that assignment and had demonstrated some leadership skills that were lacking at the time of her interview for the prior job. (T pp.197-200).
16. After a discussion between Ms. Brackett, Ms. Merrill, and Mr. Fox, the panel still could not come to an agreement as to who to offer the Nurse Supervisor A position. While all members of the panel felt that both Petitioner and Ms. Harbison were qualified for the position, Ms. Brackett and Mr. Fox still wanted to hire Petitioner while Ms. Merrill still wished to hire Ms. Harbison. (T p.188).
17. Ms. Brackett discussed the impasse with her supervisor Dr. Kevin Kilbride, Clinical Director of Broughton Hospital. Dr. Kilbride reviewed the dispute, supported Ms. Brackett's wish to offer the Nurse Supervisor A position to Petitioner and recommended Petitioner for the job. Dr. Kilbride is a white male. (PE 4; T of Renee Brackett, Tape T of Seth Hunt). (T pp.188, 491-494).
18. Ms. Merrill also discussed the situation with her supervisor, Vivian Streater, Executive Director of Nursing of Broughton Hospital. Ms. Streater supported Ms. Merrill's wish to offer the position to Ms. Harbison. Ms. Streater is a white female. (T p.617). Ms. Streater testified that the clinical nursing staff desired to have Ms. Harbison selected over the Petitioner for several reasons. First, Ms. Harbison had a Bachelor of Science Degree in Nursing (B.S.N) as opposed to the Associate Degree which Petitioner held. Ms. Streater described her preference for higher level nursing positions to be held by nurses with B.S.N.'s and that a B.S.N. counts for another level of experience. Second, Ms. Harbison had worked on Division P and had an almost equal number of years of nursing experience. Ms. Streater also noted that she understood from Ms. Merrill that Ms. Harbison performed better on the interview than did Petitioner. (T pp.617-619, 626-627, 631-632).
19. Because there was still no agreement between Division P management and the Nursing Department, the decision moved on to the next level of management. Dr. Kilbride discussed the situation with Seth Hunt, Director/CEO of Broughton Hospital. Mr. Hunt is a white male. (T p.333). Mr. Hunt directed Dr. Kilbride to discuss the situation further with Ms. Brackett and Ms. Merrill and attempt to come to an agreement. (T p.333)
20. After further discussion, there was still no agreement, with Mr. Fox, Ms. Brackett and Dr. Kilbride (representatives of Division P) wanting to hire Petitioner and Ms. Merrill and Ms. Streater (representatives of the Nursing Department) wanting to hire Ms. Harbison. Dr. Kilbride reported this lack of consensus to Mr. Hunt. (T p.402).

CONTESTED CASE DECISIONS

21. Patricia Gail Harbison, an African-American female, was selected for the disputed NSA position by Broughton Hospital Director and CEO, Seth Hunt. (T of S. Hunt, Tape).
22. Mr. Hunt testified that this was the first instance in which a decision between two candidates for a position had presented itself to him as CEO. Usually he simply approves the interview panel's selected candidate if there is consensus among the panel. However, this decision came to him because no consensus could be reached below. (T pp.417-418).
23. In the process of making the decision, Mr. Hunt made a phone call to Barbara Myers, Director of Social Work and EEO designee for Broughton Hospital. Ms. Myers is an African-American female. (T p.417). Mr. Hunt testified that he "pretty much had it settled in my mind" who to hire for the Nurse Supervisor A position but he felt that calling Ms. Myers was a formality he had to go through. (T p.417). Mr. Hunt asked Ms. Myers about the EEO goals for nursing. Ms. Myers consulted the 2000 EEO Plan for Broughton Hospital to find the information Mr. Hunt had requested and informed him that the goals for nursing were for the Nurse B classification. (T pp.557, 582, Respondent's Exhibit 8). Ms. Myers testified that Mr. Hunt never mentioned the Division P Nurse Supervisor A position in their conversations. Mr. Hunt also never mentioned the Petitioner or Ms. Harbison in any of their discussions. (T pp.558-559, 562, 582).
24. Both Hunt and Meyers testified that there were no racial or gender goals applicable to the disputed NSA position. (T. Hunt, Tape 1 of 3, Side B, 5/29/02). Hunt made his contact with Meyers prior to announcing his decision on awarding the position to Harbison. (T. Hunt, Tape 1 of 3, Side B, 5/29/02). Following the discussion with Meyers, Hunt awarded the job to Harbison. (Tape 1 of 3, Side B, 5/29/02).
25. The decision to select Harbison was not made pursuant to a bona fide affirmative action plan. The EEO plan submitted by the Respondent was not prepared pursuant to court order and was voluntary. (T Seth Hunt, Tape; T Barbara Meyers, Tape RE 8).
26. Mr. Hunt stated that the reasons for the award of the position to Harbison were: BSN and Broughton's investment therein; experience on P division; policy against lateral transfers; preference to promote; necessity for consensus, and stronger interview. (PE4: Affidavit of Seth Hunt, submitted as an exhibit to Respondent's Motion for Summary Judgment, notarized 10/15/02). Mr. Hunt elaborated by stating that he chose Ms. Harbison because Broughton Hospital had worked with Ms. Harbison by granting her a flexible schedule and reimbursement to earn her B.S.N. and that this would be a promotional opportunity for Ms. Harbison. Mr. Hunt also testified that he "took great stock" in the strong recommendation from Nursing Administration to offer the position to Ms. Harbison. (T p.411).
27. Mr. Hunt met with Renee Brackett to persuade her to accept Harbison. Hunt told Brackett that he felt her opposition to Harbison was rooted in Brackett's reluctance to train an inexperienced person. (T. R Brackett, Tape 2 of 3, Side A, 2/05/02). Hunt did not know whether Fox or Brackett ever changed their respective positions on the hiring decision for the disputed NSA position. Mr. Hunt made the decision to award the position to Ms. Harbison, overriding Mr. Fox, Ms. Brackett, and Dr. Kilbride and agreeing with Ms. Merrill, and Ms. Streater.
28. Petitioner had been allowed to make lateral transfers previous to his application for the disputed NSA position. (PE 6, 13, 14, 19, pp. 5-8).
29. No policy requires the promotion of an employee over the lateral transfer of an employee in making decisions on filling vacancies. (PE 15, 16, 17; T Seth Hunt, Tape; T Mary Ragsdale).
30. The March 18, 1996 Memorandum from Seth P. Hunt states that "it is the responsibility of the PDD and the DD to reach a consensus." Mr. Hunt admitted that he did not look back at that document in the decision to hire Harbison, but he did recall it from memory. (T. of Seth Hunt, Tape1 of 3, May 29, Side A).
31. Seth Hunt was aware of the race of both Petitioner and Ms. Harbison. Mr. Hunt testified that race did not factor into his decision to hire Ms. Harbison over the Petitioner. (T p.419) Ms. Brackett, Ms. Merrill, and Ms. Streater all testified that race did not factor into the hiring process in any way. (T pp.202, 238, 628). (Affidavit of S. Hunt).
32. Petitioner has worked in the nurse supervisor A position for approximately 9 of his years at Broughton Hospital. (PE 6). Petitioner had worked on Division P when it was Division I. He was selected for the disputed NSA position by both the nurse manager and division director of Division P.
33. Respondent and Patricia Harbison entered into an education type contract in 1993. Harbison, who was not a BSN at the time, was given time, with pay, to complete her degree. She returned to Broughton Hospital in the position of an RN after completing her BSN. The contract contains no provision or promise for continued employment or promotions while in the employ of the State of North Carolina. (PE 10).

34. Ms. Harbison had worked approximately 17 months as an RN with a B.S.N. (PE 9, 10).
35. The Respondent's reasons for its hiring decision include Ms. Harbison's greater nursing education (degree), her experience working on Division P, her stronger performance during the interview, and Broughton Hospital's desire to benefit from its earlier investment in assisting Ms. Harbison in obtaining her B.S.N. degree.

BASED UPON the foregoing Findings of Fact, the undersigned Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter pursuant to Chapters 126 and 150B of the North Carolina General Statutes.
2. To the extent that the findings of facts contain conclusions of law, or that the conclusions of law are findings of fact, they should be so considered without regard to the given labels.
3. North Carolina prohibits an employer from discriminating against any individual with respect to his terms, conditions or privileges of employment because of such individual's race.
4. N.C. Gen. Stat. 126-36 has the same purpose as Title VII, 42 U.S.C. 2000e et seq.: the elimination of discriminatory practices in employment. North Carolina courts look to federal decisions for guidance in establishing evidentiary standards and principles of law to be applied in discrimination cases and have adopted the shifting of burdens standard enumerated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 302, 36 L.Ed. 2d 668, 93 S.Ct. 1817 (1973). See *North Carolina Department of Correction v. Gibson*, 308 N.C. 131, 301 S.E.2d 78 (1983).
5. In *North Carolina Department of Correction v. Gibson*, the North Carolina Supreme Court articulated the parties' respective burdens in proving racial discrimination:
 - (1) The employee must first establish, by a preponderance of the evidence, a *prima facie* case of discrimination. If the employee meets such burden, then...
 - (2) The burden of persuasion shifts to the employer who must articulate some legitimate, nondiscriminatory reason for the employment decision.Once the employer carries this burden and has articulated such reasons for its decision, the burden of persuasion by a preponderance of the evidence shifts back to the employee, and(3) (3) The employee must then prove that the employer's legitimate reasons were not its true reasons but a pretext for discrimination, and the employer's discrimination was the real reason for its actions.
St. Mary's Honor Center, 509 U.S. at 510-511, 113 S.Ct. at 2749. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981).
6. In discrimination cases, although the burden of producing evidence may shift back and forth during the analysis, the employee bears the ultimate burden of persuasion; that is, the ultimate burden of proving his employer discriminated against him. *St. Mary's Honor Center*, 509 U.S. at 502, 507, 511, 113 S.Ct. at 2742, 2747. 2749 (1993). See also *Hawkins v. PepsiCo, Inc.*, 203 F.3d 274, 278 (4th Cir. 2000) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817 (1973)).
7. The Petitioner ultimately has the burden of proof by a greater weight or preponderance of the evidence regarding the discrimination claimed. Black's Law Dictionary cites that "preponderance means something more than weight; it denotes a superiority of weight, or outweighing." The finder of fact cannot properly act upon the weight of evidence, in favor of the one having the *onus*, unless it overbears, in some degree, the weight upon the other side.
8. The purpose behind the passage of Title VII was "to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800, 93 S.Ct. 1817, 1823 (1973). While clearly Title VII and the North Carolina discrimination laws apply on the same terms to discrimination against males or whites, *Hicks v. ABT Assocs.*, 57 F.2d 960 (3rd Cir. 1978), where a plaintiff in an employment discrimination case alleges a case of "reverse discrimination," the *prima facie* case requirements are modified.
9. Consistent with the United States Supreme Court's admonition that the generally-accepted *McDonnell Douglas* test for establishing a *prima facie* case of discrimination should be modified to accommodate different employment discrimination contexts, courts have generally added to the *McDonnell Douglas paradigm* in cases such as this one involving claims of "reverse" discrimination. Rather than showing that the plaintiff is a member of a protected class, when considering a case of

“reverse discrimination,” a plaintiff must show background circumstances which support the suspicion that the defendant is that unusual employer that discriminates against the majority. See *Murray v. Thistledown Racing Club, Inc.*, 770 F2d. 63 (1985). See also, *Settle v. Baltimore Co.* 34 F. Supp 2d 969 (D. Md. 1999), *Green v. Clarendon Co. School Dist. Three*, 923 F. Supp. 829 (D. SC 1996); *Martin-Tiegona v. Board of Trustees*, 668 F.Supp. 682 (D.D.D. 1987).

10. The Fourth Circuit has held that in reverse discrimination, failure-to-promote cases, the plaintiff (Petitioner) is required to produce, in addition to showing the elements of a prima facie case, “some other evidence that . . . race was a factor considered by the employer in not granting . . . the promotion.” *Lucas v. Dole*, 835 F2d 532, 533 (4th Cir. 1987), *cert denied sub nom.*, 494 U.S. 1026, 110 S.Ct. 1471, 108 L.Ed2d 609 (1990). This other evidence has led some District Courts in the Fourth Circuit to surmise that the Fourth Circuit standard is similar to other circuits regarding reverse discrimination and have thus required that in addition to the prima facie elements, the Petitioner put forth “background circumstances” that support “a suspicion that the defendant is that unusual employer who discriminates against the majority.” *Gilbert v. Penn-Wheeling Closure Corp.*, 917 F. Supp. 1119, 1125 (N.D.W.Va. 1996).
11. The courts however have not provided a precise description of what a plaintiff must show to establish background circumstances for such a reverse discrimination. Cases in which a plaintiff did establish this first element of reverse discrimination and are cited to illustrate the kind of evidence brought forward include instances of the plaintiff as the only white employee in an otherwise minority department, qualified whites passed over for blacks whose qualifications were not fully checked, and internal and external pressure to favor minorities. *Reynolds v. School Dist. No. 1*, 69 F3d 1523 (10th Cir. 1995) and *Lanphear v. Prokop*, 703 F2d 1311 (D.D.Cir 1983).
12. The Petitioner here has failed in carrying his burden of proof to establish such “background circumstances” showing that the Respondent is that unusual employer who discriminates against the majority. The Petitioner did not offer any evidence regarding the hiring statistics of Broughton Hospital that would support an inference that the Respondent discriminates against the majority in its hiring practices. Moreover little if any evidence came forward regarding internal or external pressures brought on to favor minorities. In fact evidence shows various members of the differing departments who had input into the hiring decision felt free to recommend Petitioner.
13. Having failed to establish a prima facie case in the usual context of reverse discrimination, the Undersigned moves to see if the Petitioner has presented a case of direct discrimination rendering it unnecessary for Petitioner to satisfy the *McDonnell Douglas* requirements. To establish a *prima facie* claim of discrimination against a State employer, the Petitioner must produce “evidence adequate to create an inference that an employment decision was based on a(n) (illegal) discriminatory criterion. . . .” *O’Connor v. Consolidated Coin Caterers, Inc.*, 517 U.S. 308, 116 S.Ct. 1307, 134 L.Ed. 3d 433 (1996). In the case involving a non-protected majority the Petitioner would predicate their argument on a proffered Affirmative Action Plan or other type requirement of selection.
14. In this case there is evidence that Mr. Hunt asked Ms. Myers about the EEO goals for nursing. And that Ms. Myers consulted the 2000 EEO Plan for Broughton Hospital to find the information Mr. Hunt had requested and informed him that the goals for nursing were for the Nurse B classification. There were no racial or gender goals applicable to the disputed NSA position. Further as found above the EEO plan submitted by the Respondent was not prepared pursuant to court order and was voluntary. There was insufficient evidence regarding operation of the plan, utilization analysis or target dates. In fact as put forth by Petitioner and found as fact by the Undersigned, the decision to select Ms. Harbison over the Petitioner was not made pursuant to a bona fide affirmative action plan and the Undersigned finds insufficient foundational evidence to support a basis of direct discrimination.
15. Notwithstanding the absence of background circumstances, the Undersigned has examined whether discrimination was evident from the Respondent’s different treatment of Ms. Harbison, an African American female from the Petitioner. The Undersigned concludes that Petitioner has failed in its burden of proof that the reasons Respondent articulated for its hiring decision were not its true reasons but a pretext for discrimination. In fact in this case, there were two legitimate individuals on the hiring panel, Mr. Fox representing the management tract and Ms. Merrill representing the clinical tract. Ms. Brackett was not a legitimate member of the interview panel and in fact withdrew having only interviewed 3 of the 7 applicants. Mr. Fox gained the support of his supervisory chain, first Ms. Brackett, then Dr. Kilbride, in his choice of Petitioner and Ms. Merrill gained the support of her supervisory chain, Ms. Streater, in her choice of Ms Harbison. Mr. Hunt being the appropriate decision maker in this case was more persuaded by the reasoning of Ms. Merrill and Ms. Streater in the clinical tract. The numbers of years in nursing of the two candidates were similar with Ms. Harbison having a BSN degree as opposed to Petitioner’s Associate Degree but Petitioner having direct work experience as a Nurse Supervisor A and Ms. Harbison having supervisory experience but not at the level of Petitioner. Both Petitioner and Harbison were qualified for the NSA position, each having different strengths.
16. Placing more weight upon different strengths does not constitute disparate treatment absent prevailing in evidence supporting illegitimate reasons for an employer’s actions. Petitioner’s evidence and the burden of proof he carries failed to sufficiently

CONTESTED CASE DECISIONS

dispute Respondent's evidence that the factors of education, promotion opportunity and performance during the interviews, not racism, precipitated the Respondent's employment decision.

17. The Undersigned therefore finds that Petitioner as the one having the onus of persuasion by a preponderance of the evidence has failed in meeting his burden of proof regarding Respondent's articulated reasons for its hiring decision as not its true reasons but a pretext for discrimination. In short, even if Petitioner could establish a prima facie case of race discrimination, the Respondent has articulated a legitimate non-discriminatory reason for its decision and Petitioner has not shown by a preponderance of the evidence that the proffered reason was a pretext for race discrimination.

BASED UPON the foregoing Findings of Fact and Conclusions of Law the Undersigned makes the following:

DECISION

The Undersigned finds and so holds that Petitioner has failed to establish by a preponderance of the evidence, a *prima facie* case of reverse racial discrimination. Moreover, the Undersigned finds that the Petitioner has further failed to carry its burden of proof as a matter of fact and law that racial discrimination by the Respondent was the reason for its decision regarding Petitioner. In sum, Petitioner has failed to prove as the party having the burden to do so, that Respondent denied him the transfer/promotion based upon discrimination brought about by race.

NOTICE

The agency making the final decision in this contested case is required to give each party an opportunity to file exceptions and to present written arguments regarding this Decision issued by the Undersigned in accordance with N. C. Gen. Stat. § 150B-36.

In accordance with N.C. Gen. Stat. § 150B-36 the agency shall adopt each finding of fact contained in the Administrative Law Judge's decision unless the finding is clearly contrary to the preponderance of the admissible evidence, giving due regard to the opportunity of the administrative law judge to evaluate the credibility of witnesses. For each finding of fact not adopted by the agency, the agency shall set forth separately and in detail the reasons for not adopting the finding of fact and the evidence in the record relied upon by the agency. Every finding of fact not specifically rejected as required by Chapter 150B shall be deemed accepted for purposes of judicial review. For each new finding of fact made by the agency that is not contained in the Administrative Law Judge's decision, the agency shall set forth separately and in detail the evidence in the record relied upon by the agency establishing that the new finding of fact is supported by a preponderance of the evidence in the official record.

The agency shall adopt the decision of the Administrative Law Judge unless the agency demonstrates that the decision of the Administrative Law Judge is clearly contrary to the preponderance of the admissible evidence in the official record. The agency that will make the final decision in this case is the North Carolina State Personnel Commission (SPC).

ORDER

It is hereby ordered that the agency making the final decision in this matter serve a copy of the final decision to the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, North Carolina 27699-6714, in accordance with N.C. Gen. Stat. § 150B-36.

IT IS SO ORDERED.

This the 30th day of April, 2003.

Augustus B. Elkins II
Administrative Law Judge

CONTESTED CASE DECISIONS

STATE OF NORTH CAROLINA
COUNTY OF CUMBERLAND

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
02 DHR 1138

RICKY ROBERTS FOR ANGELA ROBERTS Petitioner,)	
)	
)	
v.)	DECISION
)	
N.C. DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF MEDICAL ASSISTANCE Respondent.)	
)	

On November 14, 2002, Administrative Law Judge Melissa Owens Lassiter heard this contested case in Fayetteville, North Carolina. On February 20, 2003, Respondent filed a Proposed Decision. On March 11, 2003, Petitioner filed a Proposed Decision.

APPEARANCES

For Petitioner:	Ricky Roberts, Pro Se Father of Angela Roberts P O Box 64984 Fayetteville, NC 28306
For Respondent:	Belinda A. Smith Assistant Attorney General NC Dept. of Justice PO Box 629 Raleigh, NC 27602

ISSUE

Whether Respondent properly decided to reduce the level of care for which Petitioner receives Medicaid reimbursement from hospital level of care to skilled nursing facility level of care?

APPLICABLE LAW

42 USC §§ 1396, 1396(a), 1396a(a)(30 & 33A)
Social Security Act - Sections 1902(i)(1); 1905 (a)(15) and (d)
Section 1915(c) HCBS Waiver
N.C. Gen. Stat. § 108A, Article 2, Parts 1 and 6
NC State Plan for Medical Assistance
NC Medicaid CAP/C Manual

EXHIBITS

For Petitioner:	1-13, 17, 19-20
For Respondent:	1-3

FINDINGS OF FACT

Background Facts

1. Petitioner Angela Roberts is a Medicaid recipient under the Community Alternatives Program for Children (CAP/C) waiver program. Petitioner is a seventeen (17) year old young woman who has been diagnosed with brain injury due to multiple strokes that occurred in 1994, Spasticity and Dystonia, Dysarthria, Type 1 Insulin Dependent Diabetes Mellitus, Hypopituitarism, and a rare case of Thrombophilia (Antiphospholipid Body Syndrome and Abnormal Plasminogen Activator Gene).

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2. Respondent is the agency responsible for administering North Carolina's medical assistance (Medicaid) program under the federal Medicaid law. In administering North Carolina's Medicaid program, Respondent provides a CAP/C waiver program to a limited number of medically high-risk children who would be institutionalized in a nursing facility or hospital without any Medicaid payments. CAP/C allows disabled children with serious medical conditions requiring long-term care, who qualify for CAP/C services, to receive services in their homes at a lower Medicaid cost than the cost for institutional care.
3. Under the CAP/C program, eligible recipients must, at a minimum, require nursing facility care (intermediate care facility (ICF) or skilled nursing facility (SNF)). Some of the children, because their extensive medical needs are more than many nursing facilities may provide, would be hospitalized for long-term care. CAP/C has a hospital level of care designation to meet the needs of such children.
4. On January 24, 1997, Respondent had approved Medicaid CAP/C nursing services for Petitioner at the skilled nursing facility level of care.
5. During its January 2001 annual continued need review, Respondent approved CAP/C skilled nursing services for Petitioner at the hospital level of care.
6. Beginning on January 9, 2002, Respondent's employees, Social Work Consultant Sylvia Leebrick, and Beth Karr, R.N., performed an annual review of Petitioner's plan of care to determine if Petitioner's CAP assessment and nursing notes supported a hospital level of care designation such that Petitioner required substantial, complex, and continuous health care services. Leebrick and Karr determined that Petitioner did not qualify to receive CAP/C services at the hospital level of care. By letter dated April 29, 2002, Respondent notified Petitioner of its annual review determination.
7. Petitioner appealed Respondent's determination, requesting Respondent reconsider its decision.
8. By letter dated June 19, 2002, Respondent's Chief Hearing Officer Mary Jane Coward notified Petitioner that its reconsideration review was upholding its decision that Petitioner did not qualify for hospital level of care.
9. In making that determination, Respondent reviewed the following documents:
 - a. Petitioner's December 26, 2001 FL-2 (Resp Exh 3, 1st page)
 - b. January 15, 2002 Continued need CAP/C review assessment (Resp Exh 3, numbered by hand as pp 14-26)
 - c. January 31, 2002 CAP plan of care (Resp Exh 3, numbered by hand as pp 27-31)
 - d. Dr. Gordon Worley's Home Health Certification and Plan of Care dated January 7, 2002- March 7, 2002 & March 7, 2002 – May 7, 2002 (Resp Exh 3, numbered by hand as pp 32-35)
 - e. Pediatric Services of America (PSA) nursing notes and flow sheets dated December 5, 2001- December 7, 2001, March 22, 2002 - March 27, 2002, & June 6, 2002 – June 8, 2002 (Resp Exh 3, numbered by hand as pp 36-94)
 - f. PSA medication administration records dated February 28, 2002 (Resp Exh 3, numbered by hand as pp 95-98)
 - g. June 3, 2002 letter from Robert Barnes, Principal South View High School, to Ms. Coward (Pet Exh 9)
 - h. South View High School EMH Teacher Janie Gonzales' undated letter to Social Worker Consultant Sylvia Leebrick (Pet Exh 12)
10. On June 12, 2002, the additional documents were submitted by facsimile for Respondent's review:
 - a. Dr. Gordon Worley's prescription for physical therapy 3 times weekly and occupational therapy 3 times weekly
 - b. Dr. Gordon Worley's June 3, 2002 letter to Ms. Coward (Pet Exh 1)
 - c. Adaptive Physical Education Teacher Wayne Inman's June 4, 2002 letter to Ms. Coward (Pet Exh 11)
 - d. Physical Education Teacher Jeff Gainey's June 4, 2002 letter to Ms. Coward (Pet Exh 10)
 - e. "Angela Roberts' Diabetic Summary" from Karen Roberts with Flow Charts dated June 2001- May 2002 (included in Pet Exhs 5 & 6)
 - f. Additional medication administration records from PSA
11. The day of the review, Petitioner's father also submitted the following information to Respondent for review:
 - a. Additional PSA nursing flow sheets dated January 7, 2002, January 30, 2002, February 19, 2002, February 27, 2002, March 4, 2002, March 13, 2002, March 27, 2002
 - b. Dr. Sharon Cooper's June 16, 2002 letter to Ms. Coward (Pet Exh 7)
 - c. Patient Appt schedule for physical therapy dated March 19, 2002-May 27, 2002.

12. Dr. Cooper's letter listed Petitioner's diagnosis as: 1) Type I Insulin Dependent Diabetes Mellitus; 2) Panhypopituitarism; 3) Hypothyroidism; 4) Status Post Deep Vein Thrombosis Associated with Antiphospholipid Antibody Syndrome; and 5) Spastic Quadriplegia with psychomotor delays and severe Dysarthria. Dr. Cooper concluded her letter by saying:

I believe that this detailed summary of the complexity of care needs for this child will make it very clear that nursing assistance is unequivocally required for Angela, and is in the best interest of her family, the school system, and the State of North Carolina.

13. In her June 19, 2002 reconsideration review letter, Chief Hearing Officer Coward opined that:

The documentation establishes that Angela's need for personal care and assistance with activities of daily living is extensive; however, the documentation also establishes that her need for skilled nursing care is intermittent, not continuous. . . . Clearly, Angela requires much assistance; however, her need for skilled nursing services is not at the level that would qualify her for the hospital level of care. Medical Policy, as defined in the CAP/C Manual must be followed.

(Document Constituting Agency Action, June 19, 2002 letter, p 11)

Adjudicated Facts

14. Petitioner resides at home with her primary caregivers, her parents. She receives the following Medicaid benefits: case management assessment for 6.25 hours per year, case management for 3 hours per month, private duty nursing 70 hours per week (including personal care services), one nursing visit every other month, and a wheelchair with wheelchair cushion, ramp and bilateral calf braces. Respondent provides medical supplies such as 30 diapers/month, 100 lancets/month, 200 test strips/month, 50 urine test strips/month, and 12 pull-ups/month.

15. Petitioner's Medicaid benefits also include skilled nursing services for Petitioner's special care factors including checking her blood pressure 5 times per week, and testing urine for ketones as needed. Petitioner also receives, but not through Medicaid, physical therapy two times daily for 7 days per week, and occupational and speech therapy 3 times per week for one hour each session. Petitioner is semi-ambulatory, but her physical ability is limited. She can use a walker with maximum assistance. Petitioner has mild contractures to both hands and fingers, and her right leg is difficult to move and experiences mild spastic movements.

In addition to her wheelchair, Medicaid provides Petitioner with the assistive devices such as handheld shower, hospital bed, grab bar at toilet, safety railing, alternative pressure pad, walker, full-length right leg brace, and eyeglasses. She responds to sounds and normal conversations without difficulty; has soft whisper like speech with slow pronunciation, giving only simple one word answers; and is totally bowel incontinent. Petitioner takes 24 doses of medications daily including Synthroid, Amatadine, Cortef, Aspirin, Coumadin, NPH and Regular Insulin, Neurontin, Modafinil, lispro and glucagon. Those doses do not include Petitioner's insulin regimen where someone checks her blood sugar 6 times per day, gives her insulin injections 2 times per day, gives lispro insulin injections via a sliding scale as needed, and gives glucagon injections for low blood sugar levels of 30 or below.

16. Pediatric Services of America (PSA) provides Petitioner with skilled nursing care from 6:30 am - 6:30 pm Monday - Friday, and 7:30 am - 5:30 pm on Saturday. PSA's employee Donna Forester has been a LPN for 26 years, and has provided skilled nursing services and personal care services for Petitioner for the last 3½ years. Forester physically examines Petitioner for edema and deep vein thrombosis, performs personal care services for Petitioner, and accompanies her to school 5 days a week. Since Petitioner does not exhibit normal signs of hypoglycemia, is unable to understand when her blood sugar is low, and because Petitioner's blood sugar is unpredictable, Forester must monitor Petitioner's diet, watch for adverse drug interactions between Petitioner's medications, and use her professional judgment to evaluate Petitioner's blood sugar. Forester checks Petitioner's blood sugar 6 times a day, and uses her professional judgment to administer lispro or glucagon injections based on Petitioner's blood sugar level.

17. At the administrative hearing, Forester opined that a skilled nurse is required or needed to take care of Petitioner's complex medical needs. In her opinion, a lay or unskilled person, unfamiliar with Petitioner and her habits, would be unable to detect Petitioner's hypoglycemic symptoms, and evaluate Petitioner's medical conditions to sufficiently meet Petitioner's medical needs.

18. Forester acknowledged that she could care for Petitioner in a nursing home if Petitioner did not experience any medical problems. However, Petitioner would need to be hospitalized if she suffered any medical problems.

19. In her nursing notes, Forester did not write each and every nursing service she performed for Petitioner, because those services and events were such a part of Petitioner's everyday life.

20. Dr. Sharon W. Cooper, a developmental pediatrician at Womack Army Medical Center, has treated Petitioner since Petitioner suffered her multiple strokes in 1994. She currently treats Petitioner in conjunction with Dr. Gordon Worley, a developmental pediatrician at Duke University Medical Center. In her June 3, 2002 letter to Respondent, and at the administrative hearing, Dr. Cooper opined that Petitioner has a high need for private duty nursing. Petitioner's need is based upon:

need for blood sugar monitoring of such a frequent nature, the associated complications of her deep vein thrombosis, and the need to administer therapeutic injections for the occurrence of hypoglycemia. . . Because of her underlying diagnoses of antiphospholipid antibody syndrome, this young person is at great risk for subsequent clotting phenomena, which was undoubtedly the reason for her initial stroke. The included risk of hypoglycemia mandates close monitoring during the day.

(Pet Exh 7)

Dr. Cooper thinks that Petitioner medically needs someone who can perform a continuous clinical diagnosis of Petitioner's medical condition because: (1) Petitioner is unable to tell you when her blood sugar is low, (2) Petitioner takes multiple medications and is at high risk for possible interactions of those medications, and (3) Petitioner is at an extraordinarily high risk for worsening of complications. During the last 7 years, Petitioner's diagnosis has worsened because of her deep vein thrombosis, teeth problem, and glucose instability. She thinks that 17-20 doses of medications daily is not monitoring, but is intervention.

In her opinion, Petitioner's medical condition requires "continuous, complex and substantial skilled nursing care that could not otherwise be provided in a skilled nursing facility" because of Petitioner's high potential risk for suffering another stroke, going into a diabetic coma, and due to exacerbation of clotting and deep vein thrombosis. All these conditions require continuous care. In her opinion, Petitioner needs at least a LPN, and preferably a RN, that know how and why to give insulin injections, especially the sliding scale injections.

Cooper further opined that Petitioner is presently receiving the best care because her medical and psychological life needs are met, and she is in the least restrictive educational environment. If Petitioner does not receive skilled nursing level of care, she would need to be institutionalized, would not be able to attend school, and would not continue to improve at her current rate. \$3500.00 per month would be insufficient to provide adequate care for Petitioner.

21. Cooper's believes that the nursing notes submitted to Respondent do not adequately reflect the complexity of Petitioner's medical needs or the level of care Petitioner needs. The nursing information Ms. Forester told her during Petitioner's doctor's appointments was information that might not be reflected in Forester's nursing notes.

22. Dr. Gordon Worley is a developmental pediatrician at Duke University Medical Center who has been treating Petitioner for several years. In his June 3, 2002 letter to Respondent's Chief Hearing Officer Coward, Worley advised:

I believe that ten to twelve hours of skilled private duty nursing care per day, five days a week would benefit Angela. Angela is partially paralyzed, not verbally responsive, and is unable to communicate to anyone whether her blood glucose levels are low or high, whether she is experiencing pain, or even possible onset of strokes using the feelings of her body. Angela is capable of moving only her left arm and leg that have severe hypertonicity. Angela's other two extremities are partially paralyzed.

Angela's need for skilled private duty nursing care is important to her continued recovery. The Cumberland County school system does not provide full-time nursing services for Angela's school. No other home health agency in her home area can provide the nursing that is needed, due to State licensing requirements. All agencies contacted cannot provide nursing care that can do glucose monitoring at a minimum of six times a day, give insulin injections twice per day and lispro insulin injections via a sliding scale as needed; and give Coumadin, Neurontin, Amantidine, Hydrocortisone, Levlthyroxine, Aspirin, and Baclofen medication as directed. If Angela does not received [sic] private duty nursing care at home, Angela will not continue to make the mental and physical recovery that we hope for. Angela's need for skilled private duty nursing is an ongoing process.

23. The nursing notes submitted to Respondent indicated that either Ms. Forester or her parents checked Petitioner's blood sugar level 4 - 6 times per day, injected insulin, administered anticoagulants, and monitored and treated Petitioner for hypoglycemia. These notes indicated that Petitioner's blood sugar levels are unpredictable, never stable, and daily fluctuate from low blood sugar levels of 30 - 50, to high blood sugar levels of 300 - mid-400. The following chart indicates the number of sliding scale insulin shots Petitioner received for the listed months:

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2001

June – 40
July – 41
August – 40
September – 57
October - 48
November – 20 (new sliding scale begun)
December 11

2002

January - 9
February - 4
March - 16
April - 10
May - 30

24. Forester’s nursing notes also showed that necessary skilled nursing interventions were performed each time blood sugar levels were obtained.

25. Several of Petitioner’s teachers submitted letters to Respondent supporting continuance of Petitioner’s skilled nursing services at the hospital level of care. These teachers primarily contended that Petitioner would be unable to attend school if she did not receive skilled nursing services at the hospital level of care. Particular emphasis was placed on the fact that South View High School, where Petitioner currently attends school, has no full-time nurse assigned to it. South View High School Principal Robert Barnes advised: “due to the state budget, the Cumberland County Health Department provides a nurse at the high school level on a consultative basis only.” Janie Gonzales, Petitioner’s EMH Teacher at South View, noted that without Private Duty Nursing, Angela would not be able to attend school because “Cumberland County School System regulations do not allow the school to provide the nursing care.” (Pet Exhs 9, 12)

Petitioner’s teachers stressed that with a skilled nurse, Petitioner is able to attend school, is in the least restrictive environment educationally and personally, and has made tremendous progress that she could not otherwise have done without skilled nursing services. According to Ms. Gonzales, Petitioner’s Individualized Education Plan (IEP) has only addressed occupational, speech, and physical therapy, and has never included skilled nursing services.

26. Beginning January 9, 2002, Social Worker Consultant Sylvia Leebrick and Beth Karr, RN initiated the annual assessment to determine whether the level of care Petitioner required was substantial, complex, and continuous. To make this determination, Leebrick evaluated the nursing notes on Petitioner to assess what type and frequency of hourly and daily nursing interventions Ms. Forester performed for Petitioner. Leebrick did not think the intensity existed in the type and frequency of the skilled nursing interventions that was needed, for Petitioner to qualify for hospital level of care.

At the administrative hearing, Leebrick acknowledged that if Respondent did not pay for skilled nursing services at the hospital level of care for Petitioner, it would only pay for skilled nursing facility level of care services for Petitioner. At the skilled nursing facility level of care, Respondent would only pay for \$3500.00 of services per month for Petitioner. Petitioner would be unable to receive the current level and hours of nursing services at the \$3500.00 monthly rate.

27. At Ms. Leebrick’s request, Respondent’s Home Care Initiatives Unit Manager Beth Karr reviewed all documents Petitioner submitted to Respondent. Karr has been a registered nurse since 1972. Leebrick evaluated Petitioner’s documents for the number of nursing interventions performed, looking mainly at the frequency of the blood sugar level checks, and the number of times medications were administered other than in regular dosages.

Based upon her review of the nursing notes, Leebrick concluded that Forester performed skilled nursing interventions on Petitioner intermittently, not continuously. She opined that one does not need a LPN to perform personal care services such as changing diapers, and just because a RN or LPN performs many personal care services in the hospital, that performance does not make that service a skilled nursing intervention. In her opinion, the documentation submitted did not show that Petitioner has a continuous need for the hospital level of care as defined by the hospital level of care criteria in the NC Medicaid CAP/C Manual. In that manual, “hospital level of care” is for children with medical conditions who require continuous, complex, and substantial skilled nursing care. She opined that services provided at the hospital level of care are not provided for monitoring purposes.

28. Altogether, the documentation from Petitioner’s medical caregivers, demonstrated that the skilled nursing services Petitioner receives, often includes “monitoring” of her many medical conditions. More importantly, however, such documentation shows that Petitioner requires intensive medical oversight for her multiple medical problems, primarily, uncontrollable diabetes. Ms. Forester must exercise her nursing skills and professional judgment in administering frequent injections to Petitioner. In addition, Forester must also apply her professional judgment in administering Petitioner’s other 24 daily doses of medication, and in providing ongoing maintenance of Petitioner’s medical needs to avert a present, life-threatening medical emergency. Therefore, the skilled nursing services Forester provides Petitioner are not monitoring, but are skilled nursing interventions.

29. Petitioner’s father contests the change in level of care from hospital to skilled nursing because at the nursing facility level of care, Petitioner would receive fewer hours of nursing care. He contends that Petitioner’s multiple medical problems require intensive

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medical oversight involving frequent monitoring of Petitioner's blood sugar at least 8-10 times per day, giving insulin injections on a sliding scale, daily administering 24 different doses of oral medications, and continuous monitoring and adjustment of those medications. In addition, he asserts that the medications administered to Petitioner can only legally be administered by a licensed practical nurse or a registered nurse.

30. According to her plan of care, Petitioner is currently receiving monthly Medicaid payments at the hospital level of care totaling \$11,085.00 for her CAP/C assessment, case management, nursing visits, hourly nursing services by PSA, and medical supplies. The hourly skilled nurse services provided by PSA constitutes \$10,643.36 of that total. However, at the skilled nursing facility level of care, Petitioner would receive monthly Medicaid payments of \$3500.00.

31. Respondent failed to present any evidence proving that Petitioner's medical condition has changed since January 2001, when Respondent first approved Medicaid reimbursement for Petitioner for skilled nursing services at the hospital level of care. That is, Respondent failed to show how Petitioner's medical condition changed from January 2001 to January 2002, so that Petitioner no longer needs skilled nursing services at the hospital level of care.

32. Respondent failed to present any evidence showing its January 2001 hospital level of care approval for Petitioner was issued in error, was a mistake, or for any other reason was incorrect.

CONCLUSIONS OF LAW

1. The parties are properly before the Office of Administrative Hearings (OAH), and OAH has subject matter jurisdiction in this contested case.

2. The CAP/C waiver program is designed to serve a limited number of medically high risk children who would be institutionalized in a nursing facility or hospital if they did receive any Medicaid payments for at-home care.

3. The purpose of the CAP/C waiver is to provide home and community-based services to children, through age 18, who would require institutionalization but for the provision of such services. The program's goal is to allow children needing long-term medical care to return to, or remain in the community, and live as independently as possible in their homes.

4. Under the CAP/C program, eligible recipients must, at a minimum, require nursing facility care (intermediate care facility (ICF) or skilled nursing facility (SNF)). Some of the children, because their extensive medical needs are more than many nursing facilities may provide, would be hospitalized for long-term care. CAP/C has a hospital level of care designation to meet the needs of such children.

5. To be eligible for CAP/C and receive hospital level of care services, Petitioner must meet the conditions set forth in the CAP/C waiver. That is, the patient must have medical conditions requiring continuous, complex and substantial skilled nursing care that could not otherwise be provided in a skilled nursing facility.

6. Respondent has the burden of proving that Petitioner would require institutionalization but for the provision of skilled nursing services at the hospital level of care. Specifically, Respondent has the burden of proving that Petitioner's medical condition has so changed since January 2001, that Respondent is now required to modify the hospital level of care Medicaid designation for Petitioner to a skilled nursing facility level of care.

7. The issue in this case is not whether Petitioner can attend school and receive a free and appropriate education in the least restrictive environment. The issue is whether Petitioner's medical needs require continuous, complex, and substantial skilled nursing care that could not otherwise be provided in a skilled nursing facility. In other words, do Petitioner's medical needs meet the Medicaid standard for hospital level of care to so require Medicaid to pay for Petitioner's skilled nursing services at that level. Whether the school system does or does not provide any nursing services is not a consideration in making that determination.

8. Because Respondent failed to prove that: (1) its January 2001 hospital level of care designation for Petitioner was issued incorrectly, and (2) that Petitioner's medical condition has changed since January 2001 so she no longer medically needs hospital level of care skilled nursing services, it has failed to prove that Petitioner would not be institutionalized but for the skilled nursing services at the hospital level of care.

9. In its reconsideration review determination, Respondent relied heavily on the language in the NC Medicaid CAP/C Manual, Section 8.8 to determine that Petitioner no longer qualifies for skilled nursing services at the hospital level of care. In its June 19, 2002 determination letter, Respondent specifically cited the definition of "hospital level of care", and its qualifying criteria that were outlined in Section 8.8 of the CAP/C manual. However, that Manual only provides basic information in summary form, and is merely "guidance to local case management agencies for Community Alternatives Program for Children (CAP/C) and their CAP/C managers

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on the operation of the program.” In addition, Section 8.8’s list of criteria for “hospital level of care” is not an exhaustive list for qualifying for hospital level of care services with Medicaid, and should not be used as one.

10. On the other hand, Petitioner’s documentation clearly demonstrated that Petitioner has extensive medical needs that are more than many nursing facilities may provide, and are needs that require intensive medical oversight by a skilled nursing professional. This documentation shows that Petitioner’s medical needs require continuous clinical diagnosis because: (1) Petitioner is unable to tell you when her blood sugar is low, (2) Petitioner’s diabetes is unpredictable, unstable, and very difficult to manage, (3) Petitioner takes numerous medications for multiple medical problems, and is at a high risk for possible interactions of those medications, and (3) Petitioner is at an extraordinarily high risk for not only for worsening of her multiple complications, but for a life-threatening emergency. During the last 7 years, Petitioner’s diagnosis has worsened because of her deep vein thrombosis, teeth problem, and glucose instability.

11. Petitioner’s complex medical needs and conditions require continuous, complex and substantial skilled nursing care that could not otherwise be provided in a skilled nursing facility.

12. For the above-stated reasons, Respondent erred in determining that Petitioner’s Medicaid reimbursement for skilled nursing services, should be reduced from hospital level of care to skilled nursing facility level of care.

DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned hereby determines that Respondent’s decision to reduce the level of care for which Petitioner receives Medicaid reimbursement from hospital level of care to skilled nursing facility level of care, should be **REVERSED** as Petitioner qualifies for skilled nursing services at the hospital level of care.

NOTICE

The North Carolina Health and Human Services, Division of Medical Assistance, will make the Final Decision in this contested case. N.C. Gen. Stat. § 150B-36(b), (b1), (b2), and (b3) enumerate the standard of review and procedures the agency must follow in making its Final Decision, and adopting and/or not adopting the Findings of Fact and Decision of the Administrative Law Judge.

Pursuant to N.C. Gen. Stat. § 150B-36(a), before the agency makes a Final Decision in this case, it is required to give each party an opportunity to file exceptions to this decision, and to present written arguments to those in the agency who will make the Final Decision. N.C. Gen. Stat. 150B-36(b)(3) requires the agency to serve a copy of its Final Decision on each party, and furnish a copy of its Final Decision to each party’s attorney of record and to the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, NC 27699-6714.

This the 25th day of April , 2003.

Melissa Owens Lassiter
Administrative Law Judge