Proposed Rule for Adoption
10A NCAC 27G .0105
General Definitions

Agency: DHHS/ Division of Mental Health, Developmental Disabilities and Substance Abuse Services

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Impact:
- Federal Impact: No
- State Impact: Yes (Anticipated savings)
- Local Government Impact: Not determined. LME/MCOs will incur less monitoring costs if there are less providers, but total change to the provider network is negligible.
- Private Sector Impact: No
- Substantial Economic Impact: No

(Total savings to all parties between $2,500 - $5,500)

Authority: G.S. §122C-26

I. Overview:

This rule is proposed for adoption in order to define terms used within N.C.G.S. §122C-23. (See Appendix for proposed rule text.)

II. Rationale for Proposed Adoption:

N.C.G.S. §122C-23 addresses licensure of facilities within in the mental health, developmental disabilities and substance abuse (mh/dd/sa) services system. The Secretary of the North Carolina Department of Health and Human Services (DHHS) has delegated to the Division of Health Service Regulations (“DHSR”) the responsibility of licensing facilities. The statute sets forth several situations in which a facility is not allowed to be issued a license, including when the owner, principal or affiliate of the facility was in the same capacity with another facility that was issued certain penalties, had its licenses revoked, and other circumstances.

Certain terms cited within the statute are not defined, which has made it difficult for DHSR to enforce the statute. The proposed rule is intended to ensure that DHSR is able to properly enforce the statute when licensing facilities for the mental health, developmental disability and substance abuse population.

III. Authority

The Commission for Mental Health, Developmental Disabilities and Substance Abuse Services has rulemaking authority for the subject matter of the proposed language pursuant to N.C.G.S. §122C-26. Licensure of mh/dd/sa facilities is

AJR revised OSBM Revised Submission 2.1.13
performed by the NC Division of Health Service Regulation, as the Secretary of NC DHHS’ designee.

IV. Analysis of Fiscal Impact:

The NC DHSR acts as the Secretary of the NC DHHS’ delegate for licensing facilities. As part of the application process, individuals must fill out an application for licensure. Rule 10A NCAC 27G .0402 states that all applications for licensure must ask for the names of individuals who are owners, partners or shareholders holding an ownership or controlling interest of 5% or more of the entity. However, there are no definitions of those terms. In addition, the rule does not require, and the application does not inquire about, principals or affiliates as defined in this rule. Currently, because there are no binding definitions, the applicant is not asked on the application whether he is a principal or an affiliate. Once the proposed rules are in place, applicants will be required to specify if they meet the requirements for licensure as defined by the terms in this rule. After an application is received, DHSR support staff will review the application and take the added step of checking the existing Provider Penalty Tracking Database to identify if the applicant has been assessed any penalties in the past. Currently, DHSR only checks for owners, partners or shareholders; with the amendments in place, DHSR staff will be able to check for the additional categories. If the applicant is barred, the support staff will send the application back with a form letter saying the prospective provider cannot be licensed. This process for a cursory review of an application that may be barred will not take much time (approximately 15 minutes per application). Based upon historical licensure denials, DHSR anticipates that about 3-5 provider applications annually would be flagged during the Provider Penalty Tracking Database check due to prior violations. As a result, the Division would no longer spend time reviewing those provider applications, but rather move to deny licensure more swiftly. Please note that under the current rules, these applicants would likely not have gotten licenses to open facilities after their applications were reviewed. Rather, the applications would have been denied after staff spent time reviewing them.

Based on length of licensure and annual survey processes, this rule change would save between 23 and 30 hours of state staff time, between administrative support and surveyor staff, per application (between 8-10 hours for the initial licensure process and 15-20 hours required to complete the annual survey). Therefore, the Division anticipates it would save between 69 (3 denied licenses x 23 hours) and 150 (5 denied licenses X 30 hours) hours in staff time. It is estimated that current administrative staff would be grade 59 (midpoint salary = $32,232 plus fringe) and surveyor staff would be grade 73 (midpoint salary = $56,666 plus fringe). With current retirement, OASI-DI, and health insurance added in (about 34.1% in fringe benefits), this would equate to an administrative cost $20.78 per hour for administrative staff and $36.53 per hour for surveyor staff. Therefore, the Division anticipates annual cost savings would be between $2,143 (24 hours × $20.78 for administrative staff + 45 hours × $36.53 for surveyor staff for an estimate of 3 denied applications) and $4,692 (50 hours × $20.78 for administrative staff + 100 hours × $36.53 for surveyor staff for an estimated of 5 denied applications).

In addition, the state would save funds by not incurring staff time to investigate any complaints for those facilities affected by this rule. The NC DHSR anticipates it would not need to consult with the Department of Justice as often to determine whether a provider could be licensed under the statute, nor litigate regarding this issue. DHSR review/complaint resolution costs would be diminished by about 5
hours per facility. This time would be shared equally by Division administrative and surveyor staff. The Division anticipates savings between 15 hours (3 application denials) and 25 hours (5 application denials) of staff time. This would provide staff cost savings of between $430 (15 hours X avg. staff total compensation of $28.66) and $716 (25 hours X avg. staff total compensation of $28.66). Calculations for staff savings are limited in instances where the application is rejected after the initial cursory review because the individual cannot be licensed. In cases where the provider is barred an administrative staff member will expend approximately $5.20 (15 min X 20.78) to reject the application. The total offset of initial calculated savings will be between $16 ($5.20 × 3 applications) and $26 ($5.20 × 5 applications).

This rule change will not change the application process or annual survey questionnaire. Currently, the application is verified against a database that is for owners/ principles/ or associates and is no additional work for staff. In addition, there will be an added benefit of ensuring that the legal charge of 122C-23 is carried out efficiently, and the state will no longer issue facility licenses to individuals who are not eligible.

It is important to note that this rule states it applies terms used in 122C-23. The terms defined in the rule are found in (e1) of that statute, which speaks specifically to applicants for licensure. This rule is not anticipated to remove licenses from facilities that are already in operation. However, by adding the definitions as proposed, the newly defined principals and affiliates will now be added to the tracking database and, should that individual apply for licensure for another facility in the future, they can be checked in the database.

(Total Savings of about $2,500 - $5,500)

Federal Impact: No
State Impact: Yes
Local Government Impact: Not determined. LME will incur less monitoring costs if there are less providers, but total change to provider network is negligible.
Private Sector Impact: No
Substantial Economic Impact: No
10A NCAC 27G .0105 is proposed for adoption as follows:

10A NCAC 27G .0105 GENERAL DEFINITIONS

(a) This Rule contains definitions that apply for the purposes of G.S. 122C-23.

(b) Unless otherwise indicated, the following terms have the meanings specified:

1. "Affiliate" means any person that directly or indirectly controls or did control a facility licensed pursuant to G.S. 122C or any person who is controlled by a person who controls or did control a facility licensed pursuant to G.S. 122C. Two or more facilities licensed pursuant to G.S. 122C who are under common control are affiliates.

2. "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.

3. "Owner" means any person who has or had legal or equitable title to or a majority interest in a facility licensed pursuant to G.S. 122C.

4. "Person" as defined in G.S. 122C-3 includes any trust or estate, 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.

5. "Principal" means any person who is or was the owner or operator of a facility licensed pursuant to G.S. 122C, an executive officer of a corporation that does or did own or operate a facility licensed pursuant to G.S. 122C, a general partner of a partnership that does or did own or operate a facility licensed pursuant to G.S. 122C, or a sole proprietorship that does or did own or operate a facility licensed pursuant to G.S. 122C.

History Note: Authority G.S. 122C-26(1); 143B-147(a)(2)

Eff: --
§ 122C-23. Licensure.

(a) No person shall establish, maintain, or operate a licensable facility for the mentally ill, developmentally disabled, or substance abusers without a current license issued by the Secretary.

(b) Each license is issued to the person only for the premises named in the application and shall not be transferrable or assignable except with prior written approval of the Secretary.

(c) Any person who intends to establish, maintain, or operate a licensable facility shall apply to the Secretary for a license. The Secretary shall prescribe by rule the contents of the application forms.

(d) The Secretary shall issue a license if the Secretary finds that the person complies with this Article and the rules of the Commission and Secretary.

(e) Initial licenses issued under the authority of this section shall be valid for not more than 15 months. Licenses shall be renewed annually thereafter and shall expire at the end of the calendar year. The expiration date of a license shall be specified on the license when issued. Renewal of a regular license is contingent upon receipt of information required by the Secretary for renewal and continued compliance with this Article and the rules of the Commission and the Secretary. Licenses for facilities that have not served any clients during the previous 12 months are not eligible for renewal.

The Secretary may issue a provisional license for a period up to six months to a person obtaining the initial license for a facility. The licensee must demonstrate substantial compliance prior to being issued a full license.

A provisional license for a period not to exceed six months may be granted by the Secretary to a person who is temporarily unable to comply with a rule when the noncompliance does not present an immediate threat to the health and safety of the individuals in the licensable facility. During this period the licensable facility shall correct the noncompliance based on a plan submitted to and approved by the Secretary. A provisional license for an additional period of time to meet the noncompliance may not be issued.

(e1) Except as provided in subsection (e2) of this section, the Secretary shall not enroll any new provider for Medicaid Home or Community Based services or other Medicaid services, as defined in 42 C.F.R. 440.90, 42 C.F.R. 440.130(d), and 42 C.F.R. 440.180, or issue a license for a new facility or a new service to any applicant meeting any of the following criteria:

1. The applicant was the owner, principal, or affiliate of a licensable facility under Chapter 122C, Chapter 131D, or Article 7 of Chapter 110 that had its license revoked until 60 months after the date of the revocation.

2. The applicant is the owner, principal, or affiliate of a licensable facility that was assessed a penalty for a Type A or Type B violation under Article 3 of this Chapter, or any combination thereof, and any one of the following conditions exist:
   a. A single violation has been assessed in the six months prior to the application.
   b. Two violations have been assessed in the 18 months prior to the application and 18 months have not passed from the date of the most recent violation.
   c. Three violations have been assessed in the 36 months prior to the application and 36 months have not passed from the date of the most recent violation.
(3) The applicant is the owner, principal, or affiliate of a licensable facility that had its license summarily suspended or downgraded to provisional status as a result of violations under G.S. 122C-24.1(a) until 60 months after the date of reinstatement or restoration of the license.

(4) The applicant is the owner, principal, or affiliate of a licensable facility that had its license summarily suspended or downgraded to provisional status as a result of violations under Article 1A of Chapter 131D until 60 months after the date of reinstatement or restoration of the license.

(e2) The Secretary may enroll a provider described in subsection (e1) of this section if any of the following circumstances apply:

(1) The applicant is an area program or county program providing services under G.S. 122C-141, and there is no other provider of the service in the catchment area.

(2) The Secretary finds that the area program or county program has shown good cause by clear and convincing evidence why the enrollment should be allowed.

(e3) For purposes of subdivision (e1)(2), fines assessed prior to October 23, 2002, are not applicable to this provision. However, licensure or enrollment shall be denied if an applicant's history as a provider under Chapter 131D, Chapter 122C, or Article 7 of Chapter 110 is such that the Secretary has concluded the applicant will likely be unable to comply with licensing or enrollment statutes, rules, or regulations. In the event the Secretary denies licensure or enrollment under this subsection, the reasons for the denial and appeal rights pursuant to Article 3 of Chapter 150B shall be given to the provider in writing.

(f) Upon written application and in accordance with rules of the Commission, the Secretary may for good cause waive any of the rules implementing this Article, provided those rules do not affect the health, safety, or welfare of the individuals within the licensable facility. Decisions made pursuant to this subsection may be appealed to the Commission for a hearing in accordance with Chapter 150B of the General Statutes.

(g) The Secretary may suspend the admission of any new clients to a facility licensed under this Article where the conditions of the facility are detrimental to the health or safety of the clients. This suspension shall be for the period determined by the Secretary and shall remain in effect until the Secretary is satisfied that conditions or circumstances merit removal of the suspension. In suspending admissions under this subsection, the Secretary shall consider the following factors:

(1) The degree of sanctions necessary to ensure compliance with this section and rules adopted to implement this subsection, and

(2) The character and degree of impact of the conditions at the facility on the health or safety of its clients.

A facility may contest a suspension of admissions under this subsection in accordance with Chapter 150B of the General Statutes. In contesting the suspension of admissions, the facility must file a petition for a contested case within 20 days after the Department mails notice of suspension of admissions to the licensee.

(h) The Department shall charge facilities licensed under this Chapter a nonrefundable annual base license fee plus a nonrefundable annual per-bed fee as follows:
<table>
<thead>
<tr>
<th>Type of Facility</th>
<th>Number of Beds</th>
<th>Base Fee</th>
<th>Per-Bed Fee</th>
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<tr>
<td>Facilities (non-ICF/MR):</td>
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<td>$215.00</td>
<td>$0</td>
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<tr>
<td></td>
<td>1 to 6 beds</td>
<td>$305.00</td>
<td>$0</td>
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<td></td>
<td>More than 6 beds</td>
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<tr>
<td>ICF/MR Only:</td>
<td>1 to 6 beds</td>
<td>$845.00</td>
<td>$0</td>
</tr>
<tr>
<td></td>
<td>More than 6 beds</td>
<td>$800.00</td>
<td>$17.50</td>
</tr>
</tbody>
</table>

(i) (Applicable to social setting detoxification facilities licensed on and after August 7, 2003) A social setting detoxification facility or medical detoxification facility subject to licensure under this Chapter shall not deny admission or treatment to an individual based solely on the individual's inability to pay. (1899, c. 1, s. 60; Rev., s. 4600; C.S., s. 6219; 1945, c. 952, s. 41; 1957, c. 100, ss. 1, 4; 1963, c. 813, s. 1; c. 1166, s. 7; 1965, c. 1178, ss. 1-3; 1969, c. 954; 1973, c. 476, ss. 133, 152; 1977, c. 679, s. 7; 1981, c. 51, s. 3; 1983, c. 718, ss. 1, 4; 1985, c. 589, s. 2; 1985 (Reg. Sess., 1986), c. 863, s. 8; 1987, c. 345, ss. 3, 4; 1989, c. 625, s. 6; 2000-55, s. 3; 2002-164, s. 4.1; 2003-284, s. 34.8(a); 2003-294, s. 2; 2003-390, s. 3; 2005-276, ss. 41.2(h), 10.40A(d); 2006-66, s. 10.23; 2009-451, s. 10.76(f).)