



NC DEPARTMENT OF
**HEALTH AND
 HUMAN SERVICES**
 Division of Mental Health, Developmental
 Disabilities and Substance Use Services

ROY COOPER • Governor
KODY H. KINSLEY • Secretary
MARK T. BENTON • Chief Deputy Secretary for Health
KELLY CROSBIE • Director

December 11, 2023

MEMORANDUM

TO: Brian Liebman, J.D., Counsel
 Rules Review Commission
 Office of administrative Hearings

FROM: W. Denise Baker, Rulemaking Coordinator
 Commission for MH/DD/SAS and Division of MH/DD/SUS

RE: Request for Extension of Review of 10A NCAC Subchapter 27G
 G.S. 150B-21.3, Periodic Review and Expiration of Existing Rules

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I've received notice of your intent to recommend that the Rules Review Commission (RRC) deny the joint request for an extension of the scheduled review of the rules in Subchapter 27G submitted on behalf of the Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services (Commission for MH/DD/SAS) and the Division of Mental Health, Developmental Disabilities, and Substance Use Services (DMH/DD/SUS). For the reasons below, I respectfully request that you reconsider your decision and recommend instead that the Rules Review Commission (RRC) approve the request.

G.S. 150B-21.3A(d) requires the Rules Review Commission (RRC) to establish a schedule for the review and readoption of existing rules on a decennial basis assigning each Title of the North Carolina Administrative Code a date by which the review is to be completed. It requires that the RRC consider the scope and complexity of rules subject to the review as well as the resources needed to conduct the same. Finally, it grants the RRC broad authority to modify the schedule and extend the time for review in appropriate circumstances. While the statute does not bar the scheduling of the rules within Subchapter 27G for review a mere five years after the initial review was completed and the Determination Report approved by the RRC, it does grant the RRC broad authority to modify the schedule and extend the time for review under appropriate circumstances.

At its core, this review and readoption process involves a minimum of two schedules. The first schedule addresses the timeframe in which an agency must review its existing rules, publish its Initial Determination Report, consider all comments received during publication, and submit its Final Determination Report, inclusive of the agency's responses to all public comments, to the RRC. The second schedule addresses a timeframe by which the agency must readopt all existing rules determined necessary coincident with that review. It is this first schedule, which involves the agency's initial review, that is at issue.

NC DEPARTMENT OF HEALTH AND HUMAN SERVICES • DIVISION OF MENTAL HEALTH, DEVELOPMENTAL DISABILITIES AND SUBSTANCE USE SERVICES

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Of course, a review of the almost 200 existing rules in Subchapter 27G would likely permit a determination of whether each rule is Necessary or Unnecessary in light of the mental health, developmental disability, and substance use service delivery system as it now exists. We could then readopt all rules determined Necessary in accordance with the second schedule, the Readoption Schedule, developed in consultation with staff of the RRC. However, this approach would then require that, as legislatively mandated system changes are implemented, we then again amend existing rules or adopt new ones to accommodate those changes. As noted in the joint request submitted by the Commission for MH/DD/SAS and the DMH/DD/SUS, and reiterated below, the review of Subchapter 27G is complex, and the planned system changes extensive.

Rule 26 NCAC 05 .0204, *Extension of Time*, permits an agency head to submit a written request for an extension of time to file its Determination Report with the RRC. The Commission for MH/DD/SAS and the DMH/DD/SUS request a modification of the scheduled review of the rules in Subchapter 27G based, in part, upon consideration of the following factors:

1. Collectively, the rules in Chapter 27 govern mental health, developmental disabilities, and substance use community facilities and services while the rules in Subchapter 27G govern mental health, developmental disabilities, and substance use services, the Local Management Entities/Managed Care Organizations which currently oversee delivery of these programs and services, as well as the facilities and agencies providing the same. The rules in Subchapter 27G also govern the licensure process implemented by the Division of Health Service Regulation (DHSR) in accordance with G.S. § 122C. Subchapter 27G includes not only general rules (i.e., core rules) governing all mental health, developmental disabilities, and substance use services but also program specific rules applicable to specific programs and services (e.g., Substance Use Intensive Outpatient Program) as well as programs and facilities governing more than one disability type. Consequently, a review of the rules in Subchapter 27G is somewhat complex not only in terms of subject matter, but also given that it involves, at a minimum, staff of the DMH/DD/SUS, members of the Commission, staff of DHSR, and consultation with staff of the recently established Division of Child and Family Well-being as these rules impact the scope of work of each.
2. The DMH/DD/SUS and the Division of Health Benefits are collectively engaged in the implementation of the Centers for Medicare and Medicaid Services 1115 Substance Use Disorder Demonstration Waiver. This will require amendment of a minimum of eight existing licensure rules as well as adoption of at least five new rules governing the licensure process. It is not feasible that these rules be amended and the new the new rules adopted prior to completion of the scheduled July 2024 review of Subchapter 27G. As such, once reviewed per this scheduled review, and then readopted per a readoption schedule, those readopted rules will require amendment as implementation of this Waiver unfolds. Coincident with planning for the implementation of this Waiver, the divisions are also in consultation regarding the creation of disability-specific rules in an effort to more effectively address the unique service needs pertinent to each. Ultimately, at a minimum, amendment of readopted rules will result in duplication of effort and impact the workload of the Commission for MH/DD/SAS, the DMH/DD/SUS, and staff supporting the RRC.
3. The community mental health, developmental disabilities, and substance abuse service delivery system is in a period of transition as we prepare to move to a Tailored Plan approach for the delivery of State-funded services.

G.S. § 150B-21.3A(d)(1) grants the Rules Review Commission broad authority to modify the schedule established for the review and readoption of existing rules on a decennial basis and extend the time for review in *appropriate circumstances*. While the statute does not define *appropriate circumstances*, it

does require the RRC to, in establishing the schedule, consider the scope and complexity of the rules subject to this review as well as staff resources required to conduct the review suggesting that these factors are, at a minimum, among those to be considered in determining when the RRCs broad authority to modify the schedule might be exercised. Subchapter 27G, the largest of Chapter 27, contains a number of core rules applicable to community mental health, developmental disabilities, and substance use services and impact the work of the Commission as well as four divisions. Equally important, conducting a review of the rules in Subchapter 27G and implementing a readoption plan while legislatively mandated system changes are underway will likely require that we again engage in extensive rulemaking once those changes are completed. A modification of the scheduled review of Subchapter 27G permits a review of those rules informed by system changes and helps avoid the need to further amend rules readopted per a readoption schedule developed following this scheduled initial review. Finally, with the exception of Subchapter 27G, the remaining rules in Chapter 27 are scheduled for review beginning in February 2025 through April 2026 which permits reviews 7, 8, and 10 years following their initial review. Our request for an extension of the scheduled review of Subchapter 27G also permits their review closer to that provided from the remaining rules governing the community service delivery system.

In conclusion, the factors listed above seem consistent with *appropriate circumstances* under which the RRC may exercise its broad authority to modify the existing review schedule. Consequently, for the aforementioned reasons, I respectfully request that scheduled review of the rules in Subchapter 27G be modified and rescheduled for July 2026 to permit the review of these rules coincident with that of the remaining rules in Chapter 27. Please do not hesitate to contact me at denise.baker@dhhs.nc.gov should you have additional questions related to this request.

cc: Kody Kinsley (via electronic mail)
Commission (via electronic mail)
Mark Benton (via electronic mail)
Mark Payne (via electronic mail)
W. Denise Baker (via electronic mail)
Jessica Macari (via electronic mail)
Pam Scott (via electronic mail)
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