



**STATE OF NORTH CAROLINA
OFFICE OF ADMINISTRATIVE HEARINGS**

July 7, 2023

Secretary Kody H. Kinsley
Department of Health and Human Services
Sent via email only: kody.kinsley@dhhs.nc.gov

Re: Emergency Rule Filing, 10A NCAC 14E

Dear Secretary Kinsley:

On June 20, 2023, the Department of Health and Human Services (“DHHS”) filed 14 emergency rules to implement Session Law 2023-14. For the remaining 24 rules governing abortion in 10A NCAC 14E, DHHS submitted a filing pursuant to G.S. §§ 150B-21.5 and 150B-21.20 to update the statutory authority in the history notes of those rules. However, the Department failed to address the criteria required in G.S. § 150B-21.7 when the law authorizing an agency to adopt rules is repealed. Upon notification, DHHS submitted a filing pursuant to G.S. 150B-21.7 to accompany its G.S. §§ 150B-21.5 and 150B-21.20 filings. Upon a determination that the new statutory authority for these 24 rules was not “substantially the same,” those rules were removed from the Code. Now the Department files those 24 rules as emergency rules, pointing to the removal of these rules from the Code as the basis for emergency rulemaking.

G.S. 150B-21.1A(a) sets forth a two-part test to engage in emergency rulemaking: (1) adherence to the notice and hearing requirements of G.S. 150B, Article 2A, Part 2 are contrary to the public interest and (2) the immediate adoption of the rule is required by a serious and unforeseen threat to the public health or safety.

The Department’s failure to choose the best path to transition from its existing rules to new rules implementing Session Law 2023-14 does not negate importance of the public’s due process rights. The Department’s argument for emergency rules hinges upon the removal of its rules from the Code, a product of the Department’s own actions.

Donald R. van der Vaart, Director
Chief Administrative Law Judge

Fred G. Morrison, Jr.
Senior Administrative Law Judge

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When a law granting rulemaking authority is repealed, G.S. § 150B-21.7 sets forth an analysis for determining whether the rules remain in the Code. The test is whether the authority to adopt rules is “substantially the same.” If the two laws are substantially similar, the agency can make that showing under G.S. § 150B-21.7 and then file a request for the history notes to be updated under G.S. 150B-21.5. In the event the laws are not substantially similar, “the rule adopted under the repealed law is repealed as of the date the law is repealed.”¹ In other words, the APA contemplates the removal of rules from the Code following the repeal of a law granting rulemaking authority when another law does not directly replace it. That is what happened here. Even so, the APA does not provide emergency rulemaking as a path forward in that situation. Instead, the APA provides temporary rulemaking with a notice and comment period as the path forward when an agency is proposing rules in response to a new Session Law.²

At its heart, this filing is still seeking to implement Session Law 2023-14. Session Law 2023-14, Section 2.4 states: “No later than October 1, 2023, the Department of Health and Human Services shall adopt the rules necessary to administer [*Part II* of the Session Law.]” DHHS cites this provision of the Session Law in the history note of each rule submitted. In fact, DHHS has already filed these rules as temporary rules with a comment period ending August 4. If approved by the Rules Review Commission, the temporary rules will be in effect before October. It is not in the public’s interest to waive citizens’ due process rights by engaging in rulemaking with no notice or comment when there is more than sufficient time to allow for public input.

Since the filing fails the first part of the test for emergency rulemaking, there is no need to engage in any analysis of the second part of the test in G.S. 150B-21.1A(a). The rules submitted by DHHS do not meet the criteria for emergency rulemaking in G.S. 150B-21.1A(a).

In Box 8 of its findings of need form, DHHS cites G.S. 143B-10, Session Law 2023-14, Part I, Sec. 1.1 and Part II, Section 2.4 as specific statutory authority to engage in emergency rulemaking. None of the cited statutes specifically grant DHHS authority to promulgate emergency rules. G.S. 143-10 generally describes the power of heads of principal State departments to adopt rules in accordance with G.S. 150B. Part I, Sec. 1.1 of the Session Law repeals DHHS’s current rulemaking authority. Part II, Section 2.4 of the Session Law does grant DHHS the authority to adopt rules by October 1, 2023, though the General Assembly did not specifically provide a grant of authority to engage in emergency rulemaking.

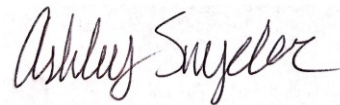
¹ G.S. 150B-21.7(a).

² See G.S. § 150B-21.1(a)(2).

In the event DHHS plans to overrule this objection and enter these rules into the Code pursuant to G.S. 150B-21.1A(b), please note emergency rules must be signed by the head of the agency prior to inclusion in the Code.³ This signature authority can be delegated as allowed by G.S. § 143B-10 which states: “the head of each principal State department may assign or reassign any function vested in him or in his department to any subordinate officer or employee of his department.” Here, the authority to adopt rules was assigned by Secretarial Directive to the Chief Deputy Secretary with the ability to further “*specifically* delegate this authority to adopt rules as deemed necessary and appropriate.” (Emphasis added). Along with the emergency rule filing, a *general* delegation dated June 27, 2023 was provided, further delegating all duties delegated to the Chief Deputy Secretary to the Deputy Secretary for External Affairs. The general delegation does not specifically mention the authority to adopt rules. Further, based upon the plain reading of G.S. 140B-10, only the Secretary has the duty to delegate duties granted specifically to the head of a principal department, such as the authority to adopt emergency rules.

The rules filed by DHHS do not meet the criteria for emergency rulemaking required in G.S. 150B-21.1A. Please respond to this letter in accordance with the provisions of G.S. 150B-21.1A(b).

Sincerely,

A handwritten signature in black ink that reads "Ashley Snyder". The signature is written in a cursive style with a large, looped initial "A".

Ashley Snyder
Codifier of Rules

cc: Nadine Pfeiffer, Rulemaking Coordinator, DHHS
Mark T. Benton, Chief Deputy Secretary, DHHS
Jonathan Kappler, Deputy Secretary for External Affairs

³ G.S. §§ 150B-21.1A(b); 150B-21.19(2).