



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

June 22, 2023

Secretary Kody H. Kinsley  
Department of Health and Human Services  
**Sent via email only: [kody.kinsley@dhhs.nc.gov](mailto: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 emergency rules to implement Session Law 2023-14. The Administrative Procedure Act provides a path for agencies to quickly implement recent changes enacted by the General Assembly: temporary rulemaking. *See* G.S. 150B-21.1(a)(2). The need to implement a change in the law is not, in and of itself, a sufficient reason to engage in emergency rulemaking. Instead, to engage in emergency rulemaking, an agency would need to meet the criteria in G.S. 150B-21.1A(a) or provide specific statutory authority promulgate emergency rules.<sup>1</sup>

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.

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 on its form and in the history note of each rule submitted. The agency would have sufficient time to engage in temporary rulemaking by the October 1, 2023

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<sup>1</sup> *See e.g.*, S.L. 2020-3, Sec. 4.38(e) (“State agencies may adopt emergency rules for the implementation of this section in accordance with G.S. 150B-21.1A.”)

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

**Fred G. Morrison, Jr.**  
Senior Administrative Law Judge

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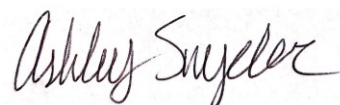
deadline<sup>2</sup> to adopt rules necessary to administer Part II of the Session Law. In fact, DHHS has already filed these rules as temporary rules with a comment period ending July 20. If approved by the Rules Review Commission, the temporary rules will be in effect before October. It is not in the 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, 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. Additionally, the effective date of Part II, Section 2.4 is July 1, 2023. When DHHS adopted these rules on June 19, 2023, Section 2.4 was not yet in effect to grant authority to adopt these 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,



Ashley Snyder  
Codifier of Rules

cc: Nadine Pfeiffer, Rulemaking Coordinator, DHHS  
Mark T. Benton, Chief Deputy Secretary, DHHS

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<sup>2</sup> Even assuming *arguendo* DHHS needs rules in place by July 1, 2023, the agency had sufficient time to engage in the temporary rulemaking process since the enactment of the Session Law on May 16, 2023. For example, DHHS could have adopted the rules on May 18 with a public comment period running May 19 – June 12, putting the rules before the Rules Review Commission on June 15. DHHS acknowledges in its statement it was aware of the proposed Session Law changes as soon as May 2.