

TITLE 10A – DEPARTMENT OF HEALTH AND HUMAN SERVICES

Notice is hereby given in accordance with G.S. 150B-21.2 that the Social Services Commission intends to adopt the rules cited as 10A NCAC 10 .0311-.0313; amend the rules cited as 10A NCAC 10 .0102, .0203, .0308-.0310, .0506, .0803, .0910; and repeal the rules cited as 10A NCAC 10 .0401-.0402, .0603, .0703.

Proposed Effective Date: *November 1, 2011*

Public Hearing:

Date: *August 9, 2011*

Time: *10:00 a.m.*

Location: *Albemarle Building, Division of Social Services, Conference Room 819-E (8th Floor), 325 Salisbury Street, Raleigh, NC 27603*

Reason for Proposed Action: *Recommendations were made from a work group consisting of DCD staff, local agency staff and community partners to move responsibility for issuance of sanctions from the state to the county level. The rules did not include a clear appeals process, therefore language setting out that process is proposed. Also proposed are changes to the existing rules to ensure the health and safety of children by clarifying rules governing denial or termination of funding to facilities subject to administrative action under G.S. 110-85, et seq. Changes are also proposed to comport with the transfer of authority to regulate certified developmental day facilities from Division of Mental Health to the Division of Child Development.*

The following rules are proposed for adoption:

10A NCAC 10 .0311 – *Proposed new rule. This rule sets out the means for a provider to appeal adverse actions taken by local purchasing agencies.*

10A NCAC 10 .0312 – *Proposed new rule. This rule establishes an appeal panel to review local purchasing agency determinations.*

10A NCAC 10 .0313 – *Proposed new rule. This rule sets out the effect of administrative actions issued by the Division of Child Development with respect to the Subsidized Child Care Program.*

The following rules are proposed for amendment:

10A NCAC 10 .0102 – *This rule is being expanded to add the definition of "Owner" to correspond with Child Care Commission rules and to ensure that sanctioned owners of facilities are not able to reincorporate to avoid imposition of sanctions for fraud.*

10A NCAC 10 .0203 – *This rule will need modification to comply with legislative changes made in the last legislative session which moved the Developmental Day*

Rules from the Division of Mental Health to the Division of Child Development.

10A NCAC 10 .0308 – *This rule has been modified in order to: (1) increase accessibility for eligible families; (2) protect the State's interest from fraud perpetrated by providers and recipients of child care; and (3) clarify the appeals procedure and afford individuals sanctioned under this Rule with due process.*

10A NCAC 10 .0309 – *This rule has been modified in order to: (1) protect recipients' and providers' interests in being reimbursed for underpayments by the local purchasing agencies; (2) clarify means of recouping funds from recipients and providers through court action for overpayments; (3) protect the State's interest in seeing that funds are properly expended; (4) require the local purchasing agencies to quickly reimburse for underpayments; and (5) clarify appeals process to afford recipients and providers with due process.*

10A NCAC 10 .0310 – *Need to amend Paragraph (a) to comply with requirements of all federal grants used to fund the Subsidized Child Care Program.*

10A NCAC 10 .0506 – *Need to change Paragraph (b) to comport with all federal grants' record retention requirements.*

10A NCAC 10 .0803 – *This rule is being expanded to require local purchasing agencies to deny or revoke approval to individuals who are placed on the State's Responsible Individuals List (RIL). This will ensure that children are cared for in a safe and healthy environment.*

10A NCAC 10 .0910 – *This rule needs modification now that the program for special needs children is no longer within the local mental health agencies.*

The following rules are proposed for repeal:

10A NCAC 10 .0401, .0402 – *These rules are no longer required as the grant funds are governed by their specific terms.*

10A NCAC 10 .0603 – *New rules (.0311 and .0312) are being proposed to clarify the appeal process for providers and/or recipients' termination or denial pursuant to 10A NCAC 10 .0602. The new rules will render this rule obsolete.*

10A NCAC 10 .0703 – *New rules (.0311 and .0312) are being proposed to clarify the appeal process for providers and/or recipients' termination or denial pursuant to 10A NCAC 10 .0702. These new rules will render this rule obsolete.*

Procedure by which a person can object to the agency on a proposed rule: *Anyone wishing to comment on these proposed rules or would like to request copies of the rules, should contact Dedra Alston, Rule-making Coordinator, NC Division of Child Development, 2201 Mail Service Center, Raleigh, NC*

27699-2201, at (919) 890-7060 or Dedra.Alston@dhhs.nc.gov.

Comments may be submitted to: Dedra Alston, 2201 Mail Service Center, Raleigh, NC 27699-2201; phone (919) 890-7060; fax (919) 662-4568; email Dedra.Alston@dhhs.nc.gov

Comment period ends: August 30, 2011

Procedure for Subjecting a Proposed Rule to Legislative Review: If an objection is not resolved prior to the adoption of the rule, a person may also submit written objections to the Rules Review Commission after the adoption of the Rule. If the Rules Review Commission receives written and signed objections after the adoption of the Rule in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the day following the day the Commission approves the rule. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-431-3000.

Fiscal Impact:

- State
- Local
- Substantial Economic Impact (>\$3,000,000)
- None

CHAPTER 10 - SUBSIDIZED CHILD CARE RULES

SECTION .0100 - IDENTIFYING AND GENERAL INFORMATION

10A NCAC 10 .0102 DEFINITIONS

For the purpose of this Chapter, unless the context of the rule clearly indicates a different meaning, the terms listed in this Rule are defined as follows:

- (1) "Department" means the Department of Health and Human Services.
- (2) "Secretary" means the Secretary of the Department of Health and Human Services.
- (3) "Division" means the Division of Child Development, Development and Early Education, Department of Health and Human Services, located

at 319 Chapanoke Road, Suite 120, Raleigh, North Carolina 27603.

- (4) "Director" means the Director of the Division of Child ~~Development~~. Development and Early Education.
- (5) "Local Purchasing Agency" means the local agency responsible for administering the state's subsidized child care program.
- (6) "Owner" means any person with a five percent or greater equity interest in a child care center, family child care home, or nonlicensed child care home.
- (7) "Provider" means the owner of a child care center, family child care home, or nonlicensed child care home.
- (8) "Recipient" means the parent or responsible adult approved for subsidized child care services.
- (9) "Subsidized Child Care Program" means the administrative, programmatic and fiscal activities related to the use of public funds to pay for child care services for children of needy families.

Authority G.S. 143B-153(2a).

SECTION .0200 - REQUIREMENTS FOR THE PURCHASE OF CHILD CARE

10A NCAC 10 .0203 RATES FOR SUBSIDIZED CHILD CARE

(a) The payment rate for child care centers, family child care homes, and nonlicensed child care homes shall be established by the Department in accordance with the annual appropriations act.

(b) Centers, as defined in G.S. 110-86(3), which are certified as developmental day centers by the Division of Division of Child Development and Early Education and serve children who meet the definition of special needs set forth in 10A NCAC 10 .0910 shall be exempt from the provisions of Paragraph (a) of this Rule. These centers shall be paid the net cost study rates established by the Department of Health and Human Services' Rate Setting Oversight Committee for developmental day centers for children with special needs. For typically developing children enrolled in developmental day centers, the net cost study rates shall be established by the Department of Health and Human Services' Rate Setting Oversight Committee. These rates shall exclude those costs associated exclusively with serving children with special needs.

(c) Any approved child care provider not included in Paragraph (b) of this Rule who provides care to children who meet the definition of special needs set forth in 10A NCAC 10 .0910 may be paid a supplemental rate above the provider's approved daily care rate for a particular age group. The supplemental rate shall be based on actual additional documented costs incurred by the provider in serving the child with special needs. The costs shall be determined by the early intervention specialist, the local education agency's exceptional children program specialist, the local purchasing agency, and the provider based on the plan developed to meet the child's individual needs.

(d) The reimbursement of additional fees as charged by centers shall be limited to registration fees. The payment rate for registration fees shall be determined by the Department in accordance with the annual appropriations act. Registration fees may not be paid more than twice per year per child regardless of the type of center.

(e) Purchasing agencies may negotiate with child care center providers for purchase of child care services at payment rates lower than those prescribed by this Rule, only with approval from the Division. Approval shall be granted if it can be determined that a non-negotiated payment rate would have a negative impact on the purchasing agency's ability to purchase subsidized child care services, based on the following factors:

- (1) the number of children on the waiting list for subsidized child care services;
- (2) whether the non-negotiated rates exceed the rates for services paid by private paying families in the service area; and
- (3) the amount of subsidized child care funds available.

(f) Child care services funds shall not be used to pay for services provided by the Department of Health and Human Services, Division of Public Health or the Department of Public Instruction, Division of Exceptional Children's Services for that portion of the service delivery costs which are reimbursed by the Division of Public Health or Department of Public Instruction.

Authority G.S. 143B-153(8)a.

SECTION .0300 - REQUIREMENTS FOR CHILD CARE SERVICE FUNDS

10A NCAC 10 .0308 SANCTIONS AND APPEALS

FOR FRAUDULENT MISREPRESENTATION

(a) The local purchasing agency shall impose sanctions for fraudulent misrepresentation when a person, whether a provider or recipient of child care

subsidies, or someone claiming to be a provider or recipient of child care subsidies, does the following:

- (1) With the intent to deceive, that person makes a false statement or representation regarding a material fact, or fails to disclose a material fact; and
- (2) As a result of the false statement or representation or the omission, that person obtains, attempts to obtain, or continues to receive a child care subsidy for himself or herself or for another person.

(b) The local purchasing agency shall impose the following sanctions for fraudulent misrepresentation in addition to requiring the recipient or provider to repay the amount of child care subsidy for which they were ineligible to receive:

- (1) After the first incidence of fraudulent misrepresentation by a recipient, the recipient shall be ineligible to receive subsidized child care services until overpayment is recouped in full or, if the recipient is not capable of paying in full the local purchasing agency shall enter into a voluntary repayment agreement with the recipient if the recipient so desires;
- (2) After the second incidence of fraudulent misrepresentation by a recipient, the recipient shall be ineligible to participate in the subsidized child care program for three months; and
 - (A) _____ shall repay the overpayment in full; or
 - (B) _____ if the recipient is not capable of paying in full, the local purchasing agency may enter into a new voluntary repayment agreement with the recipient.
- (3) After the third incidence of fraudulent misrepresentation by a recipient, the recipient shall be permanently ineligible to participate in the subsidized child care program and shall repay the overpayment in full;
- (4) _____ After the first incidence of fraudulent misrepresentation by a provider, the provider shall not be paid with subsidized child care funds for any new children that enroll in the provider's program for 12 months; and

- (A)_____the provider shall repay the overpayment in full; or
 - (B)_____if the provider cannot make full repayment, the local purchasing agency shall enter into a voluntary repayment agreement with the provider.
- (5) After the second incidence of fraudulent misrepresentation by a provider, the provider shall repay the overpayment in full, shall be permanently ineligible to participate in the subsidized child care program, and shall not be reimbursed for any services provided to children enrolled in the provider's program from the date of notification of sanction in accordance with G.S. 150B-23(c).
- (c) If a recipient or provider enters into a voluntary repayment agreement and fails to comply with terms of that agreement, eligibility to participate in the subsidized child care program shall cease until repayment is made in full or the recipient or provider and the local purchasing agency agree to modify the voluntary repayment agreement.
- (d) Notwithstanding Subparagraphs (b)(4), (5), and (6) of this Rule, the recipient or provider shall be permanently ineligible to participate in the subsidized child care program if:
- (1)_____the total dollar amount of the fraudulent misrepresentation exceeds ten thousand dollars (\$10,000); or
 - (2) the recipient or provider is convicted of fraudulent misrepresentation pursuant to G.S. 110-107.
- (e) Sanctions pursuant to this Rule shall be effective 10 days from the date of notice of the sanction. Appeal of a sanction shall not stay the termination of payments under this Rule.
- (f) A child care provider may appeal any sanction imposed in Paragraph (b) of this Rule pursuant to 10A NCAC 10 .0311 and 10A NCAC 10. 0312. A recipient may appeal any sanction imposed in Paragraph (b) of this Rule by following the appeals procedures pursuant to G.S. 108A-79.
- (g) When a court of competent jurisdiction finds a recipient or provider guilty of fraudulent misrepresentation pursuant to Subparagraph (d)(2) of this Rule, the sanction imposed is not subject to appeal under this Section.
- (h) Nothing in this Rule should be construed as limiting child care services pursuant to 10A NCAC 10 .0906.

Authority G.S. 143B-153.

10A NCAC 10 .0309 CORRECTION OF OVERPAYMENTS AND UNDERPAYMENTS

(a) A local purchasing agency that makes an overpayment as a result of inadvertent error or fraudulent misrepresentation by the recipient or provider as described in Rule .0308(a) of this Section may recoup the amount of the overpayment as follows:

- (1) The local purchasing agency may recoup the overpayment from the recipient if the recipient at the time the overpayment occurred was at least 18 years of age or older; and
- (2) Overpayments shall be collected by:
 - (A) voluntary repayment by the recipient or provider;
 - (B) involuntary repayment by pursuing court action; or
 - (C)_____wage garnishment as permitted by law.

(b) A local purchasing agency that makes an overpayment due to agency error in complying with program rules and statutes shall correct the overpayment by adjustment through the state's subsidized child care payment system.

(c) A local purchasing agency that makes an underpayment due to agency or provider error in complying with program rules and statutes shall correct the underpayment within 30 days of discovery of the error, but in no event shall the local purchasing agency be required to correct the underpayment if it is discovered more than 45 days from the date of the error.

(d) Notwithstanding Paragraphs (b) and (c) of this Rule, a local purchasing agency shall correct an overpayment or underpayment at any time, as required by the Division of Child Development and Early Education.

(e) Appeals pursuant to this Rule shall be in accordance with 10A NCAC 10 .0311 and 10A NCAC 10 .0312.

Authority G.S. 143B-153.

10A NCAC 10 .0310 REQUIREMENTS FOR THE ADMINISTRATION OF THE SUBSIDIZED CHILD CARE PROGRAM

(a) Any agency that administers child care services funding through the state's subsidized child care program shall maintain records of administration of the program according to the DHHS Records Retention and Disposition Schedule for Grants set forth by the North Carolina Department of Health and Human

Services Office of the Controller based on individual grant requirements, or until all audits begun within the retention period are complete.

(b) Any agency that administers the state's subsidized child care program shall provide records of administration of the program upon request for review by local, state, or federal agency representatives.

(c) Upon review of agency records of administration of the state's subsidized child care program, if it is found that child care services funding was not spent in accordance with applicable state or federal regulations, the Division may require the agency to pay back funds improperly spent.

(d) Any agency that both administers the state's subsidized child care program and is a provider of subsidized child care services shall develop and implement a conflict of interest policy that shall include provision for:

- (1) parental choice for recipients of subsidized child care; and
- (2) separate management of the subsidized child care program and the child care facility owned or operated by the agency.

Authority G.S. 143B-153(2a).

10A NCAC 10 .0311 PROVIDER APPEAL TO LOCAL PURCHASING AGENCY

(a) Unless otherwise specified herein, any provider contesting an action by a local purchasing agency pursuant to this Chapter is entitled to an administrative hearing and judicial review in accordance with G.S. 150B-23, however, prior to filing a Petition for Contested Case Hearing, the provider or recipient wishing to contest such an action shall request an initial review with the local purchasing agency within 30 calendar days of effective date of the local purchasing agency action.

(b) The local purchasing agency must make a determination on the initial review within 10 calendar days of the request for an initial review. Within 30 calendar days of notice of the determination on the initial review by the local purchasing agency, the provider may request a local appeal hearing by the local purchasing agency.

(c) The local appeal hearing shall be held within five calendar days of when the request is received. The provider may petition the local purchasing agency, in writing, for a delay, but in no event shall the local appeal hearing be held more than 15 calendar days after the receipt of the request for hearing.

(d) The local purchasing agency must serve a written statement of decision within 10 calendar days following the local hearing.

(e) The local purchasing agency shall include with its written statement of decision instructions for appealing its decision.

(f) Notice under this Section shall be in accordance with G.S. 150B-23.

(g) A provider may appeal the written statement of decision of the local purchasing agency to the Division of Child Development and Early Education Subsidy Services Review Panel by filing a notice of appeal within 15 calendar days of receipt of the written statement of decision.

Authority G.S. 143B-153.

10A NCAC 10 .0312 APPEAL TO DIVISION OF CHILD DEVELOPMENT AND EARLY EDUCATION SUBSIDY SERVICES REVIEW PANEL

(a) Definitions. _The following definitions apply in this Rule:

(1) "Appealing Party"__means the Provider or Recipient, as defined in 10A NCAC 10 .0102.

(2) "File or Filing"__means personal delivery, delivery by certified mail, or delivery by overnight express mail to the current Chief of Subsidy Services Section (Chief), North Carolina Division of Child Development and Early Education (Division), 2201 Mail Service Center, Raleigh, NC 27699-2201. A document or paper is deemed filed as of the date it is delivered to the Chief. Filings addressed to a person other than the Division Director, or which fail to be filed within the time periods established by this Rule, or which otherwise fail to be filed in conformity with the rules in this Section shall be considered as improper filings and denied.

(3) "Subsidy Services Appeals Panel"__means the North Carolina Division of Child Development and Early Education internal review panel established under this Rule.

(b) Appeals Panel. __The State Subsidy Services Appeals Panel (Panel) is established. _The Panel shall consist of five members appointed by the Chief. The Chief shall determine the qualifications of the Panel members. _Panel members serve at the pleasure of the Chief.

(c) Who Can Appeal. The following persons may appeal to the Panel after having exhausted the appeals process at the appropriate Local Purchasing Agency:

- (1) A provider or recipient to whom a local purchasing agency has issued a sanction pursuant to 10A NCAC 10 .0308;
- (2) A provider whom a local purchasing agency has failed to approve for participation in or has terminated participation the subsidized child care program pursuant to Section .0600, of this Chapter;
- (3) A provider whom a local purchasing agency has failed to approve for participation in or has terminated participation the subsidized child care program pursuant to Section .0700, of this Chapter; and
- (4) A provider wishing to contest the determination of overpayment pursuant to 10A NCAC 10 .0309, of this Chapter.

(d) Hearing. All members of the Panel shall hear an appeal to the Panel. An appeal shall be filed with the Panel within 30 days of exhausting the appeals process at the local purchasing agency as described as follows:

- (1) The Chief shall notify the LPA that an appeal has been filed;
- (2) Upon notification of an appeal filed pursuant to this section, the LPA shall, within five days of the date of notification, forward to the Chief, with a copy to the appellant: a copy of its final decision; the signed agreement between the LPA and the provider or recipient, where applicable; and all supplementary documentation considered during the local appeals process; and
- (3) The Chief shall convene an impartial Panel, consisting of one representative for each Section of the Division and at least one alternate representative. Representatives will be chosen by the Section Chiefs of each Section of the Division.

(e) The Panel shall convene in closed session and shall maintain a record of their decision in the appeal and the reason(s) for their decision.

(f) The Panel shall vote on each specific item being appealed.

(g) Findings and decisions of the Panel shall be by majority vote.

(h) The Panel may obtain any form of technical assistance or consultation relevant to the appeal in conducting the administrative review.

(i) The Panel shall complete an administrative review and notify the appealing party and the LPA of its decision, in writing, within 20 business days of the Panel's receipt of the appeal record.

(j) Any decision may be delayed until a subsequent meeting if the Panel determines that it lacks sufficient information to render a decision at the initial administrative review.

(k) In all cases the administrative review decision shall be distributed within 10 business days of the decision being rendered.

(l) The appellant may appeal the administrative review decision by filing a petition for contested case pursuant to G.S. 150B-23 and in accordance with G.S. 110-94. Appeals from the State Subsidy Appeals Panel must be filed within 30 days of mailing of the Panel's decision to the parties.

(m) Decision. The Panel shall make a written decision on each appeal to the Panel within the time set by the Secretary. A decision may direct an LPA to take an action or to refrain from taking an action.

(n) Chapter 150B Appeal. A person who is dissatisfied with a decision of the Panel may commence a contested case under Article 3 of G.S. 150B. Notwithstanding G.S. 150B-2(1a), an LPA is considered an agency for purposes of the limited appeal authorized by this Rule. The Director of the North Carolina Division shall make a final decision in the contested case.

Authority G.S. 143B-153.

10A NCAC 10 .0313 EFFECT OF ADMINISTRATIVE ACTION ISSUED AGAINST PROVIDER

(a) All child care subsidy payments made pursuant to a Provider Agreement will terminate 45 days after issuance of an administrative action revoking, summarily suspending, or denying a license to operate a child care facility issued pursuant to G.S. 110-85.

(b) An appeal of an administrative action revoking, summarily suspending, or denying a license shall not stay the termination of approval to participate in the state's Subsidized Child Care Program. If under appeal, the maximum time period during which payments from the state's Subsidized Child Care Program can be made is 45 days from the date on the notice of the administrative action. A provider subject to administrative action as described in this Paragraph cannot be paid with subsidized child care funds for any new children enrolled after the date on the notice of the administrative action.

(c) A child care provider who has received an administrative action revoking or denying a license by the Division of Child Development, or who is currently

under summary suspension, shall be ineligible to participate in the state's Subsidized Child Care Program as a nonlicensed child care home.

Authority G.S. 143B-153.