RRC STAFF OPINION

PLEASE NOTE: THIS COMMUNICATION IS EITHER 1) ONLY THE RECOMMENDATION OF AN RRC STAFF ATTORNEY AS TO ACTION THAT THE ATTORNEY BELIEVES THE COMMISSION SHOULD TAKE ON THE CITED RULE AT ITS NEXT MEETING, OR 2) AN OPINION OF THAT ATTORNEY AS TO SOME MATTER CONCERNING THAT RULE. THE AGENCY AND MEMBERS OF THE PUBLIC ARE INVITED TO SUBMIT THEIR OWN COMMENTS AND RECOMMENDATIONS (ACCORDING TO RRC RULES) TO THE COMMISSION.

AGENCY: Medical Care Commission

RULE CITATION: 10A NCAC 13B .3801, .3903, .4103, .4104, .4106, .4305, .4603, .4801, .4805, .5102, .5105, .5406, .5408, .5411

RECOMMENDED ACTION:

Approve, but note staff's comment

X Object, based on:

X Lack of statutory authority (All Rules)

Unclear or ambiguous

Unnecessary

Failure to comply with the APA

Extend the period of review

COMMENT:

These rules set standards for the licensing of hospitals, and are before RRC as part of the agency's scheduled readoption. The rules cover a broad array of aspects including hospital staffing, administration, and the provision of medical care. Among other things, these rules include detailed requirements that hospitals hire and maintain certain personnel, job responsibilities and required credentials for such personnel, requirements and policy statements relating to the preservation of medical records, standards for the provision of emergency services, standards for organization of neonatal care, requirements for the establishment and review of safety standards for imaging services, requirements for the establishment and review of written infection control policies and procedures, and staffing and discharge requirements for inpatient rehabilitation facilities.

Brian Liebman
Commission Counsel
Issued August 5, 2022

It is staff's opinion that the set of rules before you exceeds the grasp of the agency's statutory authority. The Medical Care Commission ("MCC" or the "Commission") draws its rulemaking authority from G.S. 131E-79(a), which states: "The Commission shall promulgate rules **necessary to implement this Article**[,]" referring to Article 5 of Chapter 131E, titled the "Hospital Licensure Act."

Review of the Hospital Licensure Act reveals that while certain provisions of Article 5 go on to discuss *inter alia*, aspects of license enforcement, requirements for granting or denying hospital privileges, discharge from facilities, and confidentiality of medical records, the statute generally directs *the hospital*, rather than MCC, to develop the policies, procedures, and requirements that are a condition of licensure. Hospitals must submit any plans and specifications for their facilities to MCC upon application for a license, and MCC may request information related to hospital operations during the application process, but MCC is not empowered to specifically set those requirements, policies, and procedures by rule.

Moreover, the rules before you delve into issues that are not specifically governed by the Hospital Licensure Act, and as such cannot be "necessary to implement" those statutes. *Inter alia*, there is no statutory requirement that a hospital maintain the position of nurse executive (Rule .3801) or medical director (Rule .4104), or maintain certain levels of inpatient rehabilitation staffing (Rule .5408). There are no statutory requirements related to preservation of medical records, other than that they are confidential and are not public records under Chapter 132 (Rule .3903). There are no statutory requirements related to establishment of emergency services procedures (Rule .4103). The word "neonatal" does not appear within Article 5 (Rule .4305), nor does any reference to radiological services (Rules .4801 and .4805). Part 4 of Article 5 deals with discharge from hospitals, yet only makes requirements related to a patient's refusal to leave, and fair billing practices. There are no discharge criteria required by Article 5 (Rule .5406).

To this, the agency makes two principal responses. MCC argues that its authority to adopt the rules before you stems from G.S. 131E-75, which is the title and purpose section of the Hospital Licensure Act. Therein, the legislature directed that Article 5's purpose was to "establish hospital licensing requirements which promote public health, safety and welfare and to provide for the development, establishment and enforcement of basic standards for the care and treatment of patients in hospitals." G.S. 131E-75(b) (2021). Thus, the agency contends that in determining whether to issue, deny, or take any other action with respect to a hospital's

license, it is "required to assess if a hospital is meeting the 'requirements which promote public health, safety, and welfare….'" and is consequently *required* to establish "operational minimum standards"—a phrase that does not appear within Article 5 of Chapter 131E—for hospitals through rulemaking. The agency goes on to argue that there is no requirement for the General Assembly to specifically enumerate "every area of rule promulgation with any of the agencies creating rules for licensing," bolstering its point by referring to several allegedly equivalent statutory provisions.

As an initial matter, with respect to the agency's reference to other rules not currently before RRC, staff cannot and does not opine as to whether those agencies have authority under their respective statutes to adopt the cited rules. The scope of this opinion is limited to the Rules submitted for review by MCC. Here, the agency is authorized only to "promulgate rules necessary to implement" Article 5 of Chapter 131E. G.S. 131E-79(b) (2021). While the agency is correct that G.S. 131E-75 enunciates the *purpose* of the other provisions of Article 5, this language cannot be read as an open-ended grant of *authority* for MCC to promulgate any rule that could conceivably "promote public health, safety and welfare" or concern the "basic standards for the care and treatment of patients in hospitals" outside of the boundaries of the statutory scheme. As noted above, the rules impose deep, granular requirements upon hospitals with respect to issues that are at best tangentially referenced within the bounds of Article 5, and at worst mentioned nowhere within these statutes. Thus, it is staff's opinion that G.S. 131E-75(b) is not an adequate statutory basis for the rules before you.

Finally, MCC appears to argue that it has additional rulemaking authority for these rules under G.S. 143B-165(6), which states:

> (6) The Commission [MCC] has the duty to adopt rules and regulations and standards with respect to the different types of hospitals to be licensed under the provisions of **Article 13A of Chapter 131** of the General Statutes of North Carolina (emphasis added).

The General Assembly repealed Chapter 131 and replaced it with Chapter 131E in 1983. Specifically, the pre-existing Hospital Licensing Act (Article 13A, Chapter 131) was replaced with the Hospital Licensure Act (Article 5, Chapter 131E), which contained the current text of G.S. 131E-79(a) providing MCC with rulemaking authority. While the current iteration of the statutory scheme replaces Article 13A of Chapter 131, there is no evidence that the legislature intended, by citing to the repealed statutes, to refer to Article 5, Chapter 131E. *See Lundsford v. Mills*, 367 N.C. 618, 623, 766 S.E.2d 297, 301 (2014) (in ascertaining legislative intent, one

should "give effect to the words actually used in a statute and not . . . delete words used or . . . insert words not used."). Contrarily, the legislature refers explicitly to Chapter 131E elsewhere within G.S. 143B-165. *See, e.g.*, G.S. 131E-165(11) (2021) ("The Commission is authorized to adopt such rules as may be necessary to carry out the provisions of Part C of Article 6, and Article 10, of Chapter 131E of the General Statutes of North Carolina."). If the legislature wished for G.S. 143B-165 to refer to Article 5 of Chapter 131E, it could have amended the statutory text. As it chose not to, but rather included a new, independent grant of rulemaking authority within Article 5, it is staff's opinion that G.S. 143B-165(6) does not provide MCC with an additional source of rulemaking authority with respect to hospital licensure.

Consequently, staff recommends RRC object for lack of statutory authority.

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Issued August 5, 2022