



Iowa General Assembly

2011 Committee Briefings

Legislative Services Agency – Legal Services Division

<http://www.legis.iowa.gov/Schedules/committee.aspx?GA=84&CID=53>

ADMINISTRATIVE RULES REVIEW COMMITTEE

Meeting Dates: [December 13, 2011](#) | [November 1, 2011](#) | [October 11, 2011](#) | [September 13, 2011](#) |
[August 16 & 17, 2011](#) | [July 12, 2011](#)

Purpose. *This compilation of briefings on legislative interim committee meetings and other meetings and topics of interest to the Iowa General Assembly, written by the Legal Services Division staff of the nonpartisan Legislative Services Agency, describes committee activities or topics. The briefings were originally distributed in the Iowa Legislative Interim Calendar and Briefing. Official minutes, reports, and other detailed information concerning the committee or topic addressed by a briefing can be obtained from the committee's Internet page listed above, from the Iowa General Assembly's Internet page at <http://www.legis.iowa.gov>, or from the agency connected with the meeting or topic described.*

ADMINISTRATIVE RULES REVIEW COMMITTEE

December 13, 2011

Chairperson: Senator Wally Horn

Vice Chairperson: Representative Dawn Pettengill

DEPARTMENT ON AGING, Department Planning Responsibilities, 11/30/11 IAB, ARC 9864B, NOTICE, ARC 9863B, EMERGENCY.

Background. 2011 Iowa Acts, HF 45, §20, requires the department to develop a plan for reducing the number of area agencies on aging (AAAs) in the state, effective July 1, 2012. The department must submit the plan to the standing committees on Human Resources of the Senate and House of Representatives and the Joint Appropriations Subcommittee on Health and Human Services on or before December 15, 2011. The department has filed emergency rules to rewrite existing provisions relating to its planning responsibilities.

Commentary. A department representative laid out the various changes made to the department's Administrative Code chapter on AAAs in order to comply with the requirements of HF 45. Particularly significant are procedures for designating and dedesignating planning areas. The representative stated that many of the changes are necessary for compliance with federal law, including setting out clear due process procedures for changes to AAAs. The representative explained that a statutory requirement that the state maintain 13 AAAs would need to be repealed during the 2012 Legislative Session in order to implement the reduction in number. The representative also noted that five AAAs in western Iowa are already making plans to combine.

Committee members expressed concern about the ability of larger, consolidated AAAs, particularly in western Iowa, to adequately meet the needs of seniors. The department representative explained that the consolidated AAAs would not be so reliant on centralized staff to cover large areas, but would include more localized staff who would be more responsive to the needs in their areas. Committee members pointed out that bringing better service to rural areas was one of the main goals of regionalization of AAAs.

Action. No action taken.

IOWA FINANCE AUTHORITY, Low-income Tax Credit Program, 11/2/11 IAB, ARC 9837B, NOTICE.

Background. These amendments replace the current 2011 qualified allocation plan (QAP) for the Low-income Housing Tax Credit Program with the 2012 QAP, which is incorporated by reference in the rulemaking. The 2012 QAP sets forth the purpose of the plan, the administrative information required for participation in the program, the threshold criteria, the selection criteria, the postreservation requirements, the appeal process, and the compliance monitoring component. The plan also establishes the fees for filing an application for low-income housing tax credits and for compliance monitoring.

Commentary. An Iowa Finance Authority (IFA) representative explained the process of transitioning from the 2011 QAP to the 2012 QAP. Public comment was heard from stakeholders in the affordable housing industry who raised several concerns about the changes made to the QAP. Stakeholders asserted that an unprecedented change to the QAP criteria had been made in 2009 without explanation to the stakeholders. That change resulted in the loss of credit

points for certain projects for which the tax credit was sought. The change was a new specification that tax abatements, but not tax exemptions, would be considered among the criteria, when no basis for such a distinction is found in statute and both are relevant to the localized purposes of the tax credit. Stakeholders also asserted that the tax credit had been awarded increasingly to projects in urban areas over rural areas, and that all available funds for the tax credit were not being used every year due to the changes in criteria.

The IFA representative replied IFA's decisions on these matters were based on "precatory" (i.e., nonbinding) principles found in statute, so changes to the QAP criteria need not be specified in the statute. The representative asserted that tax exemptions are not localized in nature, and as such, should not be considered for the purposes of awarding the tax credit, which is intended to encourage local communities to have a financial stake in projects funded by the tax credit. The representative admitted that the tax credit has increasingly been awarded to urban areas, but noted that IFA has been attempting to address this disparity through a different project.

The stakeholders disagreed with the IFA representative's assertion that tax exemptions are not local in nature, noting that decisions regarding tax exemptions are made by local assessors who choose to give up that revenue, as is the case with tax abatements, which are included in the QAP criteria. The representative replied that tax exemptions are the result of decisions made by the General Assembly, not by local authorities, regardless of who ultimately approves them. Committee members noted that tax exemptions are statutory, and not discretionary on the part of local authorities in the manner provided by tax abatements and other factors included in the QAP. Other committee members asked what precisely determines which factors not listed in statute are included in the QAP criteria. The representative replied that these decisions are generally guided by federal law.

Action. No action taken.

NURSING BOARD, *Board Rules of Procedure*, 11/30/11 IAB, ARC 9866B, NOTICE.

Background. Iowa Code §17A.3 requires that all agencies "[a]dopt as a rule a description of the organization of the agency which states the general course and method of its operations..." Many boards and commissions have adopted Robert's Rules of Order to implement this requirement.

Commentary. On advice of the Attorney General, the board proposes to eliminate any reference to Robert's Rules from its rules of organization and operation. Instead, the board proposes a general rule stating that the board will: "conduct its proceedings to ensure that all members have equal rights, privileges and obligations." It was noted that all professional licensing boards have rescinded similar rules, with the Nursing Board being the last board to retain Robert's Rules. [Note: many state boards and commissions continue to cite and use Robert's Rules.] A representative from the Attorney General stated this action would prevent an agency action from being invalidated for a procedural error. The representative stated this change would ensure that agency actions were litigated on the substantive merits of that action, not on some procedural flaw. The representative noted that Iowa's Open Records Law and the Open Meetings Law protect the public. In response to a committee question, the agency representative did state that the use of Robert's Rules had created no legal problem.

Committee members were skeptical concerning the new standard; members contended that "equal rights, privileges and obligations" does not provide any detail to adequately guide board deliberations.

Action. No action taken. Additional review is likely on final adoption.

DEPARTMENT OF TRANSPORTATION, *Travel Trailer Dealers*, §§425.3, 425.10 IAC, SPECIAL REVIEW.

Background. Iowa Administrative Code chapter 761-425 provides for the licensing of motor vehicle dealers and travel trailer dealers. A licensee must maintain a principal place of business, which must be staffed during regular business hours, not less than 32 hours per week. Iowa Code §§322.2 & 322C.2 provides that the place of business must have facilities for the display of vehicles and for repairing or reconditioning of vehicles.

Commentary. Committee members questioned whether it is necessary to specify hours of operation as part of a regulatory program. A department representative explained the purpose of the rules is to protect the customer by ensuring that the business that sold the trailer would be available at reasonable times to service the trailer. The representative noted that only one waiver had been granted allowing a dealer to close during the winter months, when business-activity is negligible. That same dealer also spoke, noting that his cell phone remains active allowing customer contact on an as needed basis. Industry representatives supported the program.

Action. No action taken.

Next Meeting. The next regular committee meeting will be held in Committee Room 22, on Wednesday, January 4, 2012, beginning at 9:30 a.m.

Secretary, ex officio: Stephanie Hoff, Administrative Code Editor, (515) 281-3355.

LSA Staff: Joe Royce, LSA Counsel, (515) 281-3084; Jack Ewing, LSA Counsel, (515) 281-6048.

Internet Page: <http://www.legis.iowa.gov/Schedules/committee.aspx?CID=53>

ADMINISTRATIVE RULES REVIEW COMMITTEE

November 1, 2011

Chairperson: Senator Wally Horn

Vice Chairperson: Representative Dawn Pettengill

EDUCATION DEPARTMENT, *Child Abuse Reports—Duties of School Authorities*, 10/5/11 IAB, ARC 9794B, NOTICE.

Background. This proposed rulemaking conforms the department's rules to 2011 Iowa Acts, H.F. 645, §95, which requires certain duties of the board of directors of a school district and the authorities in charge of an accredited nonpublic school when an employee is under investigation for an allegation of abuse under the department's rules and when a finding is made that an employee's conduct constitutes a crime. The duties include placing a school employee who is the subject of an investigation of an alleged incident of physical or sexual abuse on administrative leave once an investigator has determined that a written complaint is investigable and reporting the results of an investigation that finds that the school employee's conduct constitutes a crime to the Board of Educational Examiners.

Commentary. A department representative explained the purpose of the rulemaking, which implements a statutory change of Iowa Code §280.17 from the 2011 Legislative Session. Committee members expressed concern about the lack of standards as to what sort of evidence might be used against a school employee investigated under the rule and as to how much authority is granted to an investigator. Committee members also noted the possible stigma a school employee who is the subject of an investigation might face, even if the allegations later prove to be unfounded. The representative stated that a process and standards for investigations are set out in accordance with the statute. The possibility of setting a deadline for the conclusion of an investigation was raised, but the representative replied that it would be impractical to do so. Committee members asked if the administrative leave required by the rule would be with or without pay, and the representative stated that decision would be made by the school board. A motion was made to refer the rulemaking to the General Assembly for further consideration. The motion carried.

Action. General referral to the General Assembly.

HUMAN SERVICES DEPARTMENT, *Medicaid Eligibility—Elderly or Disabled Inmates*, 10/19/11 IAB, ARC 9804B, NOTICE.

Background. Currently, one of the factors that precludes Medicaid eligibility is residence in a public institution such as a jail or prison. 2011 Iowa Acts, S.F. 482, mandates suspension rather than cancellation of Medicaid eligibility when a person who is either elderly or disabled enters a public institution. This rulemaking sets the procedural requirements for that policy change. The expectation is that suspension of eligibility will allow for a streamlined process of reopening a person's Medicaid case when the person leaves the institution.

Commentary. A department representative, after laying out the purpose of the rulemaking, explained to the Committee that the department had within the past week been notified that limiting the suspension mandate only to the elderly would violate federal regulations in this area. Thus, the department will be removing the age limitation from the rulemaking. The representative acknowledged that the age limitation is now a requirement under state law, and stated that the department would be seeking a statutory change during the next legislative session. Committee members raised questions about the implications of a conflict between state law and federal regulations and requested that a letter from the Office of the Attorney General on the matter be distributed to the Committee.

Action. No action taken.

LABOR DIVISION, *Child Labor Limitations*, 10/05/11 IAB, ARC 9758B, NOTICE.

Background. Iowa Code §92.8(2) prohibits anyone under the age of 18 from employment as a "motor vehicle driver and helper". The term motor vehicle is broadly interpreted to include virtually any motorized means of transportation.

Commentary. This proposed rule creates an exception for 16- or 17-year-old employees of a golf course, allowing them to operate golf carts as part of their duties. Division representatives noted that youngsters playing golf on the course could drive a golf cart, and so it made little sense to deny that ability to employees.

Committee members suggested this same privilege should be extended to 16- and 17-year-old employees using all-terrain vehicles for farm work. Division representatives responded that all-terrain vehicles are significantly more powerful than golf carts and pose a greater danger to the operator. Committee members expressed concern about possible unintended consequences of this rule change, such as increased liability of the state for accidents caused by these young employees and possible conflicts with federal law. Division representatives responded that they would investigate these issues further.

Action. No action taken.

PUBLIC EMPLOYMENT RELATIONS BOARD, *Decertification Elections*, 10/05/11 IAB, ARC 9795B, NOTICE.

Background. Longstanding Public Employment Relations Board (PERB) rules provide that in a decertification election,

which determines whether a union will continue as the exclusive representative of a particular bargaining unit, a tie vote results in the union continuing as the bargaining unit's representative. Tie votes have in fact occurred, as recently as the current year, and in accord with the existing rule, the union's exclusive representation has continued. Under this proposed rule, if a tie vote occurs, the union would be decertified (i.e., not continue) as the representative of the bargaining unit.

Commentary. The board representative stated that the current rule is a misapprehension of the statutory scheme. The representative noted that a central precept of labor law is the principle that a majority of the bargaining unit must support unionization, and for that reason a tie vote reveals that a majority of the unit does not support unionization and the union should be decertified. The representative stated that the issue had first been identified years ago, but that a tie vote, occurring last year, provided the impetus for the rulemaking. Union representatives expressed their support for the current rule, stating that traditionally, a majority vote is needed to pass any action.

Committee members expressed concern on two points. First, some members noted that the statute refers only to majority votes, with no mention of tie votes. Other members were concerned that a policy of such long standing could be changed through administrative rule; these members felt the issue should be addressed through the legislative process. A member moved to refer this proposal to the General Assembly. Such a motion would refer the issue to the General Assembly for further study, but would not affect the adoption of the rule. After discussion, the members determined to postpone any further action until the rule is adopted in final form.

Action. No formal action; additional review when the notice is adopted in final form.

STATE VOTER REGISTRATION COMMISSION, *Voter Notifications*, 10/19/11 IAB, ARC 9810B, NOTICE.

Background. These proposed rules would require county election commissioners to send a notice to a voter when the voter's primary or general election polling place is permanently changed. Currently, voters across the state are treated inconsistently when polling place locations are permanently changed. Some receive notices mailed to their residences and other voters must rely on the election publications or contact the county commissioner's office to determine the location of the voter's polling place. The proposed rules require county commissioners to notify all active registered voters affected by a permanent primary or general election polling place change of their new polling place location. The rules provide commissioners with the discretion to send notices to each household with an active registered voter affected by the polling place change or to each active registered voter.

Commentary. A state commission representative explained that the purpose of this rulemaking is to clarify ambiguous language in the underlying statute. Setting a single standard, that of mailed notice, will achieve this objective. Committee members expressed concern about how much this new requirement might cost for counties that do not currently provide a mailed notice. Questions were raised as to whether there might be a more cost-effective means of achieving the commission's purpose. Committee members noted that polling places are more likely to undergo significant changes after a redistricting year, which may further increase the cost of this requirement. The representative explained that the commission works to minimize costs wherever possible, and stated that she would provide additional information to the Committee as to any additional costs resulting from this rulemaking.

Action. No action taken.

Next Meeting. The next regular Committee meeting will be held in Room 116, Statehouse Main Floor, on **Tuesday, December 13, 2011**, beginning at 9:30 a.m.

SPECIAL AGENDUM ITEM. During the December ARRC meeting, at 9:30 a.m., the Computer Support Division of the Legislative Services Agency will discuss a prototype of a new search engine to be added to the legislative website. This addition will allow persons to search the Iowa Code, and the resulting search will also identify any administrative rules applicable to that Code section.

This search engine is still in the development stage and will not be immediately available to the public.

Secretary, ex officio: Stephanie Hoff, Administrative Code Editor, (515) 281-3355.

LSA Staff: Joe Royce, LSA Counsel, (515) 281-3084; Jack Ewing, LSA Counsel, (515) 281-6048.

Internet Page: <http://www.legis.iowa.gov/Schedules/committee.aspx?CID=53>

ADMINISTRATIVE RULES REVIEW COMMITTEE

October 11, 2011

Chairperson: Senator Wally Horn

Vice Chairperson: Representative Dawn Pettengill

ADMINISTRATIVE SERVICES DEPARTMENT, *Definition of "Confidential" Employees*, 9/07/11 IAB, ARC 9738B, NOTICE.

Background. This proposal is a general re-write of the department's information technology and personnel rules; at issue in this large rulemaking is the definition of the term "confidential employee." A confidential employee is exempt from the merit employment system and is an "at will" employee.

Commentary. The current, highly detailed rule defines the term "confidential employee" based on the function of the employee. The proposal is based upon the definition of "confidential employee" in Iowa Code §20.3, relating to collective bargaining. This definition is broad and could have the effect of making many additional employees, including human resources employees, who are currently under the merit employment system, exempt from its coverage and protection. The proposed definition would include:

"...any public employee who works in the personnel offices of a public employer or who has access to information subject to use by the public employer in negotiating or who works in a close working relationship with public officers or representatives associated with negotiating on behalf of the public employer."

Department representatives stated that the intent of this change is to have a single definition of the term "confidential employee" by incorporating the Iowa Code definition. They stated that there was no intention on the part of the department to alter the employment status of any employees. The representatives stated that the definition, as set out in the notice, would not be adopted, but offered no alternatives at this point.

A number of human resources employees attended the meeting and contended that it is not appropriate to use the Iowa Code Chapter 20 definition, which relates specifically to collective bargaining. They also stated that the purpose of Iowa Code Chapter 20 is to establish and define which public employees could or could not participate in employee organizations and could or could not be represented through the collective bargaining process—nothing more. They expressed concern that the new definition would result in a loss of their merit status. They also alleged a number of irregularities in the rulemaking process itself.

Committee members also expressed concern about this proposal, questioning whether this change offers any public benefit. Members asked how many employees would be affected by this change, and the department representatives stated that figure is not known at this time. Members asked the department to keep them updated on any changes made to this item before the rulemaking returns to the Committee for further review.

Action. No action taken.

DEPARTMENT OF EDUCATION, *Senior Year Plus*, 8/24/11 IAB, ARC 9684B, NOTICE.

Background. The Senior Year Plus Program allows high school seniors to enroll in college-level courses at community colleges. 2011 Acts, S.F. 470, §12, struck language in Iowa Code §261E.8 which provided that the student is responsible for transportation to and from the community college.

Commentary. The elimination of the travel language was part of the department's legislative package in 2011. Department representatives noted that the Senior Year Plus Program, unlike other college-credit programs, is actually part of the high school curriculum, for which the school receives state aid, from \$336 up to \$1,170 and perhaps more. Department representatives maintain that part of this money should be used to transport the students, noting that no student could be denied access to this program based on transportation issues. The department representatives did state this rulemaking would be withdrawn pending legislative consideration.

Action. No action taken.

Next Meeting. The next regular Committee meeting will be held in Room 116, Statehouse Main Floor, on **Tuesday, November 1, 2011**, beginning at 9:30 a.m.

LSA Staff: Stephanie Hoff, Administrative Code Editor, (515) 281-3355.

LSA Contacts: Joe Royce, LSA Counsel, (515) 281-3084; Jack Ewing, LSA Counsel, (515) 281-6048.

Internet Page: <http://www.legis.iowa.gov/Schedules/committee.aspx?CID=53>.

ADMINISTRATIVE RULES REVIEW COMMITTEE

September 13, 2011

Chairperson: Senator Wally Horn

Vice Chairperson: Representative Dawn Pettengill

BOARD OF EDUCATIONAL EXAMINERS, *Denial of Application During a Pending Professional Practices Case*, 8/10/11 IAB, ARC 9659B, ADOPTED.

Background. This rulemaking gives the executive director of the board discretion in the approval of an application for a Class B teaching license when an applicant is under investigation and probable cause has been determined by the board.

Commentary. Committee members asked what it means to be a Class B licensee. A board representative explained that such a person must complete fewer training hours in the short term before being authorized to teach, although

eventually the full training requirements must be met. Also, a Class B license is only valid for two years. Committee members asked what such a person might be investigated for, and the board representative explained that it could be anything. In response to a question as to the need for this rule, the representative explained that without this rule, the board would have no other way to remove a person under investigation, regardless of how serious the allegations are, from a classroom. Committee members noted that such an investigation might not ultimately result in a finding of wrongdoing. Committee members asked why such matters would be handled by the executive director and not the board as a whole, and the representative explained that the board becomes involved later in the process. Committee members also asked what would happen if a school district were unable to find an available teacher after a license denial. The representative replied that the board would try to work with the district to resolve the situation, perhaps by finding a substitute.

Action. No action taken.

BOARD OF EDUCATIONAL EXAMINERS, *Alternative Teacher Preparation, 8/10/11 IAB, ARC 9660B, NOTICE.*

Background. Iowa Code §272.2(13) empowers the board to “[a]dopt rules to provide for nontraditional preparation options for licensing persons who hold a bachelor’s degree from an accredited college or university, who do not meet other requirements for licensure.” The board proposes a three-year, nonrenewable authorization in foreign language, mathematics, chemistry, physics, biology, and music, for persons who do not meet the specific requirements in those areas, but do possess a bachelor’s degree and four years’ experience. During the term of the authorization, the applicant must complete board-approved training in specified areas.

Commentary. The board representative stated this alternative preparation program is necessary to find applicants in certain hard-to-fill positions, especially in smaller districts. The representative noted that the authorization is temporary and the applicant is required to obtain teaching-specific education.

Discussion centered around the required “pedagogy” (preparatory training or instruction) for an educator. Both committee members and representatives of the Iowa State Education Association urged a traditional training program, with completion of the curriculum prior to authorization. Association representatives stated that a substitute teacher should be used until a qualified teacher could be found.

Action. No action, additional review likely on final adoption.

ATTORNEY GENERAL, *Disclosure Statements, 8/10/11 IAB, ARC 9669B, NOTICE.*

Background. 2011 Iowa Acts, S.F. 418, relates to the disclosure of information in connection with new motor vehicle repairs; it provides that a new motor vehicle dealer is not required to disclose to a buyer or lessee any repairs of damage to or adjustments on or replacements of parts with new parts on the motor vehicle if certain specified conditions are met.

Commentary. A representative of the Attorney General’s Office noted that the Act was a compromise reached between consumer advocates and automobile dealers. The representative emphasized that the requirements apply only to the sale of new automobiles; the sale of used vehicles remains under the general consumer fraud provisions. A dealer must disclose in writing any repairs of damage to or adjustments on or replacements of parts if the actual cost exceeds 4 percent of the dealer’s adjusted cost. The Act requires that the written disclosure be in a form approved by the Attorney General by rule, as is set out in this notice.

Action. No action taken.

IOWA FINANCE AUTHORITY, *Iowa Jobs Program—Calculation of Jobs Created, 8/24/11 IAB, ARC 9691B, ADOPTED.*

Background. In this rulemaking, the Iowa Finance Authority (IFA) seeks to exclude temporary positions from the reporting requirements for the Iowa Jobs Program.

Commentary. An IFA representative explained the purpose of the amendment and noted that no changes had been made after the public comment period. Committee members asked why temporary jobs are not being counted for this program when they are counted in certain other contexts. The representative explained that the enacting legislation was not specific on this point, but that it was IFA’s understanding that only full-time jobs were meant to be counted. Committee members asked what precisely a permanent job is, and how the definition might apply in contexts such as temp agency jobs and construction jobs. The representative stated that “permanent” is not defined, and expressed uncertainty as to how it might be applied in such situations. Committee members asked how a person who worked on two projects through the program might be counted, and if double counting could occur. The representative stated that double counting might be possible, as IFA does not have the resources to conduct audits in this area.

Action. A motion was made for the Committee to object to the rulemaking, based on the Committee’s belief that it is unreasonable to exclude temporary jobs created through the program from these calculations. The motion carried.

Committee Legislation.

Background. A bill which relates to administrative rules sponsored by the Administrative Rules Review Committee and approved by a majority of the members of the Committee in each house may be introduced at any time and must be referred to a standing committee which must take action on the bill within three weeks. A nullification resolution introduced by the Committee is referred to the same standing committee it would be referred to if it was a bill. [Joint Rule

19].

Rules Nullification. The Committee gave approval to a draft Administrative Rules Review Committee bill to nullify a portion of a Department of Natural Resources rule requiring the use of nontoxic shot in dove hunting.

Licensing Boards. The Committee will continue work on a Committee bill prohibiting licensing boards from considering deferred judgments as grounds for licensee discipline. Additional discussion is anticipated in October.

ARRC Rules of Procedure. At the October meeting the Committee will review its own rules of procedure.

Next Meeting. The next regular Committee meeting will be held in Room 116, Statehouse Main Floor, on **Tuesday, October 11, 2011**, beginning at 9:30 a.m.

LSA Staff: Stephanie Hoff, Administrative Code Editor, (515) 281-3355.

LSA Contacts: Joe Royce, LSA Counsel, (515) 281-3084; Jack Ewing, LSA Counsel, (515) 281-6048.

Internet Page: <http://www.legis.iowa.gov/Schedules/committee.aspx?GA=84&CID=53>

ADMINISTRATIVE RULES REVIEW COMMITTEE

August 16 & 17, 2011

Chairperson: Senator Wally Horn

Vice Chairperson: Representative Dawn Pettengill

HUMAN SERVICES DEPARTMENT, *Medicaid Filings*, EMERGENCY ADOPTION.

Background. Each year the Department of Human Services (DHS) is authorized in statute to adopt a variety of changes to the Medicaid program on an "emergency" basis, with the proviso that the changes be reviewed by the Administrative Rules Review Committee before they are effective. The 2011 legislation, H.F. 649, stated in part:

20. a. The department may implement cost containment strategies recommended by the governor, and may adopt emergency rules for such implementation.

b. The department shall not implement the cost containment strategy to require a primary care referral for the provision of chiropractic services.

Due to the extended legislative session, the timeframe for the drafting and review of these Medicaid rules was significantly restricted; 13 rule filings were sent to the Committee for review at the August meeting. Most have a September 1 effective date. These filings are summarized as follows:

1. Chapter 75, Medicaid. Allow liens to recover Medicaid expenses for services involving malpractice.
2. Chapter 78, Medicaid. Eliminate coverage for weight-loss drugs and limit coverage of drugs for symptomatic relief of cough and cold.
3. Chapter 78, Medicaid. Restrict coverage of orthodontia for children.
4. Chapter 78, Medicaid. Limit payment for durable equipment under an HCBS waiver to the amount paid for fee-for-service Medicaid.
5. Chapter 79, Medicaid. Increase reimbursement rates for home- and community-based waiver services.
6. Chapter 79, Medicaid. Increase pharmacy dispensing fee.
7. Chapter 79, Medicaid. Increase reimbursement rates for non-state-owned psychiatric medical institutions for children.
8. Chapter 79, Medicaid. Eliminate graduate medical education payments for out-of-state hospitals.
9. Chapter 79, Medicaid. Eliminate payment for treatment of a hospital-acquired condition.
10. Chapter 79, Medicaid. Reduce physician payment for services provided in a facility setting.
11. Chapter 79, Medicaid. Implement emergency room copayment and reduce Medicaid payment when service is nonemergency and patient is not referred by another provider.
12. Chapter 80, Medicaid. Require new forms for paper billing of Medicare crossover claims.
13. Chapter 81, Medicaid. Update procedures for federal nursing facility preadmission screening and evaluation of patients with mental retardation or mental illness.

A department representative discussed each of the rule filings in turn.

Commentary. Regarding the rule filing on coverage of orthodontia for children, Committee members expressed an interest in working with the department to find alternative sources of savings in the dental area in the future. It was estimated that 1,500 children would be affected by the coverage restriction. A representative of the Iowa Dental Association expressed concern over these funding cuts, and explained that the procedures in question are needed care and not merely cosmetic, and save money in the long run by reducing the need for future dental care.

For the filing increasing the reimbursement rates for home- and community-based waiver services, the department

representative explained that the filing restores a previous cut in funding for these services. An industry representative expressed concern that the filing restores the funding to the capped rate in place in 2009. This would eliminate any rate changes made since that time, and would represent a significant financial hardship for some providers. Committee members asked why this issue had not been raised previously when the language in question was being discussed during the 2011 Legislative Session. It was thought at the time that the language would provide for the necessary funds. The industry representative suggested that the language used did not provide for the outcome desired by the Legislature. Committee members remained open to making further changes in the 2012 Legislative Session.

For the filing dealing with copayments for emergency room services, the department representative explained that the copayment would be \$3. Committee members sought clarification as to how that number was chosen, and whether it could be changed. The department representative explained that \$3 is the maximum amount that could be feasibly imposed under federal regulations. Committee members asked how the copayment would be collected and if it in fact would be collected. The department representative explained that the fee would be a debt owed to the provider, and it would be the provider's responsibility to collect it.

Action. No action taken.

MEDICINE BOARD, *Continuing Education and Training, 7/13/11 IAB, ARC 9601B, FILED.*

Background. This rule updates language, eliminates redundancies, and establishes continuing education requirements for chronic pain management and end-of-life care. The requirements are for two hours of training in a five-year period. The rules do not require additional hours of training, but add these two subjects to the subjects required to be covered during a physician's training hours.

Commentary. Committee members stated it was their understanding that certain public comments received by the board had not been accounted for in this rulemaking. A board representative explained that some in the medical community oppose imposition of any further mandatory training requirements. The board, however, feels that both of these issues, pain management and end-of-life care, are significant enough to merit this rare increase in training requirements. The board representative stated there are numerous opportunities for physicians to meet these requirements, and that the requirements could be met without leaving the state, including via web-based resources. The board representative also explained that a physician who does not fulfill the requirement would not be suspended, but would only be given a warning and possibly face a fine if they were to be overly delinquent.

Some Committee members expressed concern that the imposition of this requirement might presage imposition of further, more onerous requirements in the years to come; others felt that this requirement is much needed. In response to a Committee member's question, the board representative explained that this requirement would not apply to physicians who do not provide direct patient care such as radiologists and pathologists. Industry representatives echoed public comments made by their associations that this training should not be mandated, as physicians should be allowed to decide for themselves what training subjects are appropriate. They further asserted that the board has presented no evidence that chronic pain management and end-of-life care are problematic issues in Iowa. The director of the Governor's Office of Drug Control Policy, who recently announced a task force on prescription drug abuse, expressed his support for this requirement, and stated he felt it would be helpful in support of the mission of the task force.

Action. No action taken.

NURSING BOARD, *Organization of the Board, 7/27/11 IAB, ARC 9621B, NOTICE.*

Background. In this rulemaking, the Board of Nursing proposes to revise its rules of procedure. One change would eliminate any reference to "Robert's Rules of Order, Revised"; Robert's is the traditional authority used by state boards and commissions to govern meetings. This action means that the board would operate with only limited rules of procedure, set out in chapter one, along with the requirements of Code Chapter 21, Iowa's Open Meeting Law. Issues that exceed the scope of those skeletal procedures would be dealt with on an ad hoc basis.

Commentary. A board representative explained the rulemaking, including the elimination of Robert's Rules of Order. The representative explained that the changes were made at the recommendation of the board's attorney, who felt it would reduce the risk of future litigation based only on procedural shortcomings. The representative stated that other boards such as the Medicine Board and the Dental Board do not use Robert's either. Committee members asked if new procedures would be codified in place of Robert's, and the board representative responded that she was unsure. A stakeholder expressed opposition to this rule given the uncertainty it might create. Committee members expressed strong support for the use of Robert's by all boards and commissions and expressed concern about the implications of a board or commission operating without formal rules of procedure. Committee members urged the board to reconsider this rulemaking.

Action. No action taken.

NATURAL RESOURCES DEPARTMENT, *Dove Season, SPECIAL REVIEW, FILED EMERGENCY AFTER NOTICE.*

Background. 2011 Iowa Acts, S.F. 464, added the mourning dove to the list of game birds or animals for which the Natural Resource Commission may establish a hunting season. With this specific statutory authorization, in May, the department proposed a 70-day season with a 30-bird possession limit; the notice did not propose to regulate method of

take. The department conducted a public hearing at which many participants called for a requirement for the exclusive use of nontoxic shot. On adoption, the Natural Resource Commission did adopt a nontoxic shot requirement.

Commentary. At the August Committee meeting department representatives and stakeholders contended that the use of lead shot poses a health threat to humans eating doves and to scavenging animals who ingest the lead pellets. It was noted that most states that allow dove hunting have some type of requirement for nontoxic shot. Proponents of lead shot disputed allegations that lead shot poses any environmental threat and contended that nontoxic shot was an additional and unnecessary expense.

Committee members and the Governor's representative expressed concern that the nontoxic shot requirement did not appear in the notice of intended action. Department representatives contended that the requirement was added in response to significant public comment. Discussion centered on the extent to which a notice of intended action can be modified on final adoption. Both the Committee and the department agreed on the general principle that even substantial changes can be made to a notice of intended action as long as those changes are within the scope of the original notice and a logical outgrowth of the comment received on the proposal. However, the Committee and the department disagreed on whether the nontoxic shot requirement was within the scope of the original notice.

Both Committee members and the Governor's representative felt that a decision on nontoxic shot should be made by the Legislature. Committee members also noted that a nontoxic shot requirement was debated by the House of Representatives and was specifically voted down.

Action. The Committee imposed a session delay on that portion of the rule which imposes a nontoxic shot requirement. If the General Assembly does not take action to nullify this provision, it will automatically go into effect before the fall 2012 mourning dove hunting season.

PROFESSIONAL LICENSURE DIVISION, *Licensee Discipline: Effect of Deferred Conviction or Sentence, Various Licensing Boards.*

Background. Iowa's licensing boards are adopting new disciplinary rules which would allow the boards to consider deferred judgments and deferred sentences as factors in licensee disciplinary matters. At a previous meeting, a representative from the Attorney General, appearing on behalf of the division explained that these rules are needed in light of an Iowa Supreme Court decision, and that it is necessary for deferred judgments and deferred sentences to be explicitly set out as permissible factors for consideration in order for licensing boards to be able to consider them when making disciplinary decisions. The representative also noted that the number of deferred judgments has been increasing in recent years.

Commentary. A board representative noted that the underlying crime must be related to the practice of a particular profession under a case-by-case determination by the licensing board. Regarding deferred convictions, Committee members expressed concern about the fairness of a person being denied a license without having been convicted of a crime. Members expressed concern that a person could plead guilty to a charge in order to get a deferred sentence, not knowing that plea could result in suspension or revocation of the person's license. Members also expressed concern over the use of the generic term "crime", which is not defined in the Code of Iowa. Members instead suggested the term "public offense".

Action. No action taken.

Next Meeting. The next regular Committee meeting will be held in Room 116, Statehouse, on Tuesday, September 13, 2011, beginning at 9:00 a.m.

LSA Staff: Stephanie Hoff, Administrative Code Editor, (515) 281-3355.

Contact Persons: Joe Royce, LSA Counsel, (515) 281-3084; Jack Ewing, LSA Counsel, (515) 281-6048.

Internet Page: <http://www.legis.iowa.gov/Schedules/committee.aspx?GA=84&CID=53>

ADMINISTRATIVE RULES REVIEW COMMITTEE

July 12, 2011

Chairperson: Senator Wally Horn

Vice Chairperson: Representative Dawn Pettengill

HUMAN SERVICES DEPARTMENT, *Medicaid Filings*, EMERGENCY ADOPTION.

Background. Each year the Department of Human Services is authorized in statute to adopt a variety of changes to the Medicaid program on an "emergency" basis, with the proviso that the changes be reviewed by the Administrative Rules Review Committee before they are effective. The 2011 legislation, H.F. 649, §20 stated in part:

20. a. The department may implement cost containment strategies recommended by the governor, and may adopt emergency rules for such implementation.

b. The department shall not implement the cost containment strategy to require a primary care referral for the provision of chiropractic services.

Due to the extended legislative session, the timeframe for the drafting and review of these Medicaid rules was significantly restricted; 14 rule filings were sent to the Committee on July 7, 2011, one week after adjournment. An August 1 effective date was intended, but was later postponed, with some filings effective August 17, and others September 1. These filings are summarized as follows:

1. Amendments to Chapter 75. Allow liens to recover Medicaid expenses for services involving malpractice.
2. Amendments to Chapter 78. Eliminate coverage for bariatric surgery.
3. Amendments to Chapter 78. Eliminate coverage for weight-loss drugs and limit coverage of drugs for symptomatic relief of cough and cold.
4. Amendments to Chapter 78. Restrict coverage of orthodontia for children.
5. Amendments to Chapter 78. Limit use of respite care under home and community-based services (HCBS) waivers to 48 hours per month.
6. Amendments to Chapter 78. Limit payment for durable equipment under an HCBS waiver to the amount paid for fee-for-service Medicaid.
7. to Chapter 79. Increase reimbursement rates for HCBS waiver services.
8. Amendments to Chapter 79. Increase pharmacy dispensing fees.
9. Amendments to Chapter 79. Increase reimbursement rates for psychiatric medical institutions for children (PMICs).
10. Amendments to Chapter 79. Eliminate graduate medical education payments for out-of-state hospitals.
11. Amendments to Chapter 79. Eliminate payment for treatment of a hospital-acquired condition.
12. Amendments to Chapter 79. Reduce physician payment for services provided in a facility setting.
13. Amendments to Chapter 79. Implement emergency room copayment and reduce Medicaid payment when service is nonemergency and patient is not referred by another provider.
14. Amendments to Chapter 80. Require new forms for paper billing of Medicare crossover claims.

The Director of the department, Chuck Palmer, initially spoke, providing a general overview concerning the development and background of all 14 filings. The director, along with other department representatives, noted that all of these proposals had been reviewed through the appropriations committees and authorized in H.F. 649 (see language set out above).

Commentary. “Respite care” is part of the AIDS/HIV, Brain Injury, Children’s Mental Health, Elderly, and Ill and Handicapped HCBS waivers. Respite care is necessary for families who provide constant care for family members with serious disabilities. It allows family members to receive periods of relief for vacations, holidays, and scheduled time off. Filing number 5 limits respite care to 48 hours per month. Hours not used within the month are lost. The Committee heard extensive testimony from service providers and parents who emphasized the need for continued service. Commenters noted that the only real alternative is care provided at the Woodward and Glenwood state resource center facilities, at a much higher cost to the state.

Department representatives, understanding the impact this filing would have, informed the Committee and the audience that filing number 5 would be rewritten to establish an annual limit of 576 hours a year, more than three weeks of around-the-clock care. Department representatives further agreed that the revised respite care rule would not be immediately adopted by the Council on Human Services on August 13, and that further discussion would take place. Committee members determined that the respite care issue would be again reviewed at the Committee’s August 16 meeting, at approximately 1:00 p.m.

Additional public comments were received regarding filing number 2, which eliminates coverage for bariatric surgery. Industry representatives argued that the filing would not ultimately result in any savings, as those who receive the surgery require less medical care in the long term, savings which would be lost under this filing. It was stated that this surgery is only provided to persons who are morbidly obese, and that this surgery is a lifesaving measure. It was also asserted that the vast majority of states currently offer coverage for bariatric surgery. Alternative cost-saving measures were also proposed.

Public comments were also received on filing number 4, which restricts coverage of orthodontia for children. Industry representatives argued that the filing does not properly recognize the value of the orthodontia services offered, as these particular procedures are not merely cosmetic in nature, but an important form of preventive care. In the field of orthodontia, there is an index known as the Salzmann Index, by which a patient’s level of need for such care is evaluated. Only those with a significant need would receive these procedures. Committee members asked if alternative methods are sought before resorting to this kind of procedure, and the representatives stated that was correct.

Action. Subsequent to the July meeting, the department postponed the final adoption of these rules, allowing for

additional review at the Committee's August 16 meeting. Consequently, a special meeting was not required. No action was taken on filing numbers 1 and 6-14.

HUMAN SERVICES DEPARTMENT, *Home and Community-based Services Waivers Under the Medicaid Program: Respite Care, 03/9/11 IAB, ARC 9403B, 70-DAY DELAY.*

Background. This filing had been delayed by the Committee at its April meeting, and was last reviewed in June. Although these rules and issues are impacted by the provisions of 2011 Iowa Acts, H.F. 649, they are not directly related. The rules provide that respite care cannot be utilized during the hours the primary caregiver is working, essentially the rules end payments for day camps attended by children with disabilities covered by a waiver.

Commentary. At the June Committee meeting, department representatives emphasized this rulemaking is merely a clarification of current federal requirements, and that local case managers had been improperly approving respite care requests for these day camps. The representatives stated that federal regulation provides that respite care cannot be used as an alternative to child care, and that if the caregiver is at work, then respite care is a form of child care, which cannot be reimbursed using Medicaid funds. Department representatives noted that a continuation of respite child care could only be accomplished with 100 percent state funding and would almost certainly lead to increased participation and cost.

This issue was reviewed by the General Assembly, and no action was taken in the 2011 Session. The Committee has sent a letter to Iowa's congressional delegation expressing the Committee's concern over this federal policy.

Committee members did work with local stakeholders in providing some additional services.

Action. No additional action taken; the 70-day delay expired June 11, 2011. Update—on August 2, 2011, Governor Branstad requested the department withdraw this rule filing and the department complied with the request.

Next Meeting. The next regular Committee meeting will be held in Room 116, Statehouse Main Floor, on Tuesday, August 16, and Wednesday, August 17, 2011, beginning at 9:30 a.m. Department of Human Services' rules will be reviewed at 1:00 p.m.

LSA Staff: Stephanie Hoff, Administrative Code Editor, (515) 281-3355.

Contact Persons: Joe Royce, LSA Counsel, (515) 281-3084; Jack Ewing, LSA Counsel, (515) 281-6048.

Internet Page: <http://www.legis.iowa.gov/Schedules/committee.aspx?GA=84&CID=53>
