



# IOWA ADMINISTRATIVE BULLETIN

IOWA STATE LAW LIBRARY,  
State House  
Des Moines, Iowa 50319

Published Biweekly VOLUME XXI NUMBER 19  
March 10, 1999 Pages 1685 to 1880

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## PREFACE

The Iowa Administrative Bulletin is published biweekly in pamphlet form pursuant to Iowa Code chapters 2B and 17A and contains Notices of Intended Action on rules, Filed and Filed Emergency rules by state agencies.

It also contains Proclamations and Executive Orders of the Governor which are general and permanent in nature; Economic Impact Statements to proposed rules and filed emergency rules; Objections filed by Administrative Rules Review Committee, Governor or the Attorney General; and Delay by the Committee of the effective date of filed rules; Regulatory Flexibility Analyses and Agenda for monthly Administrative Rules Review Committee meetings. Other "materials deemed fitting and proper by the Administrative Rules Review Committee" include summaries of Public Hearings, Attorney General Opinions and Supreme Court Decisions.

The Bulletin may also contain Public Funds Interest Rates [12C.6]; Workers' Compensation Rate Filings [515A.6(7)]; Usury [535.2(3)"a"]; Agricultural Credit Corporation Maximum Loan Rates [535.12]; and Regional Banking—Notice of Application and Hearing [524.1905(2)].

**PLEASE NOTE:** *Italics* indicate new material added to existing rules; ~~strike-through~~ letters indicate deleted material.

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## SUBSCRIPTION INFORMATION

### Iowa Administrative Bulletin

The Iowa Administrative Bulletin is sold as a separate publication and may be purchased by subscription or single copy. All subscriptions will expire on June 30 of each year. Subscriptions must be paid in advance and are prorated quarterly as follows:

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**Customer Service Center**  
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**Hoover State Office Building, Level A**  
**Des Moines, IA 50319**  
**Telephone: (515)242-5120**

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## Schedule for Rule Making 1999

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Dec. 25 '98	Jan. 13 '99	Feb. 2 '99	Feb. 17 '99	Feb. 19 '99	Mar. 10 '99	Apr. 14 '99	July 12 '99
Jan. 8	Jan. 27	Feb. 16	Mar. 3	Mar. 5	Mar. 24	Apr. 28	July 26
Jan. 22	Feb. 10	Mar. 2	Mar. 17	Mar. 19	Apr. 7	May 12	Aug. 9
Feb. 5	Feb. 24	Mar. 16	Mar. 31	Apr. 2	Apr. 21	May 26	Aug. 23
Feb. 19	Mar. 10	Mar. 30	Apr. 14	Apr. 16	May 5	June 9	Sept. 6
Mar. 5	Mar. 24	Apr. 13	Apr. 28	Apr. 30	May 19	June 23	Sept. 20
Mar. 19	Apr. 7	Apr. 27	May 12	May 14	June 2	July 7	Oct. 4
Apr. 2	Apr. 21	May 11	May 26	May 28	June 16	July 21	Oct. 18
Apr. 16	May 5	May 25	June 9	June 11	June 30	Aug. 4	Nov. 1
Apr. 30	May 19	June 8	June 23	June 25	July 14	Aug. 18	Nov. 15
May 14	June 2	June 22	July 7	July 9	July 28	Sept. 1	Nov. 29
May 28	June 16	July 6	July 21	July 23	Aug. 11	Sept. 15	Dec. 13
June 11	June 30	July 20	Aug. 4	Aug. 6	Aug. 25	Sept. 29	Dec. 27
June 25	July 14	Aug. 3	Aug. 18	Aug. 20	Sept. 8	Oct. 13	Jan. 10 '00
July 9	July 28	Aug. 17	Sept. 1	Sept. 3	Sept. 22	Oct. 27	Jan. 24 '00
July 23	Aug. 11	Aug. 31	Sept. 15	Sept. 17	Oct. 6	Nov. 10	Feb. 7 '00
Aug. 6	Aug. 25	Sept. 14	Sept. 29	Oct. 1	Oct. 20	Nov. 24	Feb. 21 '00
Aug. 20	Sept. 8	Sept. 28	Oct. 13	Oct. 15	Nov. 3	Dec. 8	Mar. 6 '00
Sept. 3	Sept. 22	Oct. 12	Oct. 27	Oct. 29	Nov. 17	Dec. 22	Mar. 20 '00
Sept. 17	Oct. 6	Oct. 26	Nov. 10	Nov. 12	Dec. 1	Jan. 5 '00	Apr. 3 '00
Oct. 1	Oct. 20	Nov. 9	Nov. 24	Nov. 26	Dec. 15	Jan. 19 '00	Apr. 17 '00
Oct. 15	Nov. 3	Nov. 23	Dec. 8	Dec. 10	Dec. 29	Feb. 2 '00	May 1 '00
Oct. 29	Nov. 17	Dec. 7	Dec. 22	Dec. 24	Jan. 12 '00	Feb. 16 '00	May 15 '00
Nov. 12	Dec. 1	Dec. 21	Jan. 5 '00	Jan. 7 '00	Jan. 26 '00	Mar. 1 '00	May 29 '00
Nov. 26	Dec. 15	Jan. 4 '00	Jan. 19 '00	Jan. 21 '00	Feb. 9 '00	Mar. 15 '00	June 12 '00
Dec. 10	Dec. 29	Jan. 18 '00	Feb. 2 '00	Feb. 4 '00	Feb. 23 '00	Mar. 29 '00	June 26 '00
Dec. 24	Jan. 12 '00	Feb. 1 '00	Feb. 16 '00	Feb. 18 '00	Mar. 8 '00	Apr. 12 '00	July 10 '00
Jan. 7 '00	Jan. 26 '00	Feb. 15 '00	Mar. 1 '00	Mar. 3 '00	Mar. 22 '00	Apr. 26 '00	July 24 '00

### PRINTING SCHEDULE FOR IAB

<u>ISSUE NUMBER</u>	<u>SUBMISSION DEADLINE</u>	<u>ISSUE DATE</u>
21	Friday, March 19, 1999	April 7, 1999
22	Friday, April 2, 1999	April 21, 1999
23	Friday, April 16, 1999	May 5, 1999

**PLEASE NOTE:**

Rules will not be accepted after **12 o'clock noon** on the Friday filing deadline days unless prior approval has been received from the Administrative Rules Coordinator's office.

If the filing deadline falls on a legal holiday, submissions made on the following Monday will be accepted.

## PUBLICATION PROCEDURES

TO: Administrative Rules Coordinators and Text Processors of State Agencies  
FROM: Kathleen K. Bates, Iowa Administrative Code Editor  
SUBJECT: Publication of Rules in Iowa Administrative Bulletin

The Administrative Code Division uses Interleaf 6 to publish the Iowa Administrative Bulletin and can import documents directly from most other word processing systems, including Microsoft Word, Word for Windows (Word 7 or earlier), and WordPerfect.

1. To facilitate the processing of rule-making documents, we request a 3.5" High Density (not Double Density) IBM PC-compatible diskette of the rule making. Please indicate on each diskette the following information: agency name, file name, format used for exporting, and chapter(s) amended. Diskettes may be delivered to the Administrative Code Division, 1st Floor, Lucas State Office Building or included with the documents submitted to the Governor's Administrative Rules Coordinator.

2. Alternatively, if you have Internet E-mail access, you may send your document as an attachment to an E-mail message, addressed to both of the following:

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kbates@legis.state.ia.us

**Please note that changes made prior to publication of the rule-making documents are reflected on the hard copy returned to agencies by the Governor's office, but not on the diskettes; diskettes are returned unchanged.**

Your cooperation helps us print the Bulletin more quickly and cost-effectively than was previously possible and is greatly appreciated.

*Guide to Rule Making, June 1995 Edition*, available upon request to the Iowa Administrative Code Division,  
Lucas State Office Building, First Floor, Des Moines, Iowa 50319.

## To All Agencies:

The Administrative Rules Review Committee voted to request that Agencies comply with Iowa Code section 17A.4(1)"b" by allowing the opportunity for oral presentation (hearing) to be held at least **twenty** days after publication of Notice in the Iowa Administrative Bulletin.

AGENCY	HEARING LOCATION	DATE AND TIME OF HEARING
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**AGRICULTURE AND LAND STEWARDSHIP DEPARTMENT[21]**

Apiary, 22.10 IAB 3/10/99 ARC 8733A (See also ARC 8734A herein)	Conference Room—3rd Floor Wallace State Office Bldg. Des Moines, Iowa	March 30, 1999 10 a.m.
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**BLIND, DEPARTMENT FOR THE[111]**

Rule making and declaratory orders, 1.3, ch 3, 4.1 to 4.4, ch 5 IAB 2/24/99 ARC 8714A	Director's Conference Room 524 Fourth St. Des Moines, Iowa	March 16, 1999 1 p.m.
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**CRIMINAL AND JUVENILE JUSTICE PLANNING DIVISION[428]**

Juvenile accountability incentive block grant program (JAIBG), ch 5 IAB 3/10/99 ARC 8739A (See also ARC 8740A herein)	Hearing Room 2—1st Floor Lucas State Office Bldg. Des Moines, Iowa	March 31, 1999 9 a.m.
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**ECONOMIC DEVELOPMENT, IOWA DEPARTMENT OF[261]**

Iowa community development block grant nonentitlement program, 23.14, 23.15 IAB 3/10/99 ARC 8762A	Main Conference Room 200 E. Grand Ave. Des Moines, Iowa	March 30, 1999 1 p.m.
Local housing assistance program, 28.9(3) IAB 3/10/99 ARC 8763A	Main Conference Room 200 E. Grand Ave. Des Moines, Iowa	March 30, 1999 2 p.m.
Community economic betterment program, 53.2, 53.6, 53.7, 53.9 to 53.16 IAB 3/10/99 ARC 8764A	Business Finance Conference Room First Floor 200 E. Grand Ave. Des Moines, Iowa	March 30, 1999 1:30 p.m.

**EDUCATION DEPARTMENT[281]**

Agency procedure for rule making, ch 2 IAB 3/10/99 ARC 8737A	State Board Room Grimes State Office Bldg. Des Moines, Iowa	March 31, 1999 9 a.m.
Declaratory orders, ch 3 IAB 3/10/99 ARC 8736A	State Board Room Grimes State Office Bldg. Des Moines, Iowa	March 31, 1999 11 a.m.
Appeal procedures, 6.1 to 6.22 IAB 3/10/99 ARC 8735A	State Board Room Grimes State Office Bldg. Des Moines Iowa	March 31, 1999 10 a.m.

**ENVIRONMENTAL PROTECTION COMMISSION[567]**

Air pollution, amendments to chs 20 to 23, 25 IAB 3/10/99 <b>ARC 8744A</b>	East Conference Room Air Quality Bureau 7900 Hickman Ave., Suite 1 Urbandale, Iowa	April 9, 1999 1 p.m.
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**NATURAL RESOURCE COMMISSION[571]**

Game management areas, 51.5(2), 51.9 IAB 3/10/99 <b>ARC 8747A</b>	State Forest Nursery 2404 S. Duff Ames, Iowa	April 17, 1999 10 a.m.
Wildlife refuges—Chichaqua and Cottonwood, 52.1(2) IAB 3/10/99 <b>ARC 8748A</b>	State Forest Nursery 2404 S. Duff Ames, Iowa	April 17, 1999 10 a.m.
Waterfowl and coot hunting, 91.1, 91.3, 91.4(2), 91.6 IAB 3/10/99 <b>ARC 8746A</b>	State Forest Nursery 2404 S. Duff Ames, Iowa	April 17, 1999 10 a.m.
Wild turkey fall hunting, 99.2(1), 99.5 IAB 3/10/99 <b>ARC 8743A</b>	State Forest Nursery 2404 S. Duff Ames, Iowa	April 17, 1999 10 a.m.
Deer hunting, 106.2(4), 106.8(2), 106.10(6) IAB 3/10/99 <b>ARC 8749A</b>	State Forest Nursery 2404 S. Duff Ames, Iowa	April 17, 1999 10 a.m.

**PERSONNEL DEPARTMENT[581]**

Declaratory orders; IPERS; contested cases; procedures for rule making, 19.2 to 19.16, 21.9(5), chs 26, 31 IAB 3/10/99 <b>ARC 8756A</b>	North Conference Room Personnel Dept. Grimes State Office Bldg. Des Moines, Iowa	March 30, 1999 2 p.m.
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**PHARMACY EXAMINERS BOARD[657]**

Waivers or variances from rules, 1.3 IAB 3/10/99 <b>ARC 8770A</b> (See also <b>ARC 8411A</b> , IAB 10/21/98)	East Conference Room—2nd Floor Executive Hills West 1209 E. Court Ave. Des Moines, Iowa	March 31, 1999 1 p.m.
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**PROFESSIONAL LICENSURE DIVISION[645]**

Cosmetology, 60.2(4), 60.3, 60.4, 60.13(1) IAB 3/10/99 <b>ARC 8754A</b> (See also <b>ARC 8629A</b> , IAB 1/27/99) ( <b>ICN Network</b> )	ICN Room—6th Floor Lucas State Office Bldg. Des Moines, Iowa	April 1, 1999 9 to 11 a.m.
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<b>PROFESSIONAL LICENSURE DIVISION[645] (ICN Network) (Cont'd)</b>	ICN Room Loess Hills AEA 13 24997 Hwy. 92 Council Bluffs, Iowa	April 1, 1999 9 to 11 a.m.
	Library Room 206 Iowa Central Community College 330 Ave. M Fort Dodge, Iowa	April 1, 1999 9 to 11 a.m.
	ICN Classroom Southern Prairie AEA 15 2814 N. Court St. Ottumwa, Iowa	April 1, 1999 9 to 11 a.m.
	Room 110, Tama Hall Hawkeye Community College 1501 E. Orange Rd. Waterloo, Iowa	April 1, 1999 9 to 11 a.m.
Mortuary science examiners, 101.3 IAB 3/10/99 ARC 8751A	Board Conference Room—5th Floor Lucas State Office Bldg. Des Moines, Iowa	April 1, 1999 9 to 11 a.m.
Podiatry examiners, 220.3(10), 220.7, 220.101, 220.213, 221.6(2), 221.9, 221.10(5) IAB 2/24/99 ARC 8705A	Conference Room—5th Floor Lucas State Office Bldg. Des Moines, Iowa	March 16, 1999 9 to 11 a.m.
Speech pathology and audiology examiners, ch 300, 301.2, 301.4(1), 301.5 to 301.10 IAB 3/10/99 ARC 8752A	South Conference Room 2—5th Floor Lucas State Office Bldg. Des Moines, Iowa	March 30, 1999 9 to 11 a.m.

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**SOIL CONSERVATION DIVISION[27]**

Water protection, 12.51, 12.72, 12.76 IAB 3/10/99 ARC 8759A	Conference Room—3rd Floor West Half Wallace State Office Bldg. Des Moines, Iowa	March 30, 1999 10 a.m.
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**WORKFORCE DEVELOPMENT BOARD/SERVICES DIVISION[877]**

Criticism of agency rule, 2.3 IAB 3/10/99 ARC 8732A	Director's Conference Room 1000 E. Grand Ave. Des Moines, Iowa	March 30, 1999 10 a.m.
Labor-management cooperation program, ch 9 IAB 2/24/99 ARC 8707A	Capitol View Conference Room 1000 E. Grand Ave. Des Moines, Iowa	March 16, 1999 10 a.m.
Petition for declaratory order, 26.2 IAB 3/10/99 ARC 8731A	Director's Conference Room 1000 E. Grand Ave. Des Moines, Iowa	March 30, 1999 10 a.m.

**CITATION of Administrative Rules**

The Iowa Administrative Code shall be cited as (agency identification number) IAC (chapter, rule, subrule, lettered paragraph, or numbered subparagraph).

- 441 IAC 79 (Chapter)
- 441 IAC 79.1(249A) (Rule)
- 441 IAC 79.1(1) (Subrule)
- 441 IAC 79.1(1)"a" (Paragraph)
- 441 IAC 79.1(1)"a"(1) (Subparagraph)

The Iowa Administrative Bulletin shall be cited as IAB (volume), (number), (publication date), (page number), (ARC number).

IAB Vol. XII, No. 23 (5/16/90) p. 2050, ARC 872A

Due to reorganization of state government by 1986 Iowa Acts, chapter 1245, it was necessary to revise the agency identification numbering system, i.e., the bracketed number following the agency name.

“Umbrella” agencies and elected officials are set out below at the left-hand margin in CAPITAL letters.

Divisions (boards, commissions, etc.) are indented and set out in lowercase type under their statutory “umbrellas.”

Other autonomous agencies which were not included in the original reorganization legislation as “umbrella” agencies are included alphabetically in small capitals at the left-hand margin, e.g., BEEF INDUSTRY COUNCIL, IOWA[101].

The following list will be updated as changes occur:

AGRICULTURE AND LAND STEWARDSHIP DEPARTMENT[21]

Agricultural Development Authority[25]

Soil Conservation Division[27]

ATTORNEY GENERAL[61]

AUDITOR OF STATE[81]

BEEF INDUSTRY COUNCIL, IOWA[101]

BLIND, DEPARTMENT FOR THE[111]

CITIZENS' AIDE[141]

CIVIL RIGHTS COMMISSION[161]

COMMERCE DEPARTMENT[181]

Alcoholic Beverages Division[185]

Banking Division[187]

Credit Union Division[189]

Insurance Division[191]

Professional Licensing and Regulation Division[193]

Accountancy Examining Board[193A]

Architectural Examining Board[193B]

Engineering and Land Surveying Examining Board[193C]

Landscape Architectural Examining Board[193D]

Real Estate Commission[193E]

Real Estate Appraiser Examining Board[193F]

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Utilities Division[199]

CORRECTIONS DEPARTMENT[201]

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CULTURAL AFFAIRS DEPARTMENT[221]

Arts Division[222]

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ECONOMIC DEVELOPMENT, IOWA DEPARTMENT OF[261]

City Development Board[263]

Iowa Finance Authority[265]

EDUCATION DEPARTMENT[281]

Educational Examiners Board[282]

College Student Aid Commission[283]

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Iowa Advance Funding Authority[285]

Libraries and Information Services Division[286]

Public Broadcasting Division[288]

School Budget Review Committee[289]

EGG COUNCIL[301]

ELDER AFFAIRS DEPARTMENT[321]

EMPOWERMENT BOARD, IOWA[349]

ETHICS AND CAMPAIGN DISCLOSURE BOARD, IOWA[351]

EXECUTIVE COUNCIL[361]

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GENERAL SERVICES DEPARTMENT[401]

HUMAN INVESTMENT COUNCIL[417]

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Deaf Services Division[429]

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INSPECTIONS AND APPEALS DEPARTMENT[481]  
    Employment Appeal Board[486]  
    Foster Care Review Board[489]  
    Racing and Gaming Commission[491]  
    State Public Defender[493]  
LAW ENFORCEMENT ACADEMY[501]  
LIVESTOCK HEALTH ADVISORY COUNCIL[521]  
MANAGEMENT DEPARTMENT[541]  
    Appeal Board, State[543]  
    City Finance Committee[545]  
    County Finance Committee[547]  
NARCOTICS ENFORCEMENT ADVISORY COUNCIL[551]  
NATIONAL AND COMMUNITY SERVICE, IOWA COMMISSION ON[555]  
NATURAL RESOURCES DEPARTMENT[561]  
    Energy and Geological Resources Division[565]  
    Environmental Protection Commission[567]  
    Natural Resource Commission[571]  
    Preserves, State Advisory Board[575]  
PERSONNEL DEPARTMENT[581]  
PETROLEUM UNDERGROUND STORAGE TANK FUND  
    BOARD, IOWA COMPREHENSIVE[591]  
PREVENTION OF DISABILITIES POLICY COUNCIL[597]  
PUBLIC DEFENSE DEPARTMENT[601]  
    Emergency Management Division[605]  
    Military Division[611]  
PUBLIC EMPLOYMENT RELATIONS BOARD[621]  
PUBLIC HEALTH DEPARTMENT[641]  
    Substance Abuse Commission[643]  
    Professional Licensure Division[645]  
    Dental Examiners Board[650]  
    Medical Examiners Board[653]  
    Nursing Board[655]  
    Pharmacy Examiners Board[657]  
PUBLIC SAFETY DEPARTMENT[661]  
RECORDS COMMISSION[671]  
REGENTS BOARD[681]  
    Archaeologist[685]  
REVENUE AND FINANCE DEPARTMENT[701]  
    Lottery Division[705]  
SECRETARY OF STATE[721]  
SEED CAPITAL CORPORATION, IOWA[727]  
SHEEP AND WOOL PROMOTION BOARD, IOWA[741]  
TELECOMMUNICATIONS AND TECHNOLOGY COMMISSION, IOWA[751]  
TRANSPORTATION DEPARTMENT[761]  
    Railway Finance Authority[765]  
TREASURER OF STATE[781]  
UNIFORM STATE LAWS COMMISSION[791]  
VETERANS AFFAIRS COMMISSION[801]  
VETERINARY MEDICINE BOARD[811]  
VOTER REGISTRATION COMMISSION[821]  
WORKFORCE DEVELOPMENT DEPARTMENT[871]  
    Labor Services Division[875]  
    Workers' Compensation Division[876]  
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        Workforce Development Center Administration Division[877]

**NOTICE---AVAILABILITY OF PUBLIC FUNDS**

AGENCY	PROGRAM	SERVICE DELIVERY AREA	ELIGIBLE APPLICANTS	SERVICES	APPLICATION DUE DATE	CONTRACT AND PROJECT PERIOD
Public Health	Anatomical Gift Public Awareness	State-wide	Hospitals licensed in Iowa	Develop and conduct a hospital-based public awareness project regarding organ and tissue donation or develop or promote an anatomical gift referral protocol.	4/10/99	Contract period July 1, 1999 through June 30, 2000

Request application packet from:

Ronald D. Eckoff, M.D., M.P.H.  
 Iowa Department of Public Health  
 Lucas State Office Building  
 321 East 12<sup>th</sup> Street  
 Des Moines, Iowa 50319-0075  
 Telephone: (515)281-5914  
 FAX: (515)281-4535  
 e-mail: [reckoff@idph.state.ia.us](mailto:reckoff@idph.state.ia.us)

Note: Approximately \$19,600 is available for individual grants ranging from \$ 1,000 to \$ 5,000 each.

## ARC 8733A

## AGRICULTURE AND LAND STEWARDSHIP DEPARTMENT[21]

### Notice of Intended Action

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)“b.”

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code section 160.9, the Department of Agriculture and Land Stewardship gives Notice of Intended Action to amend Chapter 22, “Apiary,” Iowa Administrative Code.

This amendment is intended to prohibit honeybees from being transported into Iowa from the states of Florida, Georgia, South Carolina and North Carolina because these states are known to be infested with the small hive beetle, *Aethina tumida*, a recently introduced, serious pest of honeybee colonies. The amended rule would remain effective until one year after its effective date unless extended by administrative rule.

The spread of these beetles into Iowa would place in jeopardy the health of Iowa’s honeybee population and the pollination service provided by the bees. No chemical control is currently registered by the U.S. Environmental Protection Agency for the control of this pest in Iowa. Therefore, if the beetles were to be transported to Iowa in shipments of bees, beekeepers would have no treatment available to them. Preventing or delaying the spread of these beetles into Iowa will give the time needed to fully test and register chemical control products.

The rule as it stands currently only prohibits bees from Florida, but the small hive beetle has been detected in Florida, Georgia, South Carolina and North Carolina. The beetle has not been detected in Iowa or adjacent states. This amendment adds the other infested states to the list of prohibited states.

Any interested person may make written suggestions or comments on the proposed amendment by 4:30 p.m. on March 30, 1999. Such written material should be directed to Robert Cox, State Apiarist, Department of Agriculture and Land Stewardship, Wallace State Office Building, Des Moines, Iowa 50319 or fax (515)281-8888 or E-mail: Bob.Cox@idals.state.ia.us.

A public hearing will be held at 10 a.m. on March 30, 1999, in the Wallace State Office Building, Third Floor Conference Room, East Ninth and Grand Avenue, Des Moines, Iowa, at which time persons may present their views.

This amendment was also Adopted and Filed Emergency and is published herein as **ARC 8734A**. The content of that submission is incorporated by reference.

This amendment is intended to implement Iowa Code section 160.9.

## ARC 8727A

## COLLEGE STUDENT AID COMMISSION[283]

### Notice of Intended Action

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)“b.”

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code sections 261.3 and 261.37(5), the College Student Aid Commission proposes to rescind Chapter 2, “Rule Making,” and adopt Chapter 2, “Agency Procedures for Rule Making”; rescind Chapter 3, “Declaratory Rulings,” and adopt Chapter 3, “Declaratory Orders”; and adopt Chapter 4, “Contested Cases,” Iowa Administrative Code.

The proposed new chapters will comply with amendments to the Iowa Administrative Procedure Act in 1998 Iowa Acts, chapter 1202 [House File 667], which will become effective July 1, 1999.

Interested persons may submit comments orally or in writing to the Executive Director, College Student Aid Commission, 200 Tenth Street, Fourth Floor, Des Moines, Iowa 50309-3609, telephone (515)281-3501, on or before March 30, 1999.

These rules are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202.

The following new chapters are proposed.

ITEM 1. Rescind **283—Chapter 2** and adopt the following **new** chapter in lieu thereof:

#### CHAPTER 2

#### AGENCY PROCEDURE FOR RULE MAKING

**283—2.1(17A) Applicability.** Except to the extent otherwise expressly provided by statute, all rules adopted by the agency are subject to the provisions of Iowa Code chapter 17A, the Iowa administrative procedure Act, and the provisions of this chapter.

**283—2.2(17A) Advice on possible rules before notice of proposed rule adoption.** In addition to seeking information by other methods, the agency may, before publication of a Notice of Intended Action under Iowa Code section 17A.4(1)“a,” solicit comments from the public on a subject matter of possible rule making by the agency by causing notice to be published in the Iowa Administrative Bulletin of the subject matter and indicating where, when, and how persons may comment.

**283—2.3(17A) Public rule-making docket.**

**2.3(1) Docket maintained.** The agency shall maintain a current public rule-making docket.

**2.3(2) Anticipated rule making.** The rule-making docket shall list each anticipated rule-making proceeding. A rule-making proceeding is deemed “anticipated” from the time a draft of proposed rules is distributed for internal discussion within the agency. For each anticipated rule-making proceeding the docket shall contain a listing of the precise subject matter which may be submitted for consideration by the director for subsequent proposal under the provisions of Iowa Code section 17A.4(1)“a,” the name and address of agency personnel with whom persons may communicate

## COLLEGE STUDENT AID COMMISSION[283](cont'd)

with respect to the matter, and an indication of the present status within the agency of that possible rule. The agency may also include in the docket other subjects upon which public comment is desired.

**2.3(3)** Pending rule-making proceedings. The rule-making docket shall list each pending rule-making proceeding. A rule-making proceeding is pending from the time it is commenced, by publication in the Iowa Administrative Bulletin of a Notice of Intended Action pursuant to Iowa Code section 17A.4(1)"a," to the time it is terminated, by publication of a Notice of Termination in the Iowa Administrative Bulletin or the rule becoming effective. For each rule-making proceeding, the docket shall indicate:

- a. The subject matter of the proposed rule;
- b. A citation to all published notices relating to the proceeding;
- c. Where written submissions on the proposed rule may be inspected;
- d. The time during which written submissions may be made;
- e. The names of persons who have made written requests for an opportunity to make oral presentations on the proposed rule, where those requests may be inspected, and where and when oral presentations may be made;
- f. Whether a written request for the issuance of a regulatory analysis, or a concise statement of reasons, has been filed, whether such an analysis or statement or a fiscal impact statement has been issued, and where any such written request, analysis, or statement may be inspected;
- g. The current status of the proposed rule and any agency determinations with respect thereto;
- h. Any known timetable for agency decisions or other action in the proceeding;
- i. The date of the rule's adoption;
- j. The date of the rule's filing, indexing, and publication;
- k. The date on which the rule will become effective; and
- l. Where the rule-making record may be inspected.

**283—2.4(17A) Notice of proposed rule making.**

**2.4(1)** Contents. At least 35 days before the adoption of a rule the agency shall cause Notice of Intended Action to be published in the Iowa Administrative Bulletin. The Notice of Intended Action shall include:

- a. A brief explanation of the purpose of the proposed rule;
- b. The specific legal authority for the proposed rule;
- c. Except to the extent impracticable, the text of the proposed rule;
- d. Where, when, and how persons may present their views on the proposed rule; and
- e. Where, when, and how persons may demand an oral proceeding on the proposed rule if the notice does not already provide for one.

Where inclusion of the complete text of a proposed rule in the Notice of Intended Action is impracticable, the agency shall include in the notice a statement fully describing the specific subject matter of the omitted portion of the text of the proposed rule, the specific issues to be addressed by that omitted text of the proposed rule, and the range of possible choices being considered by the agency for the resolution of each of those issues.

**2.4(2)** Incorporation by reference. A proposed rule may incorporate other materials by reference only if it complies with all of the requirements applicable to the incorporation by reference of other materials in an adopted rule that are contained in subrule 2.12(2) of this chapter.

**2.4(3)** Copies of notices. Persons desiring to receive copies of future Notices of Intended Action by subscription must file with the agency a written request indicating the name and address to which such notices should be sent. Within seven days after submission of a Notice of Intended Action to the administrative rules coordinator for publication in the Iowa Administrative Bulletin, the agency shall mail or electronically transmit a copy of that notice to subscribers who have filed a written request for either mailing or electronic transmittal with the agency for Notices of Intended Action. The written request shall be accompanied by payment of the subscription price which may cover the full cost of the subscription service, including its administrative overhead and the cost of copying and mailing the Notices of Intended Action for a period of one year.

**283—2.5(17A) Public participation.**

**2.5(1)** Written comments. For at least 20 days after publication of Notice of Intended Action, persons may submit argument, data, and views, in writing, on the proposed rule. Such written submissions should identify the proposed rule to which they relate and should be submitted to Executive Director, College Student Aid Commission, 200 Tenth Street, Fourth Floor, Des Moines, Iowa 50309-3609, or the person designated in the Notice of Intended Action.

**2.5(2)** Oral proceedings. The agency may, at any time, schedule an oral proceeding on a proposed rule. The agency shall schedule an oral proceeding on a proposed rule if, within 20 days after the published Notice of Intended Action, a written request for an opportunity to make oral presentations is submitted to the agency by the administrative rules review committee, a governmental subdivision, an agency, an association having not less than 25 members, or at least 25 persons. That request must also contain the following additional information:

1. A request by one or more individual persons must be signed by each of them and include the address and telephone number of each of them.
2. A request by an association must be signed by an officer or designee of the association and must contain a statement that the association has at least 25 members and the address and telephone number of the person signing that request.
3. A request by an agency or governmental subdivision must be signed by an official having authority to act on behalf of the entity and must contain the address and telephone number of the person signing that request.

**2.5(3) Conduct of oral proceedings.**

a. Applicability. This subrule applies only to those oral rule-making proceedings in which an opportunity to make oral presentations is authorized or required by Iowa Code section 17A.4(1)"b" as amended by 1998 Iowa Acts, chapter 1202, section 8, or this chapter.

b. Scheduling and notice. An oral proceeding on a proposed rule may be held in one or more locations and shall not be held earlier than 20 days after notice of its location and time is published in the Iowa Administrative Bulletin. That notice shall also identify the proposed rule by ARC number and citation to the Iowa Administrative Bulletin.

c. Presiding officer. The agency, a member of the agency, or another person designated by the agency who will be familiar with the substance of the proposed rule, shall preside at the oral proceeding on a proposed rule. If the agency does not preside, the presiding officer shall prepare a memorandum for consideration by the agency summarizing the contents of the presentations made at the oral proceeding unless the agency determines that such a memorandum is un-

## COLLEGE STUDENT AID COMMISSION[283](cont'd)

necessary because the agency will personally listen to or read the entire transcript of the oral proceeding.

d. Conduct of proceeding. At an oral proceeding on a proposed rule, persons may make oral statements and make documentary and physical submissions, which may include data, views, comments or arguments concerning the proposed rule. Persons wishing to make oral presentations at such a proceeding are encouraged to notify the agency at least one business day prior to the proceeding and indicate the general subject of their presentations. At the proceeding, those who participate shall indicate their names and addresses, identify any persons or organizations they may represent, and provide any other information relating to their participation deemed appropriate by the presiding officer. Oral proceedings shall be open to the public and shall be recorded by stenographic or electronic means.

(1) At the beginning of the oral proceeding, the presiding officer shall give a brief synopsis of the proposed rule, a statement of the statutory authority for the proposed rule, and the reasons for the agency decision to propose the rule. The presiding officer may place time limitations on individual oral presentations when necessary to ensure the orderly and expeditious conduct of the oral proceeding. To encourage joint oral presentations and to avoid repetition, additional time may be provided for persons whose presentations represent the views of other individuals as well as their own views.

(2) Persons making oral presentations are encouraged to avoid restating matters which have already been submitted in writing.

(3) To facilitate the exchange of information, the presiding officer may, where time permits, open the floor to questions or general discussion.

(4) The presiding officer shall have the authority to take any reasonable action necessary for the orderly conduct of the meeting.

(5) Physical and documentary submissions presented by participants in the oral proceeding shall be submitted to the presiding officer. Such submissions become the property of the agency.

(6) The oral proceeding may be continued by the presiding officer to a later time without notice other than by announcement at the hearing.

(7) Participants in an oral proceeding shall not be required to take an oath or to submit to cross-examination. However, the presiding officer in an oral proceeding may question participants and permit the questioning of participants by other participants about any matter relating to that rule-making proceeding, including any prior written submissions made by those participants in that proceeding; but no participant shall be required to answer any question.

(8) The presiding officer in an oral proceeding may permit rebuttal statements and request the filing of written statements subsequent to the adjournment of the oral presentations.

**2.5(4) Additional information.** In addition to receiving written comments and oral presentations on a proposed rule according to the provisions of this rule, the agency may obtain information concerning a proposed rule through any other lawful means deemed appropriate under the circumstances.

**2.5(5) Accessibility.** The agency shall schedule oral proceedings in rooms accessible to and functional for persons with physical disabilities. Persons who have special requirements should contact the administrative secretary at College Student Aid Commission, 200 Tenth Street, Fourth Floor,

Des Moines, Iowa 50309-3609, or (515)281-3501 in advance to arrange access or other needed services.

**283—2.6(17A) Regulatory analysis.**

**2.6(1) Definition of small business.** A "small business" is defined in 1998 Iowa Acts, chapter 1202, section 10(7).

**2.6(2) Mailing list.** Small businesses or organizations of small businesses may be registered on the agency's small business impact list by making a written application addressed to College Student Aid Commission, 200 Tenth Street, Fourth Floor, Des Moines, Iowa 50309-3609. The application for registration shall state:

a. The name of the small business or organization of small businesses;

b. Its address;

c. The name of a person authorized to transact business for the applicant;

d. A description of the applicant's business or organization. An organization representing 25 or more persons who qualify as a small business shall indicate that fact.

e. Whether the registrant desires copies of Notices of Intended Action at cost, or desires advance notice of the subject of all or some specific category of proposed rule making affecting small business.

The agency may at any time request additional information from the applicant to determine whether the applicant is qualified as a small business or as an organization of 25 or more small businesses. The agency may periodically send a letter to each registered small business or organization of small businesses asking whether that business or organization wishes to remain on the registration list. The name of a small business or organization of small businesses will be removed from the list if a negative response is received, or if no response is received within 30 days after the letter is sent.

**2.6(3) Time of mailing.** Within seven days after submission of a Notice of Intended Action to the administrative rules coordinator for publication in the Iowa Administrative Bulletin, the agency shall mail to all registered small businesses or organizations of small businesses, in accordance with their request, either a copy of the Notice of Intended Action or notice of the subject of that proposed rule making. In the case of a rule that may have an impact on small business adopted in reliance upon Iowa Code section 17A.4(2), the agency shall mail notice of the adopted rule to registered businesses or organizations prior to the time the adopted rule is published in the Iowa Administrative Bulletin.

**2.6(4) Qualified requesters for regulatory analysis—economic impact.** The agency shall issue a regulatory analysis of a proposed rule that conforms to the requirements of 1998 Iowa Acts, chapter 1202, section 10(2a), after a proper request from:

a. The administrative rules coordinator;

b. The administrative rules review committee.

**2.6(5) Qualified requesters for regulatory analysis—business impact.** The agency shall issue a regulatory analysis of a proposed rule that conforms to the requirements of 1998 Iowa Acts, chapter 1202, section 10(2b), after a proper request from:

a. The administrative rules review committee;

b. The administrative rules coordinator;

c. At least 25 or more persons who sign the request provided that each represents a different small business;

d. An organization representing at least 25 small businesses. That organization shall list the name, address and telephone number of not less than 25 small businesses it represents.

## COLLEGE STUDENT AID COMMISSION[283](cont'd)

**2.6(6)** Time period for analysis. Upon receipt of a timely request for a regulatory analysis the agency shall adhere to the time lines described in 1998 Iowa Acts, chapter 1202, section 10(4).

**2.6(7)** Contents of request. A request for a regulatory analysis is made when it is mailed or delivered to the agency. The request shall be in writing and satisfy the requirements of 1998 Iowa Acts, chapter 1202, section 10(1).

**2.6(8)** Contents of concise summary. The contents of the concise summary shall conform to the requirements of 1998 Iowa Acts, chapter 1202, section 10(4,5).

**2.6(9)** Publication of a concise summary. The agency shall make available, to the maximum extent feasible, copies of the published summary in conformance with 1998 Iowa Acts, chapter 1202, section 10(5).

**2.6(10)** Regulatory analysis contents—rules review committee or rules coordinator. When a regulatory analysis is issued in response to a written request from the administrative rules review committee, or the administrative rules coordinator, the regulatory analysis shall conform to the requirements of 1998 Iowa Acts, chapter 1202, section 10(2a), unless a written request expressly waives one or more of the items listed in the section.

**2.6(11)** Regulatory analysis contents—substantial impact on small business. When a regulatory analysis is issued in response to a written request from the administrative rules review committee, the administrative rules coordinator, at least 25 persons signing that request who each qualify as a small business or by an organization representing at least 25 small businesses, the regulatory analysis shall conform to the requirements of 1998 Iowa Acts, chapter 1202, section 10(2b).

**283—2.7(17A,25B) Fiscal impact statement.**

**2.7(1)** A proposed rule that mandates additional combined expenditures exceeding \$100,000 by all affected political subdivisions or agencies and entities which contract with political subdivisions to provide services must be accompanied by a fiscal impact statement outlining the costs associated with the rule. A fiscal impact statement must satisfy the requirements of Iowa Code section 25B.6.

**2.7(2)** If the agency determines at the time it adopts a rule that the fiscal impact statement upon which the rule is based contains errors, the agency shall, at the same time, issue a corrected fiscal impact statement and publish the corrected fiscal impact statement in the Iowa Administrative Bulletin.

**283—2.8(17A) Time and manner of rule adoption.**

**2.8(1)** Time of adoption. The agency shall not adopt a rule until the period for making written submissions and oral presentations has expired. Within 180 days after the later of the publication of the Notice of Intended Action, or the end of oral proceedings thereon, the agency shall adopt a rule pursuant to the rule-making proceeding or terminate the proceeding by publication of a notice to that effect in the Iowa Administrative Bulletin.

**2.8(2)** Consideration of public comment. Before the adoption of a rule, the agency shall consider fully all of the written submissions and oral submissions received in that rule-making proceeding or any memorandum summarizing such oral submissions, and any regulatory analysis or fiscal impact statement issued in that rule-making proceeding.

**2.8(3)** Reliance on agency expertise. Except as otherwise provided by law, the agency may use its own experience, technical competence, specialized knowledge, and judgment in the adoption of a rule.

**283—2.9(17A) Variance between adopted rule and published notice of proposed rule adoption.**

**2.9(1)** The agency shall not adopt a rule that differs from the rule proposed in the Notice of Intended Action on which the rule is based unless:

a. The differences are within the scope of the subject matter announced in the Notice of Intended Action and are in character with the issues raised in that notice; and

b. The differences are a logical outgrowth of the contents of that Notice of Intended Action and the comments submitted in response thereto; and

c. The Notice of Intended Action provided fair warning that the outcome of that rule-making proceeding could be the rule in question.

**2.9(2)** In determining whether the Notice of Intended Action provided fair warning that the outcome of that rule-making proceeding could be the rule in question, the agency shall consider the following factors:

a. The extent to which persons who will be affected by the rule should have understood that the rule-making proceeding on which it is based could affect their interests;

b. The extent to which the subject matter of the rule or the issues determined by the rule are different from the subject matter or issues contained in the Notice of Intended Action; and

c. The extent to which the effects of the rule differ from the effects of the proposed rule contained in the Notice of Intended Action.

**2.9(3)** The agency shall commence a rule-making proceeding within 60 days of its receipt of a petition for rule making seeking the amendment or repeal of a rule that differs from the proposed rule contained in the Notice of Intended Action upon which the rule is based, unless the agency finds that the differences between the adopted rule and the proposed rule are so insubstantial as to make such a rule-making proceeding wholly unnecessary. A copy of any such finding and the petition to which it responds shall be sent to petitioner, the administrative rules coordinator, and the administrative rules review committee, within three days of its issuance.

**2.9(4)** Concurrent rule-making proceedings. Nothing in this rule disturbs the discretion of the agency to initiate, concurrently, several different rule-making proceedings on the same subject with several different published Notices of Intended Action.

**283—2.10(17A) Exemptions from public rule-making procedures.**

**2.10(1)** Omission of notice and comment. To the extent the agency for good cause finds that public notice and participation are unnecessary, impracticable, or contrary to the public interest in the process of adopting a particular rule, the agency may adopt that rule without publishing advance Notice of Intended Action in the Iowa Administrative Bulletin and without providing for written or oral public submissions prior to its adoption. The agency shall incorporate the required finding and a brief statement of its supporting reasons in each rule adopted in reliance upon this subrule.

**2.10(2)** Public proceedings on rules adopted without them. The agency may, at any time, commence a standard rule-making proceeding for the adoption of a rule that is identical or similar to a rule it adopts in reliance upon subrule 2.10(1). Upon written petition by a governmental subdivision, the administrative rules review committee, an agency, the administrative rules coordinator, an association having not less than 25 members, or at least 25 persons, the agency shall commence a standard rule-making proceeding for any

## COLLEGE STUDENT AID COMMISSION[283](cont'd)

rule specified in the petition that was adopted in reliance upon subrule 2.10(1). Such a petition must be filed within one year of the publication of the specified rule in the Iowa Administrative Bulletin as an adopted rule. The rule-making proceeding on that rule must be commenced within 60 days of the receipt of such a petition. After a standard rule-making proceeding commenced pursuant to this subrule, the agency may either readopt the rule it adopted without benefit of all usual procedures on the basis of subrule 2.10(1), or may take any other lawful action, including the amendment or repeal of the rule in question, with whatever further proceedings are appropriate.

**283—2.11(17A) Concise statement of reasons.**

**2.11(1) General.** When requested by a person, either prior to the adoption of a rule or within 30 days after its publication in the Iowa Administrative Bulletin as an adopted rule, the agency shall issue a concise statement of reasons for the rule. Requests for such a statement must be in writing and be delivered to College Student Aid Commission, 200 Tenth Street, Fourth Floor, Des Moines, Iowa 50309-3609. The request should indicate whether the statement is sought for all or only a specified part of the rule. Requests will be considered made on the date received.

**2.11(2) Contents.** The concise statement of reasons shall contain:

- a. The reasons for adopting the rule;
- b. An indication of any change between the text of the proposed rule contained in the published Notice of Intended Action and the text of the rule as finally adopted, with the reasons for any such change;
- c. The principal reasons urged in the rule-making proceeding for and against the rule, and the agency's reasons for overruling the arguments made against the rule.

**2.11(3) Time of issuance.** After a proper request, the agency shall issue a concise statement of reasons by the later of the time the rule is adopted or 35 days after receipt of the request.

**283—2.12(17A) Contents, style, and form of rule.**

**2.12(1) Contents.** Each rule adopted by the agency shall contain the text of the rule and, in addition:

- a. The date the agency adopted the rule;
- b. A brief explanation of the principal reasons for the rule-making action if such reasons are required by 1998 Iowa Acts, chapter 1202, section 8, or the agency in its discretion decides to include such reasons;
- c. A reference to all rules repealed, amended, or suspended by the rule;
- d. A reference to the specific statutory or other authority authorizing adoption of the rule;
- e. Any findings required by any provision of law as a prerequisite to adoption or effectiveness of the rule;
- f. A brief explanation of the principal reasons for the failure to provide for waivers to the rule if no waiver provision is included and a brief explanation of any waiver or special exceptions provided in the rule if such reasons are required by 1998 Iowa Acts, chapter 1202, section 8, or the agency in its discretion decides to include such reasons; and
- g. The effective date of the rule.

**2.12(2) Incorporation by reference.** The agency may incorporate by reference in a proposed or adopted rule, and without causing publication of the incorporated matter in full, all or any part of a code, standard, rule, or other matter if the agency finds that the incorporation of its text in the agency proposed or adopted rule would be unduly cumbersome, expensive, or otherwise inexpedient. The reference in

the agency proposed or adopted rule shall fully and precisely identify the incorporated matter by location, title, citation, date, and edition, if any; shall briefly indicate the precise subject and the general contents of the incorporated matter; and shall state that the proposed or adopted rule does not include any later amendments or editions of the incorporated matter. The agency may incorporate such matter by reference in a proposed or adopted rule only if the agency makes copies of it readily available to the public. The rule shall state how and where copies of the incorporated matter may be obtained at cost from this agency, and how and where copies may be obtained from the agency of the United States, this state, another state, or the organization, association, or persons, originally issuing that matter. The agency shall retain permanently a copy of any materials incorporated by reference in a rule of the agency.

If the agency adopts standards by reference to another publication, it shall provide a copy of the publication containing the standards to the administrative rules coordinator for deposit in the state law library and may make the standards available electronically.

**2.12(3) References to materials not published in full.** When the administrative code editor decides to omit the full text of a proposed or adopted rule because publication of the full text would be unduly cumbersome, expensive, or otherwise inexpedient, the agency shall prepare and submit to the administrative code editor for inclusion in the Iowa Administrative Bulletin and Iowa Administrative Code a summary statement describing the specific subject matter of the omitted material. This summary statement shall include the title and a brief description sufficient to inform the public of the specific nature and subject matter of the proposed or adopted rules, and of significant issues involved in these rules. The summary statement shall also describe how a copy of the full text of the proposed or adopted rule, including any unpublished matter and any matter incorporated by reference, may be obtained from the agency. The agency will provide a copy of that full text at actual cost upon request and shall make copies of the full text available for review at the state law library and may make the standards available electronically.

At the request of the administrative code editor, the agency shall provide a proposed statement explaining why publication of the full text would be unduly cumbersome, expensive, or otherwise inexpedient.

**2.12(4) Style and form.** In preparing its rules, the agency shall follow the uniform numbering system, form, and style prescribed by the administrative rules coordinator.

**283—2.13(17A) Agency rule-making record.**

**2.13(1) Requirement.** The agency shall maintain an official rule-making record for each rule it proposes by publication in the Iowa Administrative Bulletin of a Notice of Intended Action, or adopts. The rule-making record and materials incorporated by reference must be available for public inspection.

**2.13(2) Contents.** The agency rule-making record shall contain:

- a. Copies of all publications in the Iowa Administrative Bulletin with respect to the rule or the proceeding upon which the rule is based and any file-stamped copies of agency submissions to the administrative rules coordinator concerning that rule or the proceeding upon which it is based;
- b. Copies of any portions of the agency's public rule-making docket containing entries relating to the rule or the proceeding upon which the rule is based;

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c. All written petitions, requests, and submissions received by the agency, and all other written materials of a factual nature as distinguished from opinion that are relevant to the merits of the rule and that were created or compiled by the agency and considered by the executive director, in connection with the formulation, proposal, or adoption of the rule or the proceeding upon which the rule is based, except to the extent the agency is authorized by law to keep them confidential; provided, however, that when any such materials are deleted because they are authorized by law to be kept confidential, the agency shall identify in the record the particular materials deleted and state the reasons for that deletion;

d. Any official transcript of oral presentations made in the proceeding upon which the rule is based or, if not transcribed, the stenographic record or electronic recording of those presentations, and any memorandum prepared by a presiding officer summarizing the contents of those presentations;

e. A copy of any regulatory analysis or fiscal impact statement prepared for the proceeding upon which the rule is based;

f. A copy of the rule and any concise statement of reasons prepared for that rule;

g. All petitions for amendments or repeal or suspension of the rule;

h. A copy of any objection to the issuance of that rule without public notice and participation that was filed pursuant to Iowa Code section 17A.4(2) by the administrative rules review committee, the governor, or the attorney general;

i. A copy of any objection to the rule filed by the administrative rules review committee, the governor, or the attorney general pursuant to Iowa Code section 17A.4(4), and any agency response to that objection;

j. A copy of any significant written criticism of the rule, including a separate file of any petitions for waiver of the rule; and

k. A copy of any executive order concerning the rule.

**2.13(3) Effect of record.** Except as otherwise required by a provision of law, the agency rule-making record required by this rule need not constitute the exclusive basis for agency action on that rule.

**2.13(4) Maintenance of files.** The agency shall maintain the rule-making file for a period of not less than five years from the later of the date the rule to which it pertains became effective, the date of the Notice of Intended Action, or the date of any written criticism as described in 2.13(2) "g," "h," "i," or "j."

**283—2.14(17A) Filing of rules.** The agency shall file each rule it adopts in the office of the administrative rules coordinator. The filing must be executed as soon after adoption of the rule as is practicable. At the time of filing, each rule must have attached to it any fiscal impact statement and any concise statement of reasons that was issued with respect to that rule. If a fiscal impact statement or statement of reasons for that rule was not issued until a time subsequent to the filing of that rule, the note or statement must be attached to the filed rule within five working days after the note or statement is issued. In filing a rule, the agency shall use the standard form prescribed by the administrative rules coordinator.

**283—2.15(17A) Effectiveness of rules prior to publication.**

**2.15(1) Grounds.** The agency may make a rule effective after its filing at any stated time prior to 35 days after its in-

dexing and publication in the Iowa Administrative Bulletin if it finds that a statute so provides, the rule confers a benefit or removes a restriction on some segment of the public, or that the effective date of the rule is necessary to avoid imminent peril to the public health, safety, or welfare. The agency shall incorporate the required finding and a brief statement of its supporting reasons in each rule adopted in reliance upon this subrule.

**2.15(2) Special notice.** When the agency makes a rule effective prior to its indexing and publication in reliance upon the provisions of Iowa Code section 17A.5(2)"b"(3), the agency shall employ all reasonable efforts to make its contents known to the persons who may be affected by that rule prior to the rule's indexing and publication. The term "all reasonable efforts" requires the agency to employ the most effective and prompt means of notice rationally calculated to inform potentially affected parties of the effectiveness of the rule that is justified and practical under the circumstances considering the various alternatives available for this purpose, the comparative costs to the agency of utilizing each of those alternatives, and the harm suffered by affected persons from any lack of notice concerning the contents of the rule prior to its indexing and publication. The means that may be used for providing notice of such rules prior to their indexing and publication include, but are not limited to, any one or more of the following means: radio, newspaper, television, signs, mail, telephone, personal notice or electronic means.

A rule made effective prior to its indexing and publication in reliance upon the provisions of Iowa Code section 17A.5(2)"b"(3) shall include in that rule a statement describing the reasonable efforts that will be used to comply with the requirements of subrule 2.15(2).

**283—2.16(17A) General statements of policy.**

**2.16(1) Compilation, indexing, public inspection.** The agency shall maintain an official, current, and dated compilation that is indexed by subject, containing all of its general statements of policy within the scope of Iowa Code section 17A.2(10)"a," "c," "f," "g," "h," "k." Each addition to, change in, or deletion from the official compilation must also be dated, indexed, and a record thereof kept. Except for those portions containing rules governed by Iowa Code section 17A.2(7)"f," or otherwise authorized by law to be kept confidential, the compilation must be made available for public inspection and copying.

**2.16(2) Enforcement of requirements.** A general statement of policy subject to the requirements of this subsection shall not be relied on by the agency to the detriment of any person who does not have actual, timely knowledge of the contents of the statement until the requirements of subrule 2.16(1) are satisfied. This provision is inapplicable to the extent necessary to avoid imminent peril to the public health, safety, or welfare.

**283—2.17(17A) Review by agency of rules.**

**2.17(1) Any interested person, association, agency, or political subdivision may submit a written request to the administrative rules coordinator requesting the agency to conduct a formal review of a specified rule.** Upon approval of that request by the administrative rules coordinator, the agency shall conduct a formal review of a specified rule to determine whether a new rule should be adopted instead or the rule should be amended or repealed. The agency may refuse to conduct a review if it has conducted such a review of the specified rule within five years prior to the filing of the written request.

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2.17(2) In conducting the formal review, the agency shall prepare within a reasonable time a written report summarizing its findings, its supporting reasons, and any proposed course of action. The report must include a concise statement of the agency's findings regarding the rule's effectiveness in achieving its objectives, including a summary of any available supporting data. The report shall also concisely describe significant written criticisms of the rule received during the previous five years, including a summary of any petitions for waiver of the rule received by the agency or granted by the agency. The report shall describe alternative solutions to resolve the criticisms of the rule, the reasons any were rejected, and any changes made in the rule in response to the criticisms as well as the reasons for the changes. A copy of the agency's report shall be sent to the administrative rules review committee and the administrative rules coordinator. The report must also be available for public inspection.

These rules are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202.

ITEM 2. Rescind 283—Chapter 3 and adopt the following new chapter in lieu thereof:

CHAPTER 3
DECLARATORY ORDERS

283—3.1(17A) Petition for declaratory order. Any person may file a petition with the college student aid commission for a declaratory order as to the applicability to specified circumstances of a statute, rule, or order within the primary jurisdiction of the commission, at 200 Tenth Street, Fourth Floor, Des Moines, Iowa 50309-3609. A petition is deemed filed when it is received by that office. The commission shall provide the petitioner with a file-stamped copy of the petition if the petitioner provides the agency an extra copy for this purpose. The petition must be typewritten or legibly handwritten in ink and must substantially conform to the following form:

COLLEGE STUDENT AID COMMISSION

Petition by (Name of Petitioner) for a Declaratory Order on (Cite provisions of law involved).



PETITION FOR DECLARATORY ORDER

The petition must provide the following information:

- 1. A clear and concise statement of all relevant facts on which the order is requested.
2. A citation and the relevant language of the specific statutes, rules, policies, decisions, or orders, whose applicability is questioned, and any other relevant law.
3. The questions petitioner wants answered, stated clearly and concisely.
4. The answers to the questions desired by the petitioner and a summary of the reasons urged by the petitioner in support of those answers.
5. The reasons for requesting the declaratory order and disclosure of the petitioner's interest in the outcome.
6. A statement indicating whether the petitioner is currently a party to another proceeding involving the questions at issue and whether, to the petitioner's knowledge, those questions have been decided by, are pending determination by, or are under investigation by, any governmental entity.
7. The names and addresses of other persons, or a description of any class of persons, known by petitioner to be

affected by, or interested in, the questions presented in the petition.

8. Any request by petitioner for a meeting provided for by 3.7(17A).

The petition must be dated and signed by the petitioner or the petitioner's representative. It must also include the name, mailing address, and telephone number of the petitioner and petitioner's representative and a statement indicating the person to whom communications concerning the petition should be directed.

283—3.2(17A) Notice of petition. Within 15 days after receipt of a petition for a declaratory order, the college student aid commission shall give notice of the petition to all persons not served by the petitioner pursuant to 3.6(17A) to whom notice is required by any provision of law. The commission may also give notice to any other persons.

283—3.3(17A) Intervention.

3.3(1) Persons who qualify under any applicable provision of law as an intervenor and who file a petition for intervention within 15 days of the filing of a petition for declaratory order (after time for notice under 3.2(17A) and before 30-day time for agency action under 3.8(17A)) shall be allowed to intervene in a proceeding for a declaratory order.

3.3(2) Any person who files a petition for intervention at any time prior to the issuance of an order may be allowed to intervene in a proceeding for a declaratory order at the discretion of the commission.

3.3(3) A petition for intervention shall be filed at 200 Tenth Street, Fourth Floor, Des Moines, Iowa 50309-3609. Such a petition is deemed filed when it is received by that office. The commission will provide the petitioner with a file-stamped copy of the petition for intervention if the petitioner provides an extra copy for this purpose. A petition for intervention must be typewritten or legibly handwritten in ink and must substantially conform to the following form:

COLLEGE STUDENT AID COMMISSION

Petition by (Name of Original Petitioner) for a Declaratory Order on (Cite provisions of law cited in original petition).



PETITION FOR INTERVENTION

The petition for intervention must provide the following information:

- 1. Facts supporting the intervenor's standing and qualifications for intervention.
2. The answers urged by the intervenor to the question or questions presented and a summary of the reasons urged in support of those answers.
3. Reasons for requesting intervention and disclosure of the intervenor's interest in the outcome.
4. A statement indicating whether the intervenor is currently a party to any proceeding involving the questions at issue and whether, to the intervenor's knowledge, those questions have been decided by, are pending determination by, or are under investigation by, any governmental entity.
5. The names and addresses of any additional persons, or a description of any additional class of persons, known by the intervenor to be affected by, or interested in, the questions presented.

## COLLEGE STUDENT AID COMMISSION[283](cont'd)

6. Whether the intervenor consents to be bound by the determination of the matters presented in the declaratory order proceeding.

The petition must be dated and signed by the intervenor or the intervenor's representative. It must also include the name, mailing address, and telephone number of the intervenor and intervenor's representative, and a statement indicating the person to whom communications should be directed.

**283—3.4(17A) Briefs.** The petitioner or any intervenor may file a brief in support of the position urged. The commission may request a brief from the petitioner, any intervenor, or any other person concerning the questions raised.

**283—3.5(17A) Inquiries.** Inquiries concerning the status of a declaratory order proceeding may be made to Executive Director, College Student Aid Commission, 200 Tenth Street, Fourth Floor, Des Moines, Iowa 50309-3609.

**283—3.6(17A) Service and filing of petitions and other papers.**

**3.6(1)** When service required. Except where otherwise provided by law, every petition for declaratory order, petition for intervention, brief, or other paper filed in a proceeding for a declaratory order shall be served upon each of the parties of record to the proceeding, and on all other persons identified in the petition for declaratory order or petition for intervention as affected by or interested in the questions presented, simultaneously with their filing. The party filing a document is responsible for service on all parties and other affected or interested persons.

**3.6(2)** Filing—when required. All petitions for declaratory orders, petitions for intervention, briefs, or other papers in a proceeding for a declaratory order shall be filed with the College Student Aid Commission, 200 Tenth Street, Fourth Floor, Des Moines, Iowa 50309-3609. All petitions, briefs, or other papers that are required to be served upon a party shall be filed simultaneously with the commission.

**3.6(3)** Method of service, time of filing, and proof of mailing. Method of service, time of filing, and proof of mailing shall be as provided by uniform rule on contested cases 382—3.12(17A).

**283—3.7(17A) Consideration.** Upon request by petitioner, the college student aid commission must schedule a brief and informal meeting between the original petitioner, all intervenors, and the commission, a member of the commission, or a member of the staff of the commission, to discuss the questions raised. The commission may solicit comments from any person on the questions raised. Also, comments on the questions raised may be submitted to the commission by any person.

**283—3.8(17A) Action on petition.**

**3.8(1)** Within the time allowed by 1998 Iowa Acts, chapter 1202, section 13(5), after receipt of a petition for a declaratory order, the executive director or designee shall take action on the petition as required by 1998 Iowa Acts, chapter 1202, section 13(5).

**3.8(2)** The date of issuance of an order or of a refusal to issue an order is as defined in contested case uniform rule 283—4.2(17A).

**283—3.9(17A) Refusal to issue order.**

**3.9(1)** The commission shall not issue a declaratory order where prohibited by 1998 Iowa Acts, chapter 1202, section 13(1), and may refuse to issue a declaratory order on some or all questions raised for the following reasons:

1. The petition does not substantially comply with the required form.

2. The petition does not contain facts sufficient to demonstrate that the petitioner will be aggrieved or adversely affected by the failure of the commission to issue an order.

3. The commission does not have jurisdiction over the questions presented in the petition.

4. The questions presented by the petition are also presented in a current rule making, contested case, or other agency or judicial proceeding, that may definitively resolve them.

5. The questions presented by the petition would more properly be resolved in a different type of proceeding or by another body with jurisdiction over the matter.

6. The facts or questions presented in the petition are unclear, overbroad, insufficient, or otherwise inappropriate as a basis upon which to issue an order.

7. There is no need to issue an order because the questions raised in the petition have been settled due to a change in circumstances.

8. The petition is not based upon facts calculated to aid in the planning of future conduct but is, instead, based solely upon prior conduct in an effort to establish the effect of that conduct or to challenge an agency decision already made.

9. The petition requests a declaratory order that would necessarily determine the legal rights, duties, or responsibilities of other persons who have not joined in the petition, intervened separately, or filed a similar petition and whose position on the questions presented may fairly be presumed to be adverse to that of petitioner.

10. The petitioner requests the commission to determine whether a statute is unconstitutional on its face.

**3.9(2)** A refusal to issue a declaratory order must indicate the specific grounds for the refusal and constitutes final agency action on the petition.

**3.9(3)** Refusal to issue a declaratory order pursuant to this provision does not preclude the filing of a new petition that seeks to eliminate the grounds for the refusal to issue an order.

**283—3.10(17A) Contents of declaratory order—effective date.** In addition to the order itself, a declaratory order must contain the date of its issuance, the name of petitioner and all intervenors, the specific statutes, rules, policies, decisions, or orders involved, the particular facts upon which it is based, and the reasons for its conclusion.

A declaratory order is effective on the date of issuance.

**283—3.11(17A) Copies of orders.** A copy of all orders issued in response to a petition for a declaratory order shall be mailed promptly to the original petitioner and all intervenors.

**283—3.12(17A) Effect of a declaratory order.** A declaratory order has the same status and binding effect as a final order issued in a contested case proceeding. It is binding on the commission, the petitioner, and any intervenors who consent to be bound and is applicable only in circumstances where the relevant facts and the law involved are indistinguishable from those on which the order was based. As to all other persons, a declaratory order serves only as precedent and is not binding on the commission. The issuance of a declaratory order constitutes final agency action on the petition.

These rules are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202.

ITEM 3. Adopt the following new 283—Chapter 4:

## COLLEGE STUDENT AID COMMISSION[283](cont'd)

CHAPTER 4  
CONTESTED CASES

**283—4.1(17A) Scope and applicability.** This chapter applies to contested case proceedings conducted by the college student aid commission.

**283—4.2(17A) Definitions.** Except where otherwise specifically defined by law:

“Contested case” means a proceeding defined by Iowa Code section 17A.2(5) and includes any matter defined as a no factual dispute contested case under 1998 Iowa Acts, chapter 1202, section 14.

“Issuance” means the date of mailing of a decision or order or date of delivery if service is by other means unless another date is specified in the order.

“Party” means each person or agency named or admitted as a party or properly seeking and entitled as of right to be admitted as a party.

“Presiding officer” means the executive director.

“Proposed decision” means the presiding officer’s recommended findings of fact, conclusions of law, decision, and order in a contested case in which the college student aid commission did not preside.

**283—4.3(17A) Time requirements.**

**4.3(1)** Time shall be computed as provided in Iowa Code subsection 4.1(34).

**4.3(2)** For good cause, the presiding officer may extend or shorten the time to take any action, except as precluded by statute. Except for good cause stated in the record, before extending or shortening the time to take any action, the presiding officer shall afford all parties an opportunity to be heard or to file written arguments.

**283—4.4(17A) Requests for contested case proceeding.** Any person claiming an entitlement to a contested case proceeding shall file a written request for such a proceeding within the time specified by the particular rules or statutes governing the subject matter or, in the absence of such law, the time specified in the agency action in question.

The request for a contested case proceeding should state the name and address of the requester, identify the specific agency action which is disputed, and where the requester is represented by a lawyer identify the provisions of law or precedent requiring or authorizing the holding of a contested case proceeding in the particular circumstances involved, and include a short and plain statement of the issues of material fact in dispute.

**283—4.5(17A) Notice of hearing.**

**4.5(1)** Delivery. Delivery of the notice of hearing constitutes the commencement of the contested case proceeding. Delivery may be executed by:

- a. Personal service as provided in the Iowa Rules of Civil Procedure; or
- b. Certified mail, return receipt requested; or
- c. First-class mail; or
- d. Publication, as provided in the Iowa Rules of Civil Procedure.

**4.5(2)** Contents. The notice of hearing shall contain the following information:

- a. A statement of the time, place, and nature of the hearing;
- b. A statement of the legal authority and jurisdiction under which the hearing is to be held;
- c. A reference to the particular sections of the statutes and rules involved;

d. A short and plain statement of the matters asserted. If the agency or other party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved. Thereafter, upon application, a more definite and detailed statement shall be furnished;

e. Identification of all parties including the name, address and telephone number of the person who will act as advocate for the agency or the state and of parties’ counsel where known;

f. Reference to the procedural rules governing conduct of the contested case proceeding;

g. Reference to the procedural rules governing informal settlement;

h. Identification of the presiding officer, if known. If not known, a description of who will serve as presiding officer (e.g., agency head, members of multimembered agency head, administrative law judge from the department of inspections and appeals); and

i. Notification of the time period in which a party may request, pursuant to 1998 Iowa Acts, chapter 1202, section 15(1), and rule 4.6(17A), that the presiding officer be an administrative law judge.

**283—4.6(17A) Presiding officer.**

**4.6(1)** Any party who wishes to request that the presiding officer assigned to render a proposed decision be an administrative law judge employed by the department of inspections and appeals must file a written request within 20 days or such other time period the agency designates after service of a notice of hearing which identifies or describes the presiding officer as the agency head or members of the agency.

**4.6(2)** The agency or its designee may deny the request only upon a finding that one or more of the following apply:

a. Neither the agency nor any officer of the agency under whose authority the contested case is to take place is a named party to the proceeding or a real party in interest to that proceeding.

b. There is a compelling need to expedite issuance of a final decision in order to protect the public health, safety, or welfare.

c. A qualified administrative law judge is unavailable to hear the case within a reasonable time.

d. The case involves significant policy issues of first impression that are inextricably intertwined with the factual issues presented.

e. The demeanor of the witnesses is likely to be dispositive in resolving the disputed factual issues.

f. Funds are unavailable to pay the costs of an administrative law judge and an interagency appeal.

g. The request was not timely filed.

h. The request is not consistent with a specified statute.

**4.6(3)** The agency or its designee shall issue a written ruling specifying the grounds for its decision within 20 days or such other time period the agency designates after a request for an administrative law judge is filed. The parties shall be notified at least 10 days prior to hearing if a qualified administrative law judge will not be available.

**4.6(4)** Except as provided otherwise by another provision of law, all rulings by an administrative law judge acting as presiding officer are subject to appeal to the agency. A party must seek any available intra-agency appeal in order to exhaust adequate administrative remedies.

**4.6(5)** Unless otherwise provided by law, agency heads and members of multimembered agency heads, when reviewing a proposed decision upon intra-agency appeal, shall

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have the powers of and shall comply with the provisions of this chapter which apply to presiding officers.

**283—4.7(17A) Waiver of procedures.** Unless otherwise precluded by law, the parties in a contested case proceeding may waive any provision of this chapter. However, the agency in its discretion may refuse to give effect to such a waiver when it deems the waiver to be inconsistent with the public interest.

**283—4.8(17A) Telephone proceedings.** The presiding officer may resolve preliminary procedural motions by telephone conference in which all parties have an opportunity to participate. Other telephone proceedings may be held with the consent of all parties. The presiding officer will determine the location of the parties and witnesses for telephone hearings. The convenience of the witnesses or parties, as well as the nature of the case, will be considered when location is chosen.

**283—4.9(17A) Disqualification.**

**4.9(1)** A presiding officer or other person shall withdraw from participation in the making of any proposed or final decision in a contested case if that person:

- a. Has a personal bias or prejudice concerning a party or a representative of a party;
- b. Has personally investigated, prosecuted or advocated in connection with that case, the specific controversy underlying that case, another pending factually related contested case, or a pending factually related controversy that may culminate in a contested case involving the same parties;
- c. Is subject to the authority, direction or prosecution of any person who has personally investigated, prosecuted or advocated in connection with that contested case, the specific controversy underlying that contested case, or a pending factually related contested case or controversy involving the same parties;
- d. Has acted as counsel to any person who is a private party to that proceeding within the past two years;
- e. Has a personal financial interest in the outcome of the case or any other significant personal interest that could be substantially affected by the outcome of the case;
- f. Has a spouse or relative within the third degree of relationship that: (1) is a party to the case, or an officer, director or trustee of a party; (2) is a lawyer in the case; (3) is known to have an interest that could be substantially affected by the outcome of the case; or (4) is likely to be a material witness in the case; or
- g. Has any other legally sufficient cause to withdraw from participation in the decision making in that case.

**4.9(2)** The term "personally investigated" means taking affirmative steps to interview witnesses directly or to obtain documents or other information directly. The term "personally investigated" does not include general direction and supervision of assigned investigators, unsolicited receipt of information which is related to assigned investigators, review of another person's investigative work product in the course of determining whether there is probable cause to initiate a proceeding, or exposure to factual information while performing other agency functions, including fact gathering for purposes other than investigation of the matter which culminates in a contested case. Factual information relevant to the merits of a contested case received by a person who later serves as presiding officer in that case shall be disclosed if required by Iowa Code section 17A.17(3) and subrules 4.9(3) and 4.23(9).

**4.9(3)** In a situation where a presiding officer or other person knows of information which might reasonably be

deemed to be a basis for disqualification and decides voluntary withdrawal is unnecessary, that person shall submit the relevant information for the record by affidavit and shall provide for the record a statement of the reasons for the determination that withdrawal is unnecessary.

**4.9(4)** If a party asserts disqualification on any appropriate ground, including those listed in subrule 4.9(1), the party shall file a motion supported by an affidavit pursuant to 1998 Iowa Acts, chapter 1202, section 19(7). The motion must be filed as soon as practicable after the reason alleged in the motion becomes known to the party.

If, during the course of the hearing, a party first becomes aware of evidence of bias or other grounds for disqualification, the party may move for disqualification but must establish the grounds by the introduction of evidence into the record.

If the presiding officer determines that disqualification is appropriate, the presiding officer or other person shall withdraw. If the presiding officer determines that withdrawal is not required, the presiding officer shall enter an order to that effect. A party asserting disqualification may seek an interlocutory appeal under rule 4.25(17A) and seek a stay under rule 4.29(17A).

**283—4.10(17A) Consolidation—severance.**

**4.10(1)** Consolidation. The presiding officer may consolidate any or all matters at issue in two or more contested case proceedings where: (a) the matters at issue involve common parties or common questions of fact or law; (b) consolidation would expedite and simplify consideration of the issues involved; and (c) consolidation would not adversely affect the rights of any of the parties to those proceedings.

**4.10(2)** Severance. The presiding officer may, for good cause shown, order any contested case proceedings or portions thereof severed.

**283—4.11(17A) Pleadings.**

**4.11(1)** Pleadings may be required by rule, by the notice of hearing, or by order of the presiding officer.

**4.11(2)** Petition.

a. Any petition required in a contested case proceeding shall be filed within 20 days of delivery of the notice of hearing or subsequent order of the presiding officer, unless otherwise ordered.

b. A petition shall state in separately numbered paragraphs the following:

- (1) The persons or entities on whose behalf the petition is filed;
- (2) The particular provisions of statutes and rules involved;
- (3) The relief demanded and the facts and law relied upon for such relief; and
- (4) The name, address and telephone number of the petitioner and the petitioner's attorney, if any.

**4.11(3)** Answer. An answer shall be filed within 20 days of service of the petition unless otherwise ordered. A party may move to dismiss or apply for a more definite and detailed statement when appropriate.

An answer shall show on whose behalf it is filed and specifically admit, deny, or otherwise answer all material allegations of the pleading to which it responds. It shall state any facts deemed to show an affirmative defense and contain as many additional defenses as the pleader may claim.

An answer shall state the name, address and telephone number of the person filing the answer, the person or entity on whose behalf it is filed, and the attorney representing that person, if any.

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Any allegation in the petition not denied in the answer is considered admitted. The presiding officer may refuse to consider any defense not raised in the answer which could have been raised on the basis of facts known when the answer was filed if any party would be prejudiced.

**4.11(4) Amendment.** Any notice of hearing, petition, or other charging document may be amended before a responsive pleading has been filed. Amendments to pleadings after a responsive pleading has been filed and to an answer may be allowed with the consent of the other parties or in the discretion of the presiding officer who may impose terms or grant a continuance.

**283—4.12(17A) Service and filing of pleadings and other papers.**

**4.12(1) When service required.** Except where otherwise provided by law, every pleading, motion, document, or other paper filed in a contested case proceeding and every paper relating to discovery in such a proceeding shall be served upon each of the parties of record to the proceeding, including the person designated as advocate or prosecutor for the state or the agency, simultaneously with their filing. Except for the original notice of hearing and an application for rehearing as provided in Iowa Code section 17A.16(2), the party filing a document is responsible for service on all parties.

**4.12(2) Service—how made.** Service upon a party represented by an attorney shall be made upon the attorney unless otherwise ordered. Service is made by delivery or by mailing a copy to the person's last-known address. Service by mail is complete upon mailing, except where otherwise specifically provided by statute, rule, or order.

**4.12(3) Filing—when required.** After the notice of hearing, all pleadings, motions, documents or other papers in a contested case proceeding shall be filed with the college student aid commission.

**4.12(4) Filing—when made.** Except where otherwise provided by law, a document is deemed filed at the time it is delivered to the college student aid commission, delivered to an established courier service for immediate delivery to that office, or mailed by first-class mail or state interoffice mail to that office, so long as there is proof of mailing.

**4.12(5) Proof of mailing.** Proof of mailing includes either: a legible United States Postal Service postmark on the envelope, a certificate of service, a notarized affidavit, or a certification in substantially the following form:

I certify under penalty of perjury and pursuant to the laws of Iowa that, on (date of mailing), I mailed copies of (describe document) addressed to the (agency office and address) and to the names and addresses of the parties listed below by depositing the same in (a United States post office mailbox with correct postage properly affixed or state interoffice mail).

(Date) (Signature)

**283—4.13(17A) Discovery.**

**4.13(1) Discovery procedures applicable in civil actions** are applicable in contested cases. Unless lengthened or shortened by these rules or by order of the presiding officer, time periods for compliance with discovery shall be as provided in the Iowa Rules of Civil Procedure.

**4.13(2) Any motion relating to discovery shall allege that the moving party has previously made a good-faith attempt to resolve the discovery issues involved with the opposing party. Motions in regard to discovery shall be ruled upon by the presiding officer. Opposing parties shall be afforded the opportunity to respond within ten days of the filing of the**

**motion unless the time is shortened as provided in subrule 4.13(1). The presiding officer may rule on the basis of the written motion and any response, or may order argument on the motion.**

**4.13(3) Evidence obtained in discovery may be used in the contested case proceeding if that evidence would otherwise be admissible in that proceeding.**

**283—4.14(17A) Subpoenas.****4.14(1) Issuance.**

**a. An agency subpoena shall be issued to a party on request. Such a request must be in writing. In the absence of good cause for permitting later action, a request for a subpoena must be received at least three days before the scheduled hearing. The request shall include the name, address, and telephone number of the requesting party.**

**b. Except to the extent otherwise provided by law, parties are responsible for service of their own subpoenas and payment of witness fees and mileage expenses.**

**4.14(2) Motion to quash or modify.** The presiding officer may quash or modify a subpoena for any lawful reason upon motion in accordance with the Iowa Rules of Civil Procedure. A motion to quash or modify a subpoena shall be set for argument promptly.

**283—4.15(17A) Motions.**

**4.15(1) No technical form for motions is required. However, prehearing motions must be in writing, state the grounds for relief, and state the relief sought.**

**4.15(2) Any party may file a written response to a motion within ten days after the motion is served, unless the time period is extended or shortened by rules of the agency or the presiding officer. The presiding officer may consider a failure to respond within the required time period in ruling on a motion.**

**4.15(3) The presiding officer may schedule oral argument on any motion.**

**4.15(4) Motions pertaining to the hearing, except motions for summary judgment, must be filed and served at least ten days prior to the date of hearing unless there is good cause for permitting later action or the time for such action is lengthened or shortened by rule of the agency or an order of the presiding officer.**

**4.15(5) Motions for summary judgment. Motions for summary judgment shall comply with the requirements of Iowa Rule of Civil Procedure 237 and shall be subject to disposition according to the requirements of that rule to the extent such requirements are not inconsistent with the provisions of this rule or any other provision of law governing the procedure in contested cases.**

**Motions for summary judgment must be filed and served at least 45 days prior to the scheduled hearing date, or other time period determined by the presiding officer. Any party resisting the motion shall file and serve a resistance within 15 days, unless otherwise ordered by the presiding officer, from the date a copy of the motion was served. The time fixed for hearing or nonoral submission shall be not less than 20 days after the filing of the motion, unless a shorter time is ordered by the presiding officer. A summary judgment order rendered on all issues in a contested case is subject to rehearing pursuant to 4.28(17A) and appeal pursuant to 4.27(17A).**

**283—4.16(17A) Prehearing conference.**

**4.16(1) Any party may request a prehearing conference. A written request for prehearing conference or an order for prehearing conference on the presiding officer's own motion shall be filed not less than seven days prior to the hearing**

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date. A prehearing conference shall be scheduled not less than three business days prior to the hearing date.

Written notice of the prehearing conference shall be given by the executive director to all parties. For good cause the presiding officer may permit variances from this rule.

**4.16(2)** Each party shall bring to the prehearing conference:

a. A final list of the witnesses who the party anticipates will testify at hearing. Witnesses not listed may be excluded from testifying unless there was good cause for the failure to include their names; and

b. A final list of exhibits which the party anticipates will be introduced at hearing. Exhibits other than rebuttal exhibits that are not listed may be excluded from admission into evidence unless there was good cause for the failure to include them.

c. Witness or exhibit lists may be amended subsequent to the prehearing conference within the time limits established by the presiding officer at the prehearing conference. Any such amendments must be served on all parties.

**4.16(3)** In addition to the requirements of subrule 4.16(2), the parties at a prehearing conference may:

- a. Enter into stipulations of law or fact;
- b. Enter into stipulations on the admissibility of exhibits;
- c. Identify matters which the parties intend to request be officially noticed;
- d. Enter into stipulations for waiver of any provision of law; and
- e. Consider any additional matters which will expedite the hearing.

**4.16(4)** Prehearing conferences shall be conducted by telephone unless otherwise ordered. Parties shall exchange and receive witness and exhibit lists in advance of a telephone prehearing conference.

**283—4.17(17A) Continuances.** Unless otherwise provided, applications for continuances shall be made to the presiding officer.

**4.17(1)** A written application for a continuance shall:

- a. Be made at the earliest possible time and no less than seven days before the hearing except in case of unanticipated emergencies;
- b. State the specific reasons for the request; and
- c. Be signed by the requesting party or the party's representative.

An oral application for a continuance may be made if the presiding officer waives the requirement for a written motion. However, a party making such an oral application for a continuance must confirm that request by written application within five days after the oral request unless that requirement is waived by the presiding officer. No application for continuance shall be made or granted without notice to all parties except in an emergency where notice is not feasible. The agency may waive notice of such requests for a particular case or an entire class of cases.

**4.17(2)** In determining whether to grant a continuance, the presiding officer may consider:

- a. Prior continuances;
- b. The interests of all parties;
- c. The likelihood of informal settlement;
- d. The existence of an emergency;
- e. Any objection;
- f. Any applicable time requirements;
- g. The existence of a conflict in the schedules of counsel, parties, or witnesses;
- h. The timeliness of the request; and

i. Other relevant factors.

The presiding officer may require documentation of any grounds for continuance.

**283—4.18(17A) Withdrawals.** A party requesting a contested case proceeding may withdraw that request prior to the hearing only in accordance with agency rules. Unless otherwise provided, a withdrawal shall be with prejudice.

**283—4.19(17A) Intervention.**

**4.19(1) Motion.** A motion for leave to intervene in a contested case proceeding shall state the grounds for the proposed intervention, the position and interest of the proposed intervenor, and the possible impact of intervention on the proceeding. A proposed answer or petition in intervention shall be attached to the motion. Any party may file a response within 14 days of service of the motion to intervene unless the time period is extended or shortened by the presiding officer.

**4.19(2) When filed.** Motion for leave to intervene shall be filed as early in the proceeding as possible to avoid adverse impact on existing parties or the conduct of the proceeding. Unless otherwise ordered, a motion for leave to intervene shall be filed before the prehearing conference, if any, or at least 20 days before the date scheduled for hearing. Any later motion must contain a statement of good cause for the failure to file in a timely manner. Unless inequitable or unjust, an intervenor shall be bound by any agreement, arrangement, or other matter previously raised in the case. Requests by untimely intervenors for continuances which would delay the proceeding will ordinarily be denied.

**4.19(3) Grounds for intervention.** The movant shall demonstrate that: (a) intervention would not unduly prolong the proceedings or otherwise prejudice the rights of existing parties; (b) the movant is likely to be aggrieved or adversely affected by a final order in the proceeding; and (c) the interests of the movant are not adequately represented by existing parties.

**4.19(4) Effect of intervention.** If appropriate, the presiding officer may order consolidation of the petitions and briefs of different parties whose interests are aligned with each other and limit the number of representatives allowed to participate actively in the proceedings. A person granted leave to intervene is a party to the proceeding. The order granting intervention may restrict the issues that may be raised by the intervenor or otherwise condition the intervenor's participation in the proceeding.

**283—4.20(17A) Hearing procedures.**

**4.20(1)** The presiding officer presides at the hearing, and may rule on motions, require briefs, issue a proposed decision, and issue such orders and rulings as will ensure the orderly conduct of the proceedings.

**4.20(2)** All objections shall be timely made and stated on the record.

**4.20(3)** Parties have the right to participate or to be represented in all hearings or prehearing conferences related to their case. Partnerships, corporations, or associations may be represented by any member, officer, director, or duly authorized agent. Any party may be represented by an attorney or another person authorized by law.

**4.20(4)** Subject to terms and conditions prescribed by the presiding officer, parties have the right to introduce evidence on issues of material fact, cross-examine witnesses present at the hearing as necessary for a full and true disclosure of the facts, present evidence in rebuttal, and submit briefs and engage in oral argument.

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4.20(5) The presiding officer shall maintain the decorum of the hearing and may refuse to admit or may expel anyone whose conduct is disorderly.

4.20(6) Witnesses may be sequestered during the hearing.

4.20(7) The presiding officer shall conduct the hearing in the following manner:

a. The presiding officer shall give an opening statement briefly describing the nature of the proceedings;

b. The parties shall be given an opportunity to present opening statements;

c. Parties shall present their cases in the sequence determined by the presiding officer;

d. Each witness shall be sworn or affirmed by the presiding officer or the court reporter, and be subject to examination and cross-examination. The presiding officer may limit questioning in a manner consistent with law;

e. When all parties and witnesses have been heard, parties may be given the opportunity to present final arguments.

**283—4.21(17A) Evidence.**

4.21(1) The presiding officer shall rule on admissibility of evidence and may, where appropriate, take official notice of facts in accordance with all applicable requirements of law.

4.21(2) Stipulation of facts is encouraged. The presiding officer may make a decision based on stipulated facts.

4.21(3) Evidence in the proceeding shall be confined to the issues as to which the parties received notice prior to the hearing unless the parties waive their right to such notice or the presiding officer determines that good cause justifies expansion of the issues. If the presiding officer decides to admit evidence on issues outside the scope of the notice over the objection of a party who did not have actual notice of those issues, that party, upon timely request, shall receive a continuance sufficient to amend pleadings and to prepare on the additional issue.

4.21(4) The party seeking admission of an exhibit must provide opposing parties with an opportunity to examine the exhibit prior to the ruling on its admissibility. Copies of documents should normally be provided to opposing parties.

All exhibits admitted into evidence shall be appropriately marked and be made part of the record.

4.21(5) Any party may object to specific evidence or may request limits on the scope of any examination or cross-examination. Such an objection shall be accompanied by a brief statement of the grounds upon which it is based. The objection, the ruling on the objection, and the reasons for the ruling shall be noted in the record. The presiding officer may rule on the objection at the time it is made or may reserve a ruling until the written decision.

4.21(6) Whenever evidence is ruled inadmissible, the party offering that evidence may submit an offer of proof on the record. The party making the offer of proof for excluded oral testimony shall briefly summarize the testimony or, with permission of the presiding officer, present the testimony. If the excluded evidence consists of a document or exhibit, it shall be marked as part of an offer of proof and inserted in the record.

**283—4.22(17A) Default.**

4.22(1) If a party fails to appear or participate in a contested case proceeding after proper service of notice, the presiding officer may, if no adjournment is granted, enter a default decision or proceed with the hearing and render a decision in the absence of the party.

4.22(2) Where appropriate and not contrary to law, any party may move for default against a party who has re-

quested the contested case proceeding and has failed to file a required pleading or has failed to appear after proper service.

4.22(3) Default decisions or decisions rendered on the merits after a party has failed to appear or participate in a contested case proceeding become final agency action unless, within 15 days or other period of time specified by statute or rule after the date of notification or mailing of the decision, a motion to vacate is filed and served on all parties or an appeal of a decision on the merits is timely initiated within the time provided by rule 4.27(17A). A motion to vacate must state all facts relied upon by the moving party which establish that good cause existed for that party's failure to appear or participate at the contested case proceeding. Each fact so stated must be substantiated by at least one sworn affidavit of a person with personal knowledge of each such fact, which affidavit(s) must be attached to the motion.

4.22(4) The time for further appeal of a decision for which a timely motion to vacate has been filed is stayed pending a decision on the motion to vacate.

4.22(5) Properly substantiated and timely filed motions to vacate shall be granted only for good cause shown. The burden of proof as to good cause is on the moving party. Adverse parties shall have ten days or other time specified by the agency to respond to a motion to vacate. Adverse parties shall be allowed to conduct discovery as to the issue of good cause and to present evidence on the issue prior to a decision on the motion, if a request to do so is included in that party's response.

4.22(6) "Good cause" for purposes of this rule shall have the same meaning as "good cause" for setting aside a default judgment under Iowa Rule of Civil Procedure 236.

4.22(7) A decision denying a motion to vacate is subject to further appeal within the time limit allowed for further appeal of a decision on the merits in the contested case proceeding. A decision granting a motion to vacate is subject to interlocutory appeal by the adverse party pursuant to rule 4.25(17A).

4.22(8) If a motion to vacate is granted and no timely interlocutory appeal has been taken, the presiding officer shall issue another notice of hearing and the contested case shall proceed accordingly.

4.22(9) A default decision may award any relief consistent with the request for relief made in the petition and embraced in its issues but, unless the defaulting party has appeared, it cannot exceed the relief demanded.

4.22(10) A default decision may provide either that the default decision is to be stayed pending a timely motion to vacate or that the default decision is to take effect immediately, subject to a request for stay under subrule 4.29(17A).

**283—4.23(17A) Ex parte communication.**

4.23(1) Prohibited communications. Unless required for the disposition of ex parte matters specifically authorized by statute, following issuance of the notice of hearing, there shall be no communication, directly or indirectly, between the presiding officer and any party or representative of any party or any other person with a direct or indirect interest in such case in connection with any issue of fact or law in the case except upon notice and opportunity for all parties to participate. This does not prohibit persons jointly assigned such tasks from communicating with each other. Nothing in this provision is intended to preclude the presiding officer from communicating with members of the agency or seeking the advice or help of persons other than those with a personal interest in, or those engaged in personally investigating as defined in subrule 4.9(2), prosecuting, or advocating in, either the case under consideration or a pending factually related

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case involving the same parties as long as those persons do not directly or indirectly communicate to the presiding officer any ex parte communications they have received of a type that the presiding officer would be prohibited from receiving or that furnish, augment, diminish, or modify the evidence in the record.

4.23(2) Prohibitions on ex parte communications commence with the issuance of the notice of hearing in a contested case and continue for as long as the case is pending.

4.23(3) Written, oral or other forms of communication are "ex parte" if made without notice and opportunity for all parties to participate.

4.23(4) To avoid prohibited ex parte communications, notice must be given in a manner reasonably calculated to give all parties a fair opportunity to participate. Notice of written communications shall be provided in compliance with rule 4.12(17A) and may be supplemented by telephone, facsimile, electronic mail or other means of notification. Where permitted, oral communications may be initiated through conference telephone call including all parties or their representatives.

4.23(5) Persons who jointly act as presiding officer in a pending contested case may communicate with each other without notice or opportunity for parties to participate.

4.23(6) The executive director or other persons may be present in deliberations or otherwise advise the presiding officer without notice or opportunity for parties to participate as long as they are not disqualified from participating in the making of a proposed or final decision under any provision of law and they comply with subrule 4.23(1).

4.23(7) Communications with the presiding officer involving uncontested scheduling or procedural matters do not require notice or opportunity for parties to participate. Parties should notify other parties prior to initiating such contact with the presiding officer when feasible, and shall notify other parties when seeking to continue hearings or other deadlines pursuant to rule 4.17(17A).

4.23(8) Disclosure of prohibited communications. A presiding officer who receives a prohibited ex parte communication during the pendency of a contested case must initially determine if the effect of the communication is so prejudicial that the presiding officer should be disqualified. If the presiding officer determines that disqualification is warranted, a copy of any prohibited written communication, all written responses to the communication, a written summary stating the substance of any prohibited oral or other communication not available in written form for disclosure, all responses made, and the identity of each person from whom the presiding officer received a prohibited ex parte communication shall be submitted for inclusion in the record under seal by protective order or disclosed. If the presiding officer determines that disqualification is not warranted, such documents shall be submitted for inclusion in the record and served on all parties. Any party desiring to rebut the prohibited communication must be allowed the opportunity to do so upon written request filed within ten days after notice of the communication.

4.23(9) Promptly after being assigned to serve as presiding officer at any stage in a contested case proceeding, a presiding officer shall disclose to all parties material factual information received through ex parte communication prior to such assignment unless the factual information has already been or shortly will be disclosed pursuant to Iowa Code section 17A.13(2) or through discovery. Factual information contained in an investigative report or similar document need not be separately disclosed by the presiding officer as

long as such documents have been or will shortly be provided to the parties.

4.23(10) The presiding officer may render a proposed or final decision imposing appropriate sanctions for violations of this rule including default, a decision against the offending party, censure, or suspension or revocation of the privilege to practice before the agency. Violation of ex parte communication prohibitions by agency personnel shall be reported to the executive director for possible sanctions including censure, suspension, dismissal, or other disciplinary action.

283—4.24(17A) **Recording costs.** Upon request, the college student aid commission shall provide a copy of the whole or any portion of the record at cost. The cost of preparing a copy of the record or of transcribing the hearing record shall be paid by the requesting party.

Parties who request that a hearing be recorded by certified shorthand reporters rather than by electronic means shall bear the cost of that recordation, unless otherwise provided by law.

283—4.25(17A) **Interlocutory appeals.** Upon written request of a party or on its own motion, the commission may review an interlocutory order of the executive director. In determining whether to do so, the commission shall weigh the extent to which its granting the interlocutory appeal would expedite final resolution of the case and the extent to which review of that interlocutory order by the agency at the time it reviews the proposed decision of the presiding officer would provide an adequate remedy. Any request for interlocutory review must be filed within 14 days of issuance of the challenged order, but no later than the time for compliance with the order or the date of hearing, whichever is first.

283—4.26(17A) **Final decision.**

4.26(1) When the commission presides over the reception of evidence at the hearing, its decision is a final decision.

4.26(2) When the commission does not preside at the reception of evidence, the presiding officer shall make a proposed decision. The proposed decision becomes the final decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the commission within the time provided in rule 4.27(17A).

283—4.27(17A) **Appeals and review.**

4.27(1) Appeal by party. Any adversely affected party may appeal a proposed decision to the commission within 30 days after issuance of the proposed decision.

4.27(2) Review. The commission may initiate review of a proposed decision on its own motion at any time within 30 days following the issuance of such a decision.

4.27(3) Notice of appeal. An appeal of a proposed decision is initiated by filing a timely notice of appeal with the college student aid commission. The notice of appeal must be signed by the appealing party or a representative of that party and contain a certificate of service. The notice shall specify:

- a. The parties initiating the appeal;
- b. The proposed decision or order appealed from;
- c. The specific findings or conclusions to which exception is taken and any other exceptions to the decision or order;
- d. The relief sought;
- e. The grounds for relief.

4.27(4) Requests to present additional evidence. A party may request the taking of additional evidence only by establishing that the evidence is material, that good cause existed

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for the failure to present the evidence at the hearing, and that the party has not waived the right to present the evidence. A written request to present additional evidence must be filed with the notice of appeal or, by a nonappealing party, within 14 days of service of the notice of appeal. The commission may remand a case to the presiding officer for further hearing or may itself preside at the taking of additional evidence.

**4.27(5) Scheduling.** The college student aid commission shall issue a schedule for consideration of the appeal.

**4.27(6) Briefs and arguments.** Unless otherwise ordered, within 20 days of the notice of appeal or order for review, each appealing party may file exceptions and briefs. Within 20 days thereafter, any party may file a responsive brief. Briefs shall cite any applicable legal authority and specify relevant portions of the record in that proceeding. Written requests to present oral argument shall be filed with the briefs. The commission may resolve the appeal on the briefs or provide an opportunity for oral argument. The commission may shorten or extend the briefing period as appropriate.

**283—4.28(17A) Applications for rehearing.**

**4.28(1) By whom filed.** Any party to a contested case proceeding may file an application for rehearing from a final order.

**4.28(2) Content of application.** The application for rehearing shall state on whose behalf it is filed, the specific grounds for rehearing, and the relief sought. In addition, the application shall state whether the applicant desires reconsideration of all or part of the agency decision on the existing record and whether, on the basis of the grounds enumerated in subrule 4.27(4), the applicant requests an opportunity to submit additional evidence.

**4.28(3) Time of filing.** The application shall be filed with the college student aid commission within 20 days after issuance of the final decision.

**4.28(4) Notice to other parties.** A copy of the application shall be timely mailed by the applicant to all parties of record not joining therein. If the application does not contain a certificate of service, the commission shall serve copies on all parties.

**4.28(5) Disposition.** Any application for a rehearing shall be deemed denied unless the agency grants the application within 20 days after its filing.

**283—4.29(17A) Stays of agency actions.**

**4.29(1) When available.**

a. Any party to a contested case proceeding may petition the college student aid commission for a stay of an order issued in that proceeding or for other temporary remedies, pending review by the agency. The petition shall be filed with the notice of appeal and shall state the reasons justifying a stay or other temporary remedy. The commission may rule on the stay or authorize the presiding officer to do so.

b. Any party to a contested case proceeding may petition the college student aid commission for a stay or other temporary remedies pending judicial review, of all or part of that proceeding. The petition shall state the reasons justifying a stay or other temporary remedy.

**4.29(2) When granted.** In determining whether to grant a stay, the presiding officer or commission shall consider the factors listed in 1998 Iowa Acts, chapter 1202, section 23(5c).

**4.29(3) Vacation.** A stay may be vacated by the issuing authority upon application of the college student aid commission or any other party.

**283—4.30(17A) No factual dispute contested cases.** If the parties agree that no dispute of material fact exists as to a matter that would be a contested case if such a dispute of fact existed, the parties may present all relevant admissible evidence either by stipulation or otherwise as agreed by the parties, without necessity for the production of evidence at an evidentiary hearing. If such agreement is reached, a jointly submitted schedule detailing the method and timetable for submission of the record, briefs and oral argument should be submitted to the presiding officer for approval as soon as practicable. If the parties cannot agree, any party may file and serve a motion for summary judgment pursuant to the rules governing such motions.

**283—4.31(17A) Emergency adjudicative proceedings.**

**4.31(1) Necessary emergency action.** To the extent necessary to prevent or avoid immediate danger to the public health, safety, or welfare, and consistent with the Constitution and other provisions of law, the agency may issue a written order in compliance with Iowa Code section 17A.18 to suspend a license in whole or in part, order the cessation of any continuing activity, order affirmative action, or take other action within the jurisdiction of the agency by emergency adjudicative order. Before issuing an emergency adjudicative order the agency shall consider factors including, but not limited to, the following:

a. Whether there has been a sufficient factual investigation to ensure that the agency is proceeding on the basis of reliable information;

b. Whether the specific circumstances which pose immediate danger to the public health, safety or welfare have been identified and determined to be continuing;

c. Whether the person required to comply with the emergency adjudicative order may continue to engage in other activities without posing immediate danger to the public health, safety or welfare;

d. Whether imposition of monitoring requirements or other interim safeguards would be sufficient to protect the public health, safety or welfare; and

e. Whether the specific action contemplated by the agency is necessary to avoid the immediate danger.

**4.31(2) Issuance of order.**

a. An emergency adjudicative order shall contain findings of fact, conclusions of law, and policy reasons to justify the determination of an immediate danger in the agency's decision to take immediate action.

b. The written emergency adjudicative order shall be immediately delivered to persons who are required to comply with the order by utilizing one or more of the following procedures:

(1) Personal delivery;

(2) Certified mail, return receipt requested, to the last address on file with the agency;

(3) Certified mail to the last address on file with the agency;

(4) First-class mail to the last address on file with the agency; or

(5) Fax. Fax may be used as the sole method of delivery if the person required to comply with the order has filed a written request that agency orders be sent by fax and has provided a fax number for that purpose.

c. To the degree practicable, the agency shall select the procedure for providing written notice that best ensures prompt, reliable delivery.

**4.31(3) Oral notice.** Unless the written emergency adjudicative order is provided by personal delivery on the same day that the order issues, the agency shall make reasonable

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immediate efforts to contact by telephone the persons who are required to comply with the order.

**4.31(4)** Completion of proceedings. After the issuance of an emergency adjudicative order, the agency shall proceed as quickly as feasible to complete any proceedings that would be required if the matter did not involve an immediate danger.

Issuance of a written emergency adjudicative order shall include notification of the date on which agency proceedings are scheduled for completion. After issuance of an emergency adjudicative order, continuance of further agency proceedings to a later date will be granted only in compelling circumstances upon application in writing.

These rules are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202.

**ARC 8728A****COLLEGE STUDENT AID  
COMMISSION[283]****Notice of Intended Action**

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)"b."

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code section 261.19, the College Student Aid Commission hereby gives Notice of Intended Action to rescind Chapter 14, "Osteopathic Grant Subvention Program," to adopt Chapter 14, "Osteopathic Physician Recruitment Program," and to rescind Chapter 30, "Osteopathic Forgivable Loan Program," Iowa Administrative Code.

The new chapter will establish rules for administering the Physician Recruitment Program for the University of Osteopathic Medicine and Health Sciences, Des Moines, Iowa. This program consists of a forgivable loan program, tuition scholarships and a loan repayment program and replaces the previous Osteopathic Grant Subvention Program no longer funded by the Iowa Legislature. The new rules provide the administrative procedures for the Osteopathic Physician Recruitment Program and generally reflect current practices. However, the physician service requirements have been changed in order to provide more uniform financial benefits. The proposed rules have been discussed with and endorsed by the program administrator at the University of Osteopathic Medicine and Health Sciences.

The proposed changes to the physician service requirements for the forgivable loan, tuition scholarship, and physician repayment programs are intended to provide, to the extent possible, equal financial benefits to recipients as required by Iowa Code section 261.19(1). Equal financial benefits for purposes of these rules are measured by comparing the after-tax benefits received by recipients of each program for each year of required service.

Interested persons may submit comments orally or in writing to the Executive Director, College Student Aid Commission, 200 Tenth Street, Fourth Floor, Des Moines, Iowa 50309, telephone (515)281-3501, on or before March 30, 1999.

These rules are intended to implement Iowa Code section 261.19.

Rescind **283—Chapters 14 and 30** and adopt the following **new** chapter:

**CHAPTER 14  
OSTEOPATHIC PHYSICIAN  
RECRUITMENT PROGRAM****PREAMBLE**

The osteopathic physician recruitment program administered by the Iowa college student aid commission is a state-supported program that consists of forgivable loans and tuition scholarships for students and loan repayment benefits for graduates of the University of Osteopathic Medicine and Health Sciences, Des Moines, Iowa.

**283—14.1(261) Definitions.**

"Eligible rural community" means a medically underserved rural community.

"Iowa resident student" means an individual who meets the criteria used by the state board of regents to determine residency for tuition purposes, 681 IAC 1.4(262).

"Primary care" means family medicine, general internal medicine and pediatrics.

**283—14.2(261) Forgivable loan.**

**14.2(1)** Student eligibility. A recipient of a forgivable loan must be an Iowa resident who is enrolled in a program at the University of Osteopathic Medicine and Health Sciences leading to a degree in osteopathic medicine and agrees to practice medicine in Iowa.

**14.2(2)** Award limits. The annual amount of the forgivable loan to an eligible osteopathic student is determined by the annual appropriation, loan collections and the number of eligible students.

**14.2(3)** Extent of grant. Students who are repeating an entire year's academic program and who are not charged tuition and fees for that program will not be eligible for benefits during that year.

**14.2(4)** Physician service requirement. The physician service requirement for the forgivable loan program is one year for borrowers who receive up to two annual loans and two years for borrowers who receive three or more annual loans.

**14.2(5)** Promissory note. Recipients of a forgivable loan shall sign a promissory note agreeing to the physician service requirements or to repay the loan and accrued interest according to repayment terms specified in the note.

**14.2(6)** Interest rate. The rate of interest on loans under this program shall be at the rate of 10.5 percent per annum on the unpaid principal balance.

**14.2(7) Disbursement of loan proceeds.**

a. The full loan amount will be disbursed when the university certifies that the borrower is an Iowa resident and enrolled in good standing.

b. The loan check will be made copayable to the borrower and the University of Osteopathic Medicine and Health Sciences and will be sent to the university within ten days following the receipt of the proper certifications.

c. The university will deliver the check to the student and require that the loan check be applied directly to the student's account.

d. If the student withdraws from the university and is entitled to a refund of tuition and fees, the pro-rata share of the refund attributable to the forgivable loan must be refunded to the commission.

**14.2(8)** Repayment terms. Repayment of the forgivable loan begins 30 days following:

a. Termination of enrollment at the University of Osteopathic Medicine and Health Sciences.

## COLLEGE STUDENT AID COMMISSION[283](cont'd)

b. Graduation of the borrower when the borrower does not intend to commence a medical residency or internship within a reasonable period of time and subsequently practice medicine in the state of Iowa.

c. Completion of a medical residency or internship where the borrower does not commence practice of medicine in the state of Iowa within a reasonable period of time.

d. Termination, for any reason, of the borrower's medical practice in the state of Iowa, if the borrower has practiced in the state for less than the required length of service.

**14.2(9) Loan payments.**

a. Prior to the start of the repayment period, the commission shall provide the borrower with a repayment schedule, modified to reflect any applicable cancellation benefits.

b. It shall be the borrower's responsibility to remit payments to the commission by the fifteenth day of each month.

c. In the event the borrower fails to abide by any material provision of the promissory note or fails to make any payment due under the promissory note within ten days after the date the payment is due, the commission may declare the borrower in default and declare the entire unpaid balance and accrued interest on the promissory note due.

d. The borrower is responsible for notifying the commission immediately of a change of name, place of employment, or home address.

**14.2(10) Deferral of repayment.**

a. Repayment of the borrower's loan obligation may be deferred under the following circumstances: return to full-time study; active duty in the United States military service, not to exceed three years; a period of temporary disability, not to exceed three years.

b. Repayment of the borrower's loan obligation under this loan program is not required during periods of enrollment as a student at the University of Osteopathic Medicine and Health Sciences, during periods of internship or residency, or while fulfilling the physician service requirement.

c. Forbearance is a revision of repayment terms to temporarily postpone payments. It may be granted when a borrower experiences a temporary hardship and is willing but unable to pay in accordance with the repayment schedule. Borrowers remain responsible for interest accrual during forbearance periods.

The program administrator may grant forbearance for periods of less than six months; periods of greater than six months but less than one year must be approved by the executive director and periods of greater than one year must be approved by the commission.

**14.2(11) Loan cancellation.**

a. An eligible borrower may qualify for forgiveness of the outstanding balance of principal and accrued interest.

b. Partial loan cancellation shall be granted based on the percentage of the service requirement completed by the borrower. The commission shall revise the repayment schedule accordingly.

c. To certify eligibility for cancellation, the borrower must submit to the commission an affidavit verifying practice in Iowa.

d. A borrower shall notify the commission within 30 days of a name or address change, a change of enrollment status, transfer to another school, a change of employment, enlistment in the military services of the United States, and of events leading to temporary disability.

e. In the event of death or total and permanent disability, a borrower's obligation to repay this loan is canceled. Borrowers seeking forgiveness as the result of total or permanent

disability must submit information substantiating the claim to the commission.

**14.2(12) Restrictions.** A student who is in default on a Stafford Loan, SLS Loan, or a Perkins/National Direct/National Defense Student Loan or who owes a repayment on any Title IV grant assistance or state award shall be ineligible for assistance under the osteopathic forgivable loan program. Eligibility for state aid may be reinstated upon payment in full of the delinquent obligation or by commission ruling on the basis of adequate extenuating evidence presented in appeal under the procedures set forth in 283—Chapter 5, Iowa Administrative Code.

**283—14.3(261) Tuition scholarship.**

**14.3(1) Student eligibility.** A third year student at the University of Osteopathic Medicine and Health Sciences who agrees to practice in an eligible rural Iowa community shall be eligible for a tuition scholarship. The tuition scholarship is renewable for one year. A student who receives a tuition scholarship shall not be eligible for the physician loan repayment program.

**14.3(2) Selection criteria.** Individuals shall be selected by the University of Osteopathic Medicine and Health Sciences.

**14.3(3) Renewal.** To be eligible for renewal of the tuition scholarship, a student must advance to the fourth year of study and be in good academic standing.

**14.3(4) Award amount.** The tuition scholarship shall be for an amount not to exceed the annual tuition at the university.

**14.3(5) Physician service requirement.** The physician service requirement for the tuition scholarship is one year for each year that a recipient receives the scholarship.

**14.3(6) Disbursement of scholarship.**

a. The full amount of the scholarship will be disbursed to the university upon receipt of certification from the university that the scholarship recipient is enrolled and in good standing.

b. The university will apply the scholarship funds to the student's tuition account.

c. If the student withdraws from the university and is entitled to a refund of tuition and fees, the pro-rata share of the refund attributable to the tuition scholarship shall be refunded to the commission.

**14.3(7) Repayment.**

a. A student shall repay the tuition scholarship plus interest at 12 percent per annum to the commission if the student fails to:

(1) Complete a residency in primary care within four years after graduation from the University of Osteopathic Medicine and Health Sciences.

(2) Practice in an Iowa community identified by the university as a participating physician shortage community.

(3) Annually certify employment in a designated Iowa physician shortage community.

b. The scholarship shall be paid in full within three years from the date of failure to comply with the terms of the scholarship.

**14.3(8) Restrictions.** A student who is in default on a Stafford Loan, SLS Loan, or a Perkins/National Direct/National Defense Student Loan or who owes a repayment on any Title IV grant assistance or state award shall be ineligible for a tuition scholarship. Eligibility for state aid may be reinstated upon payment in full of the delinquent obligation or by commission ruling on the basis of adequate extenuating evidence presented in appeal under the procedures set forth in 283—Chapter 5, Iowa Administrative Code.

## COLLEGE STUDENT AID COMMISSION[283](cont'd)

**283—14.4(261) Physician loan repayment program.**

**14.4(1) Recruitment.** The University of Osteopathic Medicine and Health Sciences shall recruit and place physicians in rural communities that have agreed to provide additional funds for the physician's loan repayment.

**14.4(2) Physician service requirement.** The physician service requirement for the physician loan repayment program is four years.

**14.4(3) Award.** The physician may receive up to \$30,000 in state-funded repayment benefits when a community agrees to fund matching benefits of at least \$30,000.

**14.4(4) Disbursement.**

a. The commission shall disburse state funds to the University of Osteopathic Medicine and Health Sciences upon receipt of the physician's contract to practice in a rural physician shortage community.

b. The University of Osteopathic Medicine and Health Sciences shall arrange for the repayment of the physician's loan(s).

**14.4(5) Repayment.**

a. If a physician fails to practice primary care in the agreed-upon location for four years, the physician shall repay the commission on a prorated basis. The prorated balance will be calculated as a daily amount by dividing the amount advanced by the number of days in the service period less the number of days served by the physician multiplied by the daily amount.

b. A physician shall repay the prorated balance of the physician loan repayment benefits and accrued interest of 12 percent per annum.

c. The prorated balance of the physician loan repayment benefits must be paid in full within three years from the date the primary care service ended.

**14.4(6) Restrictions.** A physician who is in default on a Stafford Loan, SLS Loan, or a Perkins/National Direct/National Defense Student Loan or who owes a repayment on any Title IV grant assistance or state award shall be ineligible for repayment benefits. Eligibility for state aid may be reinstated upon payment in full of the delinquent obligation or by commission ruling on the basis of adequate extenuating evidence presented in appeal under the procedures set forth in 283—Chapter 5, Iowa Administrative Code.

**14.4(7) Administrative allowance.** The commission shall pay the University of Osteopathic Medicine and Health Sciences an administrative fee from the funds appropriated for the tuition scholarship and physician placement programs.

These rules are intended to implement Iowa Code section 261.19.

**ARC 8729A****COLLEGE STUDENT AID  
COMMISSION[283]****Notice of Intended Action**

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)"b."

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code sections 261.3 and 261.37(5), the College Student Aid Commission proposes to

amend Chapter 35, "Industrial Technology Forgivable Loan Program," Iowa Administrative Code.

The proposed amendment of the Industrial Technology Forgivable Loan Program will allow more students planning to teach industrial technology to qualify for loan benefits.

Interested persons may submit comments orally or in writing to the Executive Director, College Student Aid Commission, 200 Tenth Street, Fourth Floor, Des Moines, Iowa 50309, telephone (515)281-3501, on or before March 30, 1999.

This amendment is intended to implement 1998 Iowa Acts, chapter 1215.

The following amendment is proposed.

Amend subrule 35.1(2) by adopting the following **new** paragraph "e":

e. Financial need is defined as the difference between the student's college expenses and the amount of the financial aid available to defray the expenses.

**ARC 8739A****CRIMINAL AND JUVENILE  
JUSTICE PLANNING DIVISION[428]****Notice of Intended Action**

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)"b."

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code section 17A.3 and Public Law 105-119, the Criminal and Juvenile Justice Planning Division hereby gives Notice of Intended Action to adopt Chapter 5, "Juvenile Accountability Incentive Block Grant Program (JAIBG)," Iowa Administrative Code.

The purpose of this new chapter is to implement Public Law 105-119, November 26, 1997, which appropriated funds to the states for the Juvenile Accountability Incentive Block Grants (JAIBG) program described in Title III of H.R. 3, as passed by the House of Representatives on May 8, 1997, to develop programs to promote greater accountability in the juvenile justice system.

Any interested person may make written or oral suggestions or comments on this proposed chapter on or before March 31, 1999. Comments should be directed to the Administrator, Criminal and Juvenile Justice Planning Division, Lucas State Office Building, Des Moines, Iowa 50319, telephone (515)242-5823.

Also, there will be a public hearing on March 31, 1999, at 9 a.m. in the Lucas State Office Building, First Floor, Hearing Room 2, Des Moines, Iowa 50319. Persons may present their views at this public hearing either orally or in writing. Persons who wish to make oral presentations at the public hearing should contact the Administrator, Criminal and Juvenile Justice Planning Division, at least one day prior to the date of the public hearing.

These rules are intended to implement Iowa Code section 216A.133 and Public Law 105-119.

These rules were also Adopted and Filed Emergency and are published herein as **ARC 8740A**. The content of that submission is incorporated herein by reference.

## ARC 8762A

ECONOMIC DEVELOPMENT,  
IOWA DEPARTMENT OF[261]

## Notice of Intended Action

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)“b.”

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code sections 15.104 and 15.106, the Iowa Department of Economic Development hereby gives Notice of Intended Action to amend Chapter 23, “Iowa Community Development Block Grant Nonentitlement Program,” Iowa Administrative Code.

The proposed amendment outlines procedures to distribute supplemental HUD funds received in response to a presidential declaration of a disaster area in Iowa.

Public comments concerning the proposed amendment will be accepted until 4:30 p.m. on March 30, 1999. Interested persons may submit written or oral comments by contacting Roselyn McKie Wazny, Division of Community and Rural Development, Department of Economic Development, 200 East Grand Avenue, Des Moines, Iowa 50309; telephone number (515)242-4822.

A public hearing to receive comments about the proposed amendment will be held on March 30, 1999, at the above address in the IDED main conference room at 1 p.m. Individuals interested in providing comments at the hearing should contact Roselyn McKie Wazny by 4 p.m. on March 29, 1999, to be placed on the hearing agenda.

This amendment is intended to implement Iowa Code section 15.108(1)“a.”

The following amendment is proposed.

Amend 261—Chapter 23 by adopting the following new rule 261—23.14(15) and renumbering current rule 261—23.14(15) as 261—23.15(15).

**261—23.14(15) Disaster recovery fund.** The disaster recovery fund is reserved for communities impacted by natural disasters when a supplemental disaster appropriation is made under the community development block grant program. Funds are available to repair damage and to prevent future threat to public health, safety or welfare that is directly related to the disaster for which HUD supplemental funds have been allocated to the state.

**23.14(1) Application procedure.** Communities in need of disaster recovery funds shall submit a written request to IDED, Bureau of Community Facilities and Services, 200 East Grand Avenue, Des Moines, Iowa 50309. The request shall include a description of the community’s problem, the amount of funding requested, projected use of funds, the amount of local funds to be provided and the percent of low- and moderate-income persons benefiting from the project.

**23.14(2) Application review.** Upon receipt of a request, IDED, in consultation with appropriate federal, state and local agencies, shall make a determination of whether the community and project are eligible for funding and notify the applicant community of its determination. A project shall be considered eligible only if it meets all of the following criteria:

1. A threat must exist to health, safety or community welfare that requires immediate action.
2. The threat must be a result of a natural disaster receiving a presidential declaration for which IDED received a supplemental HUD appropriation.
3. No known alternative project or action would be more feasible than the proposed project.
4. Sufficient other local, state or federal funds (including the CDBG competitive program) either are not available or cannot be obtained in the time frame required.

**23.14(3) Compliance with federal and state regulation.** A community receiving funds under the disaster recovery fund shall comply with all laws, rules and regulations applicable to the CDBG competitive program, except those waived by HUD as a result of federal action in conjunction with the disaster recovery initiative and those not required by federal law that IDED may choose to waive. IDED shall make available a list of all applicable federal regulations and disaster-related waivers granted by Congress and relevant federal agencies to all applicants for assistance.

## ARC 8763A

ECONOMIC DEVELOPMENT,  
IOWA DEPARTMENT OF[261]

## Notice of Intended Action

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)“b.”

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code sections 15.104 and 15.106, the Iowa Department of Economic Development hereby gives Notice of Intended Action to amend Chapter 28, “Local Housing Assistance Program,” Iowa Administrative Code.

The proposed amendment provides for a technical amendment that requires pertinent records for the program be retained for three years after project completion.

Public comments concerning the proposed amendment will be accepted until 4:30 p.m. on March 30, 1999. Interested persons may submit written or oral comments by contacting Roselyn McKie Wazny, Division of Community and Rural Development, Department of Economic Development, 200 East Grand Avenue, Des Moines, Iowa 50309; telephone (515)242-4822.

A public hearing to receive comments about the proposed amendment will be held March 30, 1999, at 2 p.m. at the above address in the IDED main conference room. Individuals interested in providing comments at the hearing should contact Roselyn McKie Wazny by 10 a.m. on March 30, 1999, to be placed on the hearing agenda.

This amendment is intended to implement Iowa Code section 15.353.

The following amendment is proposed.

Amend subrule 28.9(3) as follows:

**28.9(3) Record keeping and retention.** The recipient shall retain all financial records, supporting documents and other records pertaining to LHAP ~~activity~~ *activities* for ~~one year~~ *three years* after contract closeout. Representatives of IDED

ECONOMIC DEVELOPMENT, IOWA DEPARTMENT OF[261](cont'd)

shall have access to all records belonging to or in use by recipients pertaining to LHAP funds.

## ARC 8764A

### ECONOMIC DEVELOPMENT, IOWA DEPARTMENT OF[261]

#### Notice of Intended Action

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)"b."

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code sections 15.104 and 15.106, the Iowa Department of Economic Development hereby gives Notice of Intended Action to amend Chapter 53, "Community Economic Betterment Program," Iowa Administrative Code.

The proposed amendments revise the rules for the Venture Project component of the CEBA Program. The amendments include eligibility requirements for Venture Project applications, application procedures and evaluation criteria.

Public comments concerning the proposed amendments will be accepted until 4:30 p.m. on March 30, 1999. Interested persons may submit written or oral comments by contacting Ken Boyd, Bureau of Business Finance, Department of Economic Development, 200 East Grand Avenue, Des Moines, Iowa 50309; telephone number (515)242-4810; E-mail address ken.boyd@ided.state.ia.us.

A public hearing to receive comments about the proposed amendments will be held on March 30, 1999, at 1:30 p.m. at the above address in the Business Finance Conference Room on the first floor. Individuals interested in providing comments at the hearing should contact Ken Boyd by 4 p.m. on or before March 29, 1999, to be placed on the hearing agenda.

These amendments are intended to implement Iowa Code sections 15.315 to 15.325.

The following amendments are proposed.

ITEM 1. Amend rule **261—53.2(15)**, definition of "Venture project," as follows:

"Venture project" means an economic activity performed by a start-up *company*, ~~or~~ early-stage company, *or existing company developing a new product or new technology.*

ITEM 2. Amend rule 261—53.6(15), introductory paragraph, as follows:

**261—53.6(15) Application for assistance.** *The requirements outlined in this rule are applicable to all CEBA program components, except applications under the venture project component. Refer to rule 261—53.10(15) for application requirements for venture projects.*

ITEM 3. Amend paragraph **53.6(3)"e"** as follows:

e. The department will rate and rank applications according to the criteria in rule 53.7(15). Additionally, for small business gap financing applications, the department will use rule 53.8(15), ~~or for~~ For new business opportunities, *and* new product development, ~~or venture project~~ applications, the department will use rule 53.9(15). The department will present its recommendations on rating and ranking to the committee. The committee will present its

recommendations to the board. The board will have final authority in the rating and ranking of applications. The board will also make the final decision to approve, reject, table, defer, or refer an application to another funding program. The department may negotiate with the applicant or proposed recipient concerning dollar amounts, terms, or any other elements of the application package. The board may offer an award in a lesser amount or structured in a manner different than requested.

ITEM 4. Amend rule 261—53.7(15), introductory paragraph, as follows:

**261—53.7(15) Selection criteria.** In ranking applications for funding *submitted under the small business gap financing component, the new business opportunities component, and the new product development component*, at least the following criteria shall be considered:

ITEM 5. Amend rule 261—53.9(15) as follows:

**261—53.9(15) New business opportunities, and new product development components, and venture project components.**

**53.9(1)** Additional criteria and targeting for new business opportunities and new product development components. The criteria in rule 53.7(15) will be used for evaluating applications under these components. Applications for these components must be for businesses that show the following characteristics:

- The industry is one targeted within the state's strategic plan; or
- The resulting economic activity is underrepresented in the state's overall economic activity mix; and
- The project offers a quality economic opportunity to Iowans.

~~**53.9(2)** Additional criteria for venture projects. The criteria in rule 53.7(15) will be used for evaluating applications under this component. Applications for this component shall also meet the following criteria:~~

- ~~The business requesting CEBA assistance must be a start-up or early-stage company; and~~
- ~~The business must accept the assistance as an equity-like investment; and~~
- ~~The CEBA assistance is limited to \$100,000.~~

~~**53.9(3)**~~ **53.9(2)** Applications. Applicants applying for assistance under these components shall use the general business financial assistance application form provided by the department. The department may, at its option, transfer requests to a different financial assistance program, including but not limited to:

- Small business gap financing component of CEBA;
- EDSA (economic development set-aside program);
- BDFC (business development finance corporation program); or
- PFSA (public facilities set-aside program).

~~**53.9(4)**~~ **53.9(3)** Rating system. The rating system for proposed projects will be as follows:

- Local effort (as defined in 53.8(3)"a"). Maximum—20 points;
- Private contributions as compared to CEBA request (as defined in 53.8(3)"c"). Maximum—20 points;
- Comprehensive community and economic development plan (as defined in 53.8(3)"d"). Maximum—10 points;
- Extra points if small business, as defined by the SBA. Maximum—10 points;
- Project impact, as defined in 53.8(3)"f" and 53.8(4). Maximum—120 points;

## ECONOMIC DEVELOPMENT, IOWA DEPARTMENT OF[261](cont'd)

f. Potential for future expansion of the industry in general. Maximum—20 points. This factor awards additional points for those projects that tend to show a greater potential for expansion of that industry within Iowa.

The maximum total score possible is 200 points.

Projects that score less than 120 points in rule 53.9(15) will not be recommended for funding by the staff to the committee.

~~53.9(5)~~ **53.9(4)** Project period. Projects funded under rule 53.9(15) are considered to have up to a maximum five-year project period.

The recipient shall maintain the pledged jobs for 90 days beyond the project expiration date or will be subject to penalties as provided for in rule ~~53.13(15)~~ **53.14(15)**.

ITEM 6. Adopt the following new rule 261—53.10(15) and renumber existing rules ~~261—53.10(15)~~ to ~~261—53.15(15)~~ as ~~261—53.11(15)~~ to ~~261—53.16(15)~~:

**261—53.10(15) Venture project components.**

**53.10(1)** Eligible applicants; projects; coordination with PROMISE JOBS.

a. Eligible businesses. Eligible businesses include start-up companies, early-stage companies, and existing companies that are developing a new product or new technology.

b. Form and amount of assistance. The CEBA award will be in the form of an equity-like investment (e.g., royalty agreement or deferred loan). The maximum award amount shall not exceed \$250,000.

c. Eligible applicants. Applications will be accepted from cities, counties, and community colleges on behalf of eligible businesses. Applications shall be submitted on the CEBA venture project application form provided by the department. If an application is approved, the department will contract directly with the business on whose behalf the application was submitted.

d. Coordination with PROMISE JOBS. Businesses receiving assistance shall make available for PROMISE JOBS participants 10 percent of the new jobs created.

**53.10(2)** Ineligible applications. The department will not rate and rank ineligible applications. An application may be determined to be ineligible if:

a. It is submitted by an ineligible applicant; or

b. The project consists of a business relocation from within the state unless unusual circumstances exist which make the relocation necessary for the business's viability; or

c. The CEBA application is not properly signed by the applicant and the business; or

d. The business has a record of violations of the law over a period of time that tends to show a consistent pattern. The business shall provide the department with a report detailing violations of law within the most recent consecutive three-year period prior to application. Consistent with Iowa Code section 15A.1(3), violations of environmental protection statutes, regulations or laws shall be reported for the most recent five-year period prior to application. If the department finds that a business has a record of violations of law that tends to show a consistent pattern, the business shall not be eligible under this program. Violations of law include, but are not limited to, environmental and worker safety statutes, rules and regulations. A business shall not be ineligible if the department finds that the violations did not seriously affect the public health, safety, or the environment or, if they did, that there were mitigating circumstances.

**53.10(3)** Rating system. Eligible applications will be reviewed and rated using the following criteria:

a. Jobs associated with the project. Factors considered include, but are not limited to, the following:

- (1) The number of jobs created, if any, by the project;
- (2) The potential for job creation as a result of the project;
- (3) The quality of the wages and benefits for jobs actually or potentially created as a result of the project.

NOTE: For the venture project component, CEBA funds will not be leveraged on a per job basis.

Maximum—10 points.

b. Additional funding sources. The amount of the total project costs coming from sources other than CEBA venture funds including, but not limited to, private equity investment, conventional loans, owner equity investment, or other acceptable forms of investment as determined by the department. Maximum—10 points.

c. Strength of the business plan. Factors to be considered include, but are not limited to, the following:

- (1) A description of the business and the overall industry;
- (2) The experience level of the business management team;
- (3) A description of the product and production plan;
- (4) Project financial projections;
- (5) Feasibility of the product and project;
- (6) Market identification and marketing strategy.

Maximum—60 points.

d. Potential return on investment of the CEBA venture award. Maximum—10 points.

e. Potential for future growth of the business. Maximum—5 points.

f. Local financial support. The amount of the total project costs attributable to local funding sources including, but not limited to, city, county, community college, chamber of commerce, economic development groups, utilities, or other local sources, compared to the resources reasonably available from those sources. Maximum—10 points.

g. Comprehensive community and economic development plan. A community submitting a comprehensive community and economic development plan meeting the requirements of 261—Chapter 80 will receive 5 extra points. Applications must receive a minimum of 60 points to be recommended for funding.

**53.10(4)** Application review and approval.

a. Awards of \$100,000 or less. For awards of \$100,000 or less, department staff will review and rate applications and prepare funding recommendations for the director. The director of the department has the authority to approve CEBA venture project awards in an amount up to and including \$100,000.

b. Awards over \$100,000. For awards over \$100,000 but not more than \$250,000, the department will review and rate applications and present its recommendations to the committee. The committee will present its recommendations to the board. The board will have final decision-making authority. The board may approve, reject, table, defer or refer an application to another funding source.

## ARC 8765A

### ECONOMIC DEVELOPMENT, IOWA DEPARTMENT OF[261]

#### Notice of Intended Action

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)"b."

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code paragraph 17A.3(1)"b," the Department of Economic Development hereby gives Notice of Intended Action to rescind Chapter 101, "Agency Procedure for Rule Making," Chapter 102, "Petition for Rule Making," and Chapter 103, "Petition for Declaratory Ruling," appearing in the Iowa Administrative Code, and to adopt Chapter 101, "Department Procedure for Rule Making," Chapter 102, "Petition for Rule Making," and Chapter 103, "Petition for Declaratory Order."

These amendments revise the Department's rules governing procedures for rule making, petitions for rule making, and declaratory orders.

The Seventy-seventh General Assembly amended the Iowa Administrative Procedure Act in 1998 Iowa Acts, chapter 1202. A task force from the Attorney General's office drafted amendments to the Uniform Rules on Agency Procedure to implement the amendments to the Administrative Procedure Act. The Department's proposed amendments to its rule-making and declaratory order chapters are based on the amendments of the Attorney General's task force, with some omissions and modifications to fit the Department. The task force's amendments are available at the State Law Library, Capitol Building, Des Moines, Iowa, or on the Attorney General's website <http://www.state.ia.us/government/ag/deptdir.htm>.

With these revisions, the Department's rules will be in compliance with 1998 Iowa Acts, chapter 1202. The major changes governing the rule-making process in 1998 Iowa Acts, chapter 1202, which will become effective July 1, 1999, are as follows:

- The requirement for an economic impact statement if requested by members of the Administrative Rules Review Committee (ARRC) is deleted and replaced with a requirement for a regulatory analysis if requested by the ARRC or the Administrative Rules Coordinator. In addition, if the rule would have a substantial impact on small business, a request for a fiscal impact statement may also be made by at least 25 persons, provided that each represents a small business, or an organization representing at least 25 small businesses.

- The ARRC, the Administrative Rules Coordinator, a political subdivision, a state agency, 25 persons signing one request, or an association having not less than 25 members may request the Department to conduct a formal review of a specified rule to determine whether the rule should be repealed or amended or a new rule adopted instead. If the Department has not conducted such a review of the specified rule within a period of five years prior to the filing with the Department of that written request, the Department shall prepare within a reasonable time a written report with respect to the rule summarizing the Department's findings, its supporting reasons, and any proposed course of action. The report must include a concise statement of the rule's effectiveness, including a summary of data supporting the conclusions

reached; written criticisms of the rule received during the previous five years, including a summary of any petitions for waiver of the rule (i.e., requests for exceptions to policy) tendered to the Department or granted by the Department; and alternative solutions regarding the subject matter of the criticisms and the reasons they were rejected or the changes made in the rule in response to those criticisms and the reasons for the changes. A copy of the report is sent to the ARRC and the Administrative Rules Coordinator.

- The current law regarding declaratory rulings is deleted and replaced with declaratory orders. The purpose is the same, but requirements are more specific than in current law. Rules are added to provide for petitions for intervention.

Public comments concerning the proposed amendments will be accepted until 4:30 p.m. on March 30, 1999. Interested persons may submit written or oral comments by contacting Melanie Johnson, Director's Office, Department of Economic Development, 200 East Grand Avenue, Des Moines, Iowa 50309-1819; telephone (515)242-4862.

These amendments are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202, and Iowa Code section 25B.6.

The following amendments are proposed.

ITEM 1. Rescind 261—Chapter 101 and adopt the following new chapter in lieu thereof:

#### CHAPTER 101

#### DEPARTMENT PROCEDURE FOR RULE MAKING

**261—101.1(17A) Applicability.** Except to the extent otherwise expressly provided by statute, all rules adopted by the department are subject to the provisions of Iowa Code chapter 17A, the Iowa administrative procedure Act, and the provisions of this chapter.

**261—101.2(17A) Advice on possible rules before notice of proposed rule adoption.** In addition to seeking information by other methods, the department may, before publication of a Notice of Intended Action under Iowa Code section 17A.4(1)"a," solicit comments from the public on a subject matter of possible rule making by the department by causing notice to be published in the Iowa Administrative Bulletin of the subject matter and indicating where, when, and how persons may comment.

**261—101.3(17A) Public rule-making docket.**

**101.3(1) Docket maintained.** The department shall maintain a current public rule-making docket.

**101.3(2) Anticipated rule making.** The rule-making docket shall list each anticipated rule-making proceeding. A rule-making proceeding is deemed "anticipated" from the time a draft of proposed rules is distributed for internal discussion within the department. For each anticipated rule-making proceeding, the docket shall contain a listing of the precise subject matter which may be submitted for consideration to the economic development board for subsequent proposal under the provisions of Iowa Code section 17A.4(1)"a," the name and address of department personnel with whom persons may communicate with respect to the matter, and an indication of the present status within the department of that possible rule. The department may also include in the docket other subjects upon which public comment is desired.

**101.3(3) Pending rule-making proceedings.** The rule-making docket shall list each pending rule-making proceeding. A rule-making proceeding is pending from the time it is

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commenced, by publication in the Iowa Administrative Bulletin of a Notice of Intended Action pursuant to Iowa Code section 17A.4(1)"a," to the time it is terminated, by publication of a Notice of Termination in the Iowa Administrative Bulletin or the rule's becoming effective. For each rule-making proceeding, the docket shall indicate:

- a. The subject matter of the proposed rule.
- b. A citation to all published notices relating to the proceeding.
- c. Where written submissions on the proposed rule may be inspected.
- d. The time during which written submissions may be made.
- e. The names of persons who have made written requests for an opportunity to make oral presentations on the proposed rule, where those requests may be inspected, and where and when oral presentations may be made.
- f. Whether a written request for the issuance of a regulatory analysis or a concise statement of reasons has been filed, whether such an analysis or statement or a fiscal impact statement has been issued, and where any such written request, analysis, or statement may be inspected.
- g. The current status of the proposed rule and any department determinations with respect thereto.
- h. Any known timetable for department decisions or other action in the proceeding.
- i. The date of the rule's adoption.
- j. The date of the rule's filing, indexing, and publication.
- k. The date on which the rule will become effective.
- l. Where the rule-making record may be inspected.

**261—101.4(17A) Notice of proposed rule making.**

**101.4(1) Contents.** At least 35 days before the adoption of a rule, the department shall cause Notice of Intended Action to be published in the Iowa Administrative Bulletin. The Notice of Intended Action shall include:

- a. A brief explanation of the purpose of the proposed rule.
- b. The specific legal authority for the proposed rule.
- c. Except to the extent impracticable, the text of the proposed rule.
- d. Where, when, and how persons may present their views on the proposed rule.
- e. Where, when, and how persons may demand an oral proceeding on the proposed rule if the notice does not already provide for one.

Where inclusion of the complete text of a proposed rule in the Notice of Intended Action is impracticable, the department shall include in the notice a statement fully describing the specific subject matter of the omitted portion of the text of the proposed rule, the specific issues to be addressed by that omitted text of the proposed rule, and the range of possible choices being considered by the department for the resolution of each of those issues.

**101.4(2) Copies of notices.** Persons desiring to receive copies of future Notices of Intended Action must file with the department a written request indicating the name and address (including an E-mail address if electronic transmittal is requested) to which the notices shall be sent. Within seven days after submission of a Notice of Intended Action to the administrative rules coordinator for publication in the Iowa Administrative Bulletin, the department shall mail a copy of that notice to subscribers who have filed a written request for mailing with the department for Notices of Intended Action. The written request shall be accompanied by payment of the subscription price, if any, which covers the full cost of the

subscription service, including its administrative overhead and the cost of copying and mailing the Notices of Intended Action for a period of one year. If persons have requested that the department electronically transmit a copy of the notice by E-mail, there shall be no charge for this service.

**261—101.5(17A) Public participation.**

**101.5(1) Written comments.** For at least 20 days after publication of the Notice of Intended Action, persons may submit argument, data, and views, in writing or via electronic transmission, on the proposed rule. These submissions should identify the proposed rule to which they relate and should be submitted to the individual identified in the Notice of Intended Action.

**101.5(2) Oral proceedings.** The department may, at any time, schedule an oral proceeding on a proposed rule. The department shall schedule an oral proceeding on a proposed rule if, within 20 days after the published Notice of Intended Action, a written request for an opportunity to make oral presentations is submitted to the department by the administrative rules review committee, a governmental subdivision, a state agency, an association having not less than 25 members, or at least 25 persons. That request must also contain the following additional information:

1. A request by one or more individual persons must be signed by each of them and include the address and telephone number of each of them.
2. A request by an association must be signed by an officer or designee of the association and must contain a statement that the association has at least 25 members and the address and telephone number of the person signing that request.
3. A request by a state agency or governmental subdivision must be signed by an official having authority to act on behalf of the entity and must contain the address and telephone number of the person signing that request.

The department may waive technical compliance with these procedures.

**101.5(3) Conduct of oral proceedings.**

**a. Applicability.** This subrule applies only to those oral rule-making proceedings in which an opportunity to make oral presentations is authorized or required by Iowa Code section 17A.4(1)"b" as amended by 1998 Iowa Acts, chapter 1202, section 8.

**b. Scheduling and notice.** An oral proceeding on a proposed rule may be held in one or more locations and shall not be held earlier than 20 days after notice of its location and time is published in the Iowa Administrative Bulletin. That notice shall also identify the proposed rule by ARC number and citation to the Iowa Administrative Bulletin.

**c. Presiding officer.** An employee of the department, or another person designated by the department who will be familiar with the substance of the proposed rules, shall preside at the oral proceeding on the proposed rules. If an employee of the department does not preside, the presiding officer shall prepare a memorandum for consideration by the department summarizing the contents of the presentations made at the oral proceeding unless the department determines that such a memorandum is not necessary because the department will personally listen to or read the entire transcript of the oral proceeding.

**d. Conduct of proceeding.** At an oral proceeding on a proposed rule, persons may make oral statements and make documentary and physical submissions, which may include data, views, comments or arguments concerning the proposed rule. Persons wishing to make oral presentations at the proceeding are encouraged to notify the department at least

## ECONOMIC DEVELOPMENT, IOWA DEPARTMENT OF[261](cont'd)

one business day prior to the proceeding and indicate the general subject of their presentations. At the proceeding, those who participate shall indicate their names and addresses, identify any persons or organizations they represent, and provide any other information relating to their participation deemed appropriate by the presiding officer. Oral proceedings shall be open to the public and shall be recorded by stenographic or electronic means.

(1) At the beginning of the oral proceeding, the presiding officer shall give a brief synopsis of the proposed rule, a statement of the statutory authority for the proposed rule, and the reasons for the department decision to propose the rule. The presiding officer may place time limitations on individual oral presentations when necessary to ensure the orderly and expeditious conduct of the oral proceeding. To encourage joint oral presentations and to avoid repetition, additional time may be provided for persons whose presentations represent the views of other individuals as well as their own views.

(2) Persons making oral presentations are encouraged to avoid restating matters which have already been submitted in writing.

(3) To facilitate the exchange of information, the presiding officer may, where time permits, open the floor to questions or general discussion.

(4) The presiding officer shall have the authority to take any reasonable action necessary for the orderly conduct of the meeting.

(5) Physical and documentary submissions presented by participants in the oral proceeding shall be submitted to the presiding officer. These submissions become the property of the department.

(6) The oral proceeding may be continued by the presiding officer to a later time without notice other than by announcement at the hearing.

(7) Participants in an oral proceeding shall not be required to take an oath or to submit to cross-examination. However, the presiding officer in an oral proceeding may question participants and permit the questioning of participants by other participants about any matter relating to that rule-making proceeding, including any prior written submissions made by those participants in that proceeding; but no participant shall be required to answer any question.

(8) The presiding officer in an oral proceeding may permit rebuttal statements and request the filing of written statements subsequent to the adjournment of the oral presentations.

**101.5(4) Additional information.** In addition to receiving written comments and oral presentations on a proposed rule according to the provisions of this rule, the department may obtain information concerning a proposed rule through any other lawful means deemed appropriate under the circumstances.

The department may send notices of proposed rule making and a request for comments to any agency, organization, or association known to it to have a direct interest or expertise pertaining to the substance of the proposed rule.

**101.5(5) Accessibility.** The department shall schedule oral proceedings in rooms accessible to and functional for persons with physical disabilities. Persons who have special requirements should contact the person identified in the Notice of Intended Action in advance to arrange access or other needed services.

**261—101.6(17A) Regulatory analysis.**

**101.6(1) Definition of small business.** A "small business" is defined in 1998 Iowa Acts, chapter 1202, section 10, subsection 7.

**101.6(2) Distribution list.** Small businesses or organizations of small businesses may be registered on the department's small business impact list by making a written application addressed to the Director's Office, Department of Economic Development, 200 East Grand Avenue, Des Moines, Iowa 50309-1819, Attn: Legal Counsel. The application for registration shall state:

a. The name of the small business or organization of small businesses.

b. Its address.

c. The name of a person authorized to transact business for the applicant.

d. A description of the applicant's business or organization. An organization representing 25 or more persons who qualify as a small business shall indicate that fact.

e. Whether the registrant desires copies of Notices of Intended Action at cost or via electronic transmission, or desires advance notice of the subject of all or some specific category of proposed rule making affecting small business.

The department may at any time request additional information from the applicant to determine whether the applicant is qualified as a small business or as an organization of 25 or more small businesses. The department may periodically send a letter to each registered small business or organization of small businesses asking whether that business or organization wishes to remain on the registration list. The name of a small business or organization of small businesses shall be removed from the list if a negative response is received, or if no response is received within 30 days after the letter is sent.

**101.6(3) Time of distribution.** Within seven days after submission of a Notice of Intended Action to the administrative rules coordinator for publication in the Iowa Administrative Bulletin, the department shall mail or electronically transmit to all registered small businesses or organizations of small businesses, in accordance with their request, either a copy of the Notice of Intended Action or notice of the subject of that proposed rule making. In the case of a rule that may have an impact on small business adopted in reliance upon Iowa Code section 17A.4(2), the department shall mail notice of the adopted rule to registered businesses or organizations prior to the time the adopted rule is published in the Iowa Administrative Bulletin.

**101.6(4) Qualified requestors for regulatory analysis—economic impact.** The department shall issue a regulatory analysis of a proposed rule that conforms to the requirements of 1998 Iowa Acts, chapter 1202, section 10, subsection 2, paragraph "a," after a proper request from:

a. The administrative rules coordinator.

b. The administrative rules review committee.

**101.6(5) Qualified requestors for regulatory analysis—business impact.** The department shall issue a regulatory analysis of a proposed rule that conforms to the requirements of 1998 Iowa Acts, chapter 1202, section 10, subsection 2, paragraph "b," after a proper request from:

a. The administrative rules review committee.

b. The administrative rules coordinator.

c. At least 25 or more persons who sign the request provided that each represents a different small business.

d. An organization representing at least 25 small businesses. That organization shall list the name, address and telephone number of not less than 25 small businesses it represents.

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**101.6(6)** Time period for analysis. Upon receipt of a timely request for a regulatory analysis, the agency shall adhere to the time lines described in 1998 Iowa Acts, chapter 1202, section 10, subsection 4.

**101.6(7)** Contents of request. A request for a regulatory analysis is made when it is mailed or delivered to the department. The request shall be in writing and satisfy the requirements of 1998 Iowa Acts, chapter 1202, section 10, subsection 1.

**101.6(8)** Contents of concise summary. The contents of the concise summary shall conform to the requirements of 1998 Iowa Acts, chapter 1202, section 10, subsections 4 and 5.

**101.6(9)** Publication of a concise summary. The department shall make available, to the maximum extent feasible, copies of the published summary in conformance with 1998 Iowa Acts, chapter 1202, section 10, subsection 5.

**101.6(10)** Regulatory analysis contents—rules review committee or rules coordinator. When a regulatory analysis is issued in response to a written request from the administrative rules review committee or the administrative rules coordinator, the regulatory analysis shall conform to the requirements of 1998 Iowa Acts, chapter 1202, section 10, subsection 2, paragraph “a,” unless a written request expressly waives one or more of the items listed therein.

**101.6(11)** Regulatory analysis contents—substantial impact on small business. When a regulatory analysis is issued in response to a written request from the administrative rules review committee, the administrative rules coordinator, at least 25 persons signing that request who each qualify as a small business or by an organization representing at least 25 small businesses, the regulatory analysis shall conform to the requirements of 1998 Iowa Acts, chapter 1202, section 10, subsection 2, paragraph “b.”

**261—101.7(17A,25B) Fiscal impact statement.** A rule that mandates additional combined expenditures exceeding \$100,000 by all affected political subdivisions or agencies and entities which contract with political subdivisions to provide services must be accompanied by a fiscal impact statement outlining the costs associated with the rule. A fiscal impact statement must satisfy the requirements of Iowa Code section 25B.6.

If the department determines at the time it adopts a rule that the fiscal impact statement upon which the rule is based contains errors, the department shall, at the same time, issue a corrected fiscal impact statement and publish the corrected fiscal impact statement in the Iowa Administrative Bulletin.

**261—101.8(17A) Time and manner of rule adoption.**

**101.8(1)** Time of adoption. The department shall not adopt a rule until the period for making written submissions and oral presentations has expired. Within 180 days after the later of the publication of the Notice of Intended Action, or the end of oral proceedings thereon, the department shall adopt a rule pursuant to the rule-making proceeding or terminate the proceeding by publication of a notice to that effect in the Iowa Administrative Bulletin.

**101.8(2)** Consideration of public comment. Before the adoption of a rule, the department shall consider fully all of the written submissions and oral submissions received in that rule-making proceeding or any written summary of the oral submissions and any regulatory analysis or fiscal impact statement issued in that rule-making proceeding.

**101.8(3)** Reliance on department expertise. Except as otherwise provided by law, the department may use its own

experience, technical competence, specialized knowledge, and judgment in the adoption of a rule.

**261—101.9(17A) Variance between adopted rule and published notice of proposed rule adoption.**

**101.9(1)** Allowable variances. The department shall not adopt a rule that differs from the rule proposed in the Notice of Intended Action on which the rule is based unless:

a. The differences are within the scope of the subject matter announced in the Notice of Intended Action and are in character with the issues raised in that notice; and

b. The differences are a logical outgrowth of the contents of that Notice of Intended Action or the comments submitted in response thereto; and

c. The Notice of Intended Action provided fair warning that the outcome of that rule-making proceeding could be the rule in question.

**101.9(2)** Fair warning. In determining whether the Notice of Intended Action provided fair warning that the outcome of that rule-making proceeding could be the rule in question, the department shall consider the following factors:

a. The extent to which persons who will be affected by the rule should have understood that the rule-making proceeding on which it is based could affect their interests;

b. The extent to which the subject matter of the rule or the issues determined by the rule are different from the subject matter or issues contained in the Notice of Intended Action; and

c. The extent to which the effects of the rule differ from the effects of the proposed rule contained in the Notice of Intended Action.

**101.9(3)** Petition for rule making. The department shall commence a rule-making proceeding within 60 days of its receipt of a petition for rule making seeking the amendment or repeal of a rule that differs from the proposed rule contained in the Notice of Intended Action upon which the rule is based, unless the department finds that the differences between the adopted rule and the proposed rule are so insubstantial as to make such a rule-making proceeding wholly unnecessary. A copy of any such finding and the petition to which it responds shall be sent to petitioner, the administrative rules coordinator, and the administrative rules review committee, within three days of its issuance.

**101.9(4)** Concurrent rule-making proceedings. Nothing in this rule disturbs the discretion of the department to initiate, concurrently, several different rule-making proceedings on the same subject with several different published Notices of Intended Action.

**261—101.10(17A) Exemptions from public rule-making procedures.**

**101.10(1)** Omission of notice and comment. To the extent the department for good cause finds that public notice and participation are unnecessary, impracticable, or contrary to the public interest in the process of adopting a particular rule, the department may adopt that rule without publishing advance Notice of Intended Action in the Iowa Administrative Bulletin and without providing for written or oral public submissions prior to its adoption. The department shall incorporate the required finding and a brief statement of its supporting reasons in each rule adopted in reliance upon this subrule.

**101.10(2)** Categories exempt. The following narrowly tailored category of rules is exempt from the usual public notice and participation requirements because those requirements are unnecessary, impracticable, or contrary to the pub-

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lic interest with respect to each and every member of the defined class: rules mandated by federal law, including federal statutes or regulations establishing conditions for federal funding of departmental programs where the department is not exercising any options under federal law.

**101.10(3)** Public proceedings on rules adopted without them. The department may, at any time, commence a standard rule-making proceeding for the adoption of a rule that is identical or similar to a rule it adopts in reliance upon subrule 101.10(1). Upon written petition by a governmental subdivision, the administrative rules review committee, a state agency, the administrative rules coordinator, an association having not less than 25 members, or at least 25 persons, the department shall commence a standard rule-making proceeding for any rule specified in the petition that was adopted in reliance upon subrule 101.10(1). This petition must be filed within one year of the publication of the specified rule in the Iowa Administrative Bulletin as an adopted rule. The rule-making proceeding on that rule must be commenced within 60 days of the receipt of the petition. After a standard rule-making proceeding commenced pursuant to this subrule, the department may either readopt the rule it adopted without benefit of all usual procedures on the basis of subrule 101.10(1) or may take any other lawful action, including the amendment or repeal of the rule in question, with whatever further proceedings are appropriate.

**261—101.11(17A) Concise statement of reasons.**

**101.11(1)** General. When requested by a person, either prior to the adoption of a rule or within 30 days after its publication in the Iowa Administrative Bulletin as an adopted rule, the department shall issue a concise statement of reasons for the rule. Requests for such a statement must be in writing and be delivered to the Director's Office, Department of Economic Development, 200 East Grand Avenue, Des Moines, Iowa 50309-1819, Attn: Legal Counsel. The request should indicate whether the statement is sought for all or only a specified part of the rule. Requests shall be considered made on the date received.

**101.11(2)** Contents. The concise statement of reasons shall contain:

- a. The reasons for adopting the rule.
- b. An indication of any change between the text of the proposed rule contained in the published Notice of Intended Action and the text of the rule as finally adopted, with the reasons for any change.
- c. The principal reasons urged in the rule-making proceeding for and against the rule, and the department's reasons for overruling the arguments made against the rule.

**101.11(3)** Time of issuance. After a proper request, the department shall issue a concise statement of reasons by the later of the time the rule is adopted or 35 days after receipt of the request.

**261—101.12(17A) Contents, style, and form of rule.**

**101.12(1)** Contents. Each rule adopted by the department shall contain the text of the rule and, in addition:

- a. The date the department adopted the rule.
- b. A brief explanation of the principal reasons for the rule-making action if the reasons are required by 1998 Iowa Acts, chapter 1202, section 8, or the department in its discretion decides to include the reasons.

c. A reference to all rules repealed, amended, or suspended by the rule.

d. A reference to the specific statutory or other authority authorizing adoption of the rule.

e. Any findings required by any provision of law as a prerequisite to adoption or effectiveness of the rule.

f. A brief explanation of the principal reasons for the failure to provide for waivers to the rule if no waiver provision is included and a brief explanation of any waiver or special exceptions provided in the rule if the reasons are required by 1998 Iowa Acts, chapter 1202, section 8, or the department in its discretion decides to include the reasons.

g. The effective date of the rule.

**101.12(2)** Documents incorporated by reference. The department may incorporate by reference in a proposed or adopted rule, and without causing publication of the incorporated matter in full, all or any part of a code, standard, rule, or other matter if the agency finds that the incorporation of its text in the agency proposed or adopted rule would be unduly cumbersome, expensive, or otherwise inexpedient. The reference in the department proposed or adopted rule shall fully and precisely identify the incorporated matter by location, title, citation, date, and edition, if any; shall briefly indicate the precise subject and the general contents of the incorporated matter; and shall state that the proposed or adopted rule does not include any later amendments or editions of the incorporated matter. The department may incorporate such matter by reference in a proposed or adopted rule only if the department makes copies of it readily available to the public. The rule shall state how and where copies of the incorporated matter may be obtained at cost from this department, and how and where copies may be obtained from the agency of the United States, this state, another state, or the organization, association, or persons, originally issuing that matter. The department shall retain permanently a copy of any materials incorporated by reference in a rule of the department.

**101.12(3)** References to materials not published in full. When the administrative code editor decides to omit the full text of a proposed or adopted rule because publication of the full text would be unduly cumbersome, expensive, or otherwise inexpedient, the department shall prepare and submit to the administrative code editor for inclusion in the Iowa Administrative Bulletin and Iowa Administrative Code a summary statement describing the specific subject matter of the omitted material. This summary statement shall include the title and a brief description sufficient to inform the public of the specific nature and subject matter of the proposed or adopted rules and of significant issues involved in these rules. The summary statement shall also describe how a copy of the full text of the proposed or adopted rule, including any unpublished matter and any matter incorporated by reference, may be obtained from the department. The department shall provide a copy of that full text at actual cost upon request and shall make copies of the full text available for review either electronically or at the state law library.

At the request of the administrative code editor, the department shall provide a proposed statement explaining why publication of the full text would be unduly cumbersome, expensive, or otherwise inexpedient.

**101.12(4)** Style and form. In preparing its rules, the department shall follow the uniform numbering system, form, and style prescribed by the administrative rules coordinator.

**261—101.13(17A) Department rule-making record.**

**101.13(1)** Requirement. The department shall maintain an official rule-making record for each rule it proposes by publication in the Iowa Administrative Bulletin of a Notice of Intended Action, or adopts. The rule-making record and materials incorporated by reference shall be available for public inspection.

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**101.13(2) Contents.** The department rule-making record shall contain:

a. Copies of or citations to all publications in the Iowa Administrative Bulletin with respect to the rule or the proceeding upon which the rule is based and any file-stamped copies of department submissions to the administrative rules coordinator concerning that rule or the proceeding upon which it is based.

b. Copies of any portions of the department's public rule-making docket containing entries relating to the rule or the proceeding upon which the rule is based.

c. All written petitions, requests, and submissions received by the department, and all other written materials of a factual nature as distinguished from opinion that are relevant to the merits of the rule and that were created or compiled by the department in connection with the formulation, proposal, or adoption of the rule or the proceeding upon which the rule is based, except to the extent the department is authorized by law to keep them confidential; provided, however, that when any materials are deleted because they are authorized by law to be kept confidential, the department shall identify in the record the particular materials deleted and state the reasons for that deletion.

d. Any official transcript of oral presentations made in the proceeding upon which the rule is based or, if not transcribed, the stenographic record or electronic recording of those presentations, and any memorandum prepared by a presiding officer summarizing the contents of those presentations.

e. A copy of any regulatory analysis or fiscal impact statement prepared for the proceeding upon which the rule is based.

f. A copy of the rule and any concise statement of reasons prepared for that rule.

g. All petitions for amendment or repeal or suspension of the rule.

h. A copy of any objection to the issuance of that rule without public notice and participation that was filed pursuant to Iowa Code section 17A.4(2) by the administrative rules review committee, the governor, or the attorney general.

i. A copy of any objection to the rule filed by the administrative rules review committee, the governor, or the attorney general pursuant to Iowa Code subsection 17A.4(4), and any department response to that objection.

j. A copy of any executive order concerning the rule.

**101.13(3) Effect of record.** Except as otherwise required by a provision of law, the department rule-making record required by this rule need not constitute the exclusive basis for department action on that rule.

**101.13(4) Maintenance of record.** The department shall maintain the rule-making record for a period of not less than five years from the later of the date the rule to which it pertains became effective or the date of the Notice of Intended Action.

**261—101.14(17A) Filing of rules.** The department shall file each rule it adopts in the office of the administrative rules coordinator. The filing shall be executed as soon after adoption of the rule as is practicable. At the time of filing, each rule shall have attached to it any fiscal impact statement and any concise statement of reasons that was issued with respect to that rule. If a fiscal impact statement or statement of reasons for that rule was not issued until a time subsequent to the filing of that rule, the note or statement must be attached to the filed rule within five working days after the fiscal impact statement or concise statement is issued. In filing a rule, the

department shall use the standard form prescribed by the administrative rules coordinator.

**261—101.15(17A) Effectiveness of rules prior to publication.**

**101.15(1) Grounds.** The department may make a rule effective after its filing at any stated time prior to 35 days after its indexing and publication in the Iowa Administrative Bulletin if it finds that a statute so provides, the rule confers a benefit or removes a restriction on some segment of the public, or that the effective date of the rule is necessary to avoid imminent peril to the public health, safety, or welfare. The department shall incorporate the required finding and a brief statement of its supporting reasons in each rule adopted in reliance upon this subrule.

**101.15(2) Special notice.** When the department makes a rule effective prior to its indexing and publication in reliance upon the provisions of Iowa Code section 17A.5(2)"b"(3), the department shall employ all reasonable efforts to make its contents known to the persons who may be affected by that rule prior to the rule's indexing and publication. The term "all reasonable efforts" requires the department to employ the most effective and prompt means of notice rationally calculated to inform potentially affected parties of the effectiveness of the rule that is justified and practical under the circumstances considering the various alternatives available for this purpose, the comparative costs to the department of utilizing each of those alternatives, and the harm suffered by affected persons from any lack of notice concerning the contents of the rule prior to its indexing and publication. The means that may be used for providing notice of such rules prior to their indexing and publication include, but are not limited to, any one or more of the following means: radio, newspaper, television, signs, mail, telephone, personal notice, or electronic means.

A rule made effective prior to its indexing and publication in reliance upon the provisions of Iowa Code section 17A.5(2)"b"(3) shall include in that rule a statement describing the reasonable efforts that will be used to comply with the requirements of this subrule.

**261—101.16(17A) Review by department of rules.**

**101.16(1) Request for review.** Any interested person, association, agency, or political subdivision may submit a written request to the administrative rules coordinator for the department to conduct a formal review of a specified rule. Upon approval of that request by the administrative rules coordinator, the department shall conduct a formal review of a specified rule to determine whether a new rule should be adopted instead or the rule should be amended or repealed. The department may refuse to conduct a review if it has conducted a review of the specified rule within five years prior to the filing of the written request.

**101.16(2) Conduct of review.** In conducting the formal review, the department shall prepare within a reasonable time a written report summarizing its findings, its supporting reasons, and any proposed course of action. The report shall include a concise statement of the department's findings regarding the rule's effectiveness in achieving its objectives, including a summary of any available supporting data. The report shall also concisely describe significant written criticisms of the rule received during the previous five years, including a summary of any requests for exceptions to the rule received by the department or granted by the department. The report shall describe alternative solutions to resolve the criticisms of the rule, the reasons any were rejected, and any changes made in the rule in response to the criticisms as well

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as the reasons for the changes. A copy of the department's report shall be sent to the administrative rules review committee and the administrative rules coordinator. The report shall also be available for public inspection.

**261—101.17(17A) Written criticisms of department rules.** Any interested person may submit written criticism of a rule adopted by the department.

**101.17(1)** Where submitted, form. Rule criticisms shall be in writing and submitted to the Director's Office, Department of Economic Development, 200 East Grand Avenue, Des Moines, Iowa 50309-1819, Attn: Legal Counsel. The criticism must be typewritten, or legibly handwritten in ink, and must substantially conform to the following form:

**DEPARTMENT OF ECONOMIC DEVELOPMENT**

Criticism of Rule: (specify rule)

Reason(s) for Criticism:

Submitted By: Name: \_\_\_\_\_

Address: \_\_\_\_\_

Telephone Number: \_\_\_\_\_

Signature: \_\_\_\_\_

Date: \_\_\_\_\_

**101.17(2) Maintenance.** Written criticisms of department rules will be maintained in a separate record for a period of five years from the date of receipt by the department. This record will be open for public inspection.

These rules are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202, and Iowa Code section 25B.6.

ITEM 2. Rescind 261—Chapter 102 and adopt the following **new** chapter in lieu thereof:

**CHAPTER 102  
PETITION FOR RULE MAKING**

**261—102.1(17A) Petition for rule making.** Any person or state agency may file a petition for rule making with the department at the Director's Office, Department of Economic Development, 200 East Grand Avenue, Des Moines, Iowa 50309-1819, Attn: Legal Counsel. A petition is deemed filed when it is received by that office. The department must provide the petitioner with a file-stamped copy of the petition if the petitioner provides the department an extra copy for this purpose. The petition must be typewritten, or legibly handwritten in ink, and must substantially conform to the following form:

**BEFORE THE DEPARTMENT OF ECONOMIC DEVELOPMENT**

Petition by (Name of Petitioner) for the (adoption, amendment, or repeal) of rules relating to (state subject matter).



**PETITION FOR  
RULE MAKING**

The petition must provide the following information:

1. A statement of the specific rule-making action sought by the petitioner including the text or a summary of the contents of the proposed rule or amendment to a rule and, if it is a petition to amend or repeal a rule, a citation and the relevant language to the particular portion or portions of the rule proposed to be amended or repealed.

2. A citation to any law deemed relevant to the department's authority to take the action urged or to the desirability of that action.

3. A brief summary of petitioner's arguments in support of the action urged in the petition.

4. A brief summary of any data supporting the action urged in the petition.

5. The names and addresses of other persons, or a description of any class of persons, known by petitioner to be affected by, or interested in, the proposed action which is the subject of the petition.

6. Any request by petitioner for a meeting provided for by subrule 102.4(1).

**102.1(1)** The petition must be dated and signed by the petitioner or the petitioner's representative. It must also include the name, mailing address, and telephone number of the petitioner and petitioner's representative, and a statement indicating the person to whom communications concerning the petition should be directed.

**102.1(2)** The department may deny a petition because it does not substantially conform to the required form.

**261—102.2(17A) Briefs.** The petitioner may attach a brief to the petition in support of the action urged in the petition. The department may request a brief from the petitioner or from any other person concerning the substance of the petition.

**261—102.3(17A) Inquiries.** Inquiries concerning the status of a petition for rule making may be made to the Director's Office, Department of Economic Development, 200 East Grand Avenue, Des Moines, Iowa 50309-1819, Attn: Legal Counsel.

**261—102.4(17A) Department consideration.**

**102.4(1) Forwarding of petition and meeting.** Within five working days after the filing of a petition, the department shall submit a copy of the petition and any accompanying brief to the administrative rules coordinator and to the administrative rules review committee. Upon request by the petitioner in the petition, the department shall schedule a brief and informal meeting between the petitioner and a member of the staff of the department to discuss the petition. The department may request the petitioner to submit additional information or argument concerning the petition. The department may also solicit comments from any person on the substance of the petition. Also, comments on the substance of the petition may be submitted to the department by any person.

**102.4(2) Action on petition.** Within 60 days after the filing of the petition, or within any longer period agreed to by the petitioner, the department shall, in writing, deny the petition, and notify petitioner of its action and the specific grounds for the denial, or grant the petition and notify petitioner that it has instituted rule-making proceedings on the subject of the petition. Petitioner shall be deemed notified of the denial or grant of the petition on the date when the department mails or delivers the required notification to petitioner.

**102.4(3) Denial of petition for nonconformance with form.** Denial of a petition because it does not substantially conform to the required form does not preclude the filing of a new petition on the same subject that seeks to eliminate the grounds for the department's rejection of the petition.

These rules are intended to implement Iowa Code section 17A.7 as amended by 1998 Iowa Acts, chapter 1202, section 11.

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ITEM 3. Rescind 261—Chapter 103 and adopt the following new chapter in lieu thereof:

CHAPTER 103
PETITION FOR DECLARATORY ORDER

261—103.1(17A) Petition for declaratory order. Any person may file a petition with the department for a declaratory order as to the applicability to specified circumstances of a statute, rule, or order within the primary jurisdiction of the department at the Director's Office, Department of Economic Development, 200 East Grand Avenue, Des Moines, Iowa 50309-1819, Attn: Legal Counsel. A petition is deemed filed when it is received by that office. The department shall provide the petitioner with a file-stamped copy of the petition if the petitioner provides the department an extra copy for this purpose. The petition must be typewritten or legibly handwritten in ink and should substantially conform to the following form:

BEFORE THE DEPARTMENT OF ECONOMIC DEVELOPMENT

Petition by (Name of Petitioner) for a Declaratory Order on (Cite provisions of law involved).



PETITION FOR DECLARATORY ORDER

The petition must provide the following information:

- 1. A clear and concise statement of all relevant facts on which the order is requested.
2. A citation and the relevant language of the specific statutes, rules, or orders, whose applicability is questioned, and any other relevant law.
3. The questions petitioner wants answered, stated clearly and concisely.
4. The answers to the questions desired by the petitioner and a summary of the reasons urged by the petitioner in support of those answers. A request which seeks to change rather than to declare or determine policy will be denied.
5. The reasons for requesting the declaratory order and disclosure of the petitioner's interest in the outcome.
6. A statement indicating whether the petitioner is currently a party to another proceeding involving the questions at issue and whether, to the petitioner's knowledge, those questions have been decided by, are pending determination by, or are under investigation by, any governmental entity.
7. The names and addresses of other persons, or a description of any class of persons, known by the petitioner to be affected by, or interested in, the questions presented in the petition.
8. Any request by the petitioner for a meeting provided for by rule 261—103.7(17A).

The petition must be dated and signed by the petitioner or the petitioner's representative. It must also include the name, mailing address, and telephone number of the petitioner and petitioner's representative and a statement indicating the person to whom communications concerning the petition should be directed.

261—103.2(17A) Notice of petition. Within five working days of receipt of a petition for a declaratory order, the department shall give notice of the petition to all persons not served by the petitioner pursuant to rule 261—103.6(17A) to whom notice is required by any provision of law. The department may give notice to any other persons.

261—103.3(17A) Intervention.

103.3(1) Nondiscretionary intervention. Persons who qualify under any applicable provision of law as an intervenor and who file a petition for intervention within 15 working days of the filing of a petition for declaratory order and before the 30-day time for department action under rule 261—103.8(17A) shall be allowed to intervene in a proceeding for a declaratory order.

103.3(2) Discretionary intervention. Any person who files a petition for intervention at any time prior to the issuance of an order may be allowed to intervene in a proceeding for a declaratory order at the discretion of the department.

103.3(3) Filing and form of petition for intervention. A petition for intervention shall be filed at the Director's Office, Department of Economic Development, 200 East Grand Avenue, Des Moines, Iowa 50309-1819, Attn: Legal Counsel. A petition is deemed filed when it is received by that office. The department shall provide the petitioner with a file-stamped copy of the petition for intervention if the petitioner provides an extra copy for this purpose. A petition for intervention must be typewritten or legibly handwritten in ink and should substantially conform to the following form:

BEFORE THE DEPARTMENT OF ECONOMIC DEVELOPMENT

Petition by (Name of Original Petitioner) for a Declaratory Order on (Cite provisions of law cited in original petition).



PETITION FOR INTERVENTION

The petition for intervention must provide the following information:

- 1. Facts supporting the intervenor's standing and qualifications for intervention.
2. The answers urged by the intervenor to the question or questions presented and a summary of the reasons urged in support of those answers.
3. Reasons for requesting intervention and disclosure of the intervenor's interest in the outcome.
4. A statement indicating whether the intervenor is currently a party to any proceeding involving the questions at issue and whether, to the intervenor's knowledge, those questions have been decided by, are pending determination by, or are under investigation by, any governmental entity.
5. The names and addresses of any additional persons, or a description of any additional class of persons, known by the intervenor to be affected by, or interested in, the questions presented.
6. Whether the intervenor consents to be bound by the determination of the matters presented by the declaratory order proceeding.

The petition must be dated and signed by the intervenor or the intervenor's representative. It must also include the name, mailing address, and telephone number of the intervenor and the intervenor's representative, and a statement indicating the person to whom communications should be directed.

261—103.4(17A) Briefs. The petitioner or any intervenor may file a brief in support of the position urged. The department may request a brief from the petitioner, any intervenor, or any other person concerning the questions raised.

261—103.5(17A) Inquiries. Inquiries concerning the status of a declaratory order proceeding may be made to the Director's Office, Department of Economic Development, 200

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East Grand Avenue, Des Moines, Iowa 50309-1819, Attn: Legal Counsel.

**261—103.6(17A) Service and filing of petitions and other papers.**

**103.6(1) Service.** Except where otherwise provided by law, every petition for declaratory order, petition for intervention, brief, or other paper filed in a proceeding for a declaratory order shall be served by mailing or personal delivery upon each of the parties of record to the proceeding, and on all other persons identified as affected by or interested in the questions presented, simultaneously with their filing. The party filing a document is responsible for service on all parties and other affected or interested persons. All documents filed shall indicate all parties or other persons served and the date and method of service.

**103.6(2) Filing.** All petitions for declaratory orders, petitions for intervention, briefs, or other papers in a proceeding for a declaratory order shall be filed with the Director's Office, Department of Economic Development, 200 East Grand Avenue, Des Moines, Iowa 50309-1819, Attn: Legal Counsel. All documents are considered filed upon receipt.

**261—103.7(17A) Consideration.** Upon request by the petitioner, the department shall schedule a brief and informal meeting between the original petitioner, all intervenors, and a member of the staff of the department to discuss the questions raised. The department may solicit comments from any person on the questions raised. Also, comments on the questions raised may be submitted to the department by any person.

**261—103.8(17A) Action on petition.**

**103.8(1) Time frames for action.** Within 30 days after receipt of a petition for a declaratory order, the director or the director's designee shall take action on the petition as required by 1998 Iowa Acts, chapter 1202, section 13, subsection 5.

**103.8(2) Date of issuance of order.** The date of issuance of an order or of a refusal to issue an order is the date of mailing of the order or refusal or date of delivery if service is by other means unless another date is specified in the order.

**261—103.9(17A) Refusal to issue order.**

**103.9(1) Reasons for refusal to issue order.** The department shall not issue a declaratory order where prohibited by 1998 Iowa Acts, chapter 1202, section 13, subsection 1, and may refuse to issue a declaratory order on some or all questions raised for the following reasons:

1. The petition does not substantially comply with the required form.

2. The petition does not contain facts sufficient to demonstrate that the petitioner will be aggrieved or adversely affected by the failure of the department to issue an order.

3. The department does not have jurisdiction over the questions presented in the petition.

4. The questions presented by the petition are also presented in a current rule making, contested case, or other department or judicial proceeding, that may definitively resolve them.

5. The questions presented by the petition would more properly be resolved in a different type of proceeding or by another body with jurisdiction over the matter.

6. The facts or questions presented in the petition are unclear, overbroad, insufficient, or otherwise inappropriate as a basis upon which to issue an order.

7. There is no need to issue an order because the questions raised in the petition have been settled due to a change in circumstances.

8. The petition is not based upon facts calculated to aid in the planning of future conduct but is, instead, based solely upon prior conduct in an effort to establish the effect of that conduct or to challenge a department decision already made.

9. The petition requests a declaratory order that would necessarily determine the legal rights, duties, or responsibilities of other persons who have not joined in the petition, intervened separately, or filed a similar petition and whose position on the questions presented may fairly be presumed to be adverse to that of petitioner.

10. The petitioner requests the department to determine whether a statute is unconstitutional on its face.

**103.9(2) Action on refusal.** A refusal to issue a declaratory order must indicate the specific grounds for the refusal and constitutes final department action on the petition.

**103.9(3) Filing of new petition.** Refusal to issue a declaratory order pursuant to this provision does not preclude the filing of a new petition that seeks to eliminate the grounds for the department's refusal to issue an order.

**261—103.10(17A) Contents of declaratory order—effective date.** In addition to the order itself, a declaratory order must contain the date of its issuance, the name of petitioner and all intervenors, the specific statutes, rules, or orders involved, the particular facts upon which it is based, and the reasons for its conclusion.

A declaratory order is effective on the date of issuance.

**261—103.11(17A) Copies of orders.** A copy of all orders issued in response to a petition for a declaratory order shall be mailed promptly to the original petitioner and all intervenors.

**261—103.12(17A) Effect of a declaratory order.** A declaratory order has the same status and binding effect as a final order issued in a contested case proceeding. It is binding on the department, the petitioner, and any intervenors who consent to be bound and is applicable only in circumstances where the relevant facts and the law involved are indistinguishable from those on which the order was based. As to all other persons, a declaratory order serves only as precedent and is not binding on the department. The issuance of a declaratory order constitutes final agency action on the petition.

These rules are intended to implement 1998 Iowa Acts, chapter 1202, section 13.

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## EDUCATION DEPARTMENT[281]

## Notice of Intended Action

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)“b.”

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code section 256.7(5), the State Board of Education hereby gives Notice of Intended Action to rescind Chapter 2, “Petitions for Rule Making,” and to adopt Chapter 2, “Agency Procedure for Rule Making,” Iowa Administrative Code.

This new chapter will govern agency procedures for rule making and will reflect a change in the chapter title. This new chapter is being proposed to adopt the Uniform Rules on Agency Procedure which were amended to comply with 1998 Iowa Acts, chapter 1202.

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A public hearing on the proposed rules will be held on March 31, 1999, at 9 a.m. in the State Board Room, Grimes State Office Building, Des Moines, Iowa. Written comments will be accepted until March 31, 1999, and may be directed to Ann McCarthy, Department of Education, Grimes State Office Building, Des Moines, Iowa 50319-0146.

This new chapter is intended to implement Iowa Code section 256.7(3) and chapter 17A as amended by 1998 Iowa Acts, chapter 1202.

The following new chapter is proposed.

Rescind 281—Chapter 2 and adopt the following new chapter in lieu thereof:

**CHAPTER 2**  
**AGENCY PROCEDURE FOR RULE MAKING**

**281—2.1(17A) Applicability.** Except to the extent otherwise expressly provided by statute, all rules adopted by the agency are subject to the provisions of Iowa Code chapter 17A, the Iowa administrative procedure Act, and the provisions of this chapter.

**281—2.2(17A) Advice on possible rules before notice of proposed rule adoption.** In addition to seeking information by other methods, the agency may, before publication of a Notice of Intended Action under Iowa Code section 17A.4(1)"a," solicit comments from the public on a subject matter of possible rule making by the agency by causing notice to be published in the Iowa Administrative Bulletin of the subject matter and indicating where, when, and how persons may comment.

**281—2.3(17A) Public rule-making docket.**

**2.3(1) Docket maintained.** The agency shall maintain a current public rule-making docket.

**2.3(2) Anticipated rule making.** The rule-making docket shall list each anticipated rule-making proceeding. A rule-making proceeding is deemed "anticipated" from the time a draft of proposed rules is distributed for internal discussion within the agency. For each anticipated rule-making proceeding the docket shall contain a listing of the precise subject matter which may be submitted for consideration by the director for subsequent proposal under the provisions of Iowa Code section 17A.4(1)"a," the name and address of agency personnel with whom persons may communicate with respect to the matter, and an indication of the present status within the agency of that possible rule. The agency may also include in the docket other subjects upon which public comment is desired.

**2.3(3) Pending rule-making proceedings.** The rule-making docket shall list each pending rule-making proceeding. A rule-making proceeding is pending from the time it is commenced, by publication in the Iowa Administrative Bulletin of a Notice of Intended Action pursuant to Iowa Code section 17A.4(1)"a," to the time it is terminated, by publication of a Notice of Termination in the Iowa Administrative Bulletin or the rule becoming effective. For each rule-making proceeding, the docket shall indicate:

- a. The subject matter of the proposed rule;
- b. A citation to all published notices relating to the proceeding;
- c. Where written submissions on the proposed rule may be inspected;
- d. The time during which written submissions may be made;
- e. The names of persons who have made written requests for an opportunity to make oral presentations on the

proposed rule, where those requests may be inspected, and where and when oral presentations may be made;

f. Whether a written request for the issuance of a regulatory analysis, or a concise statement of reasons, has been filed, whether such an analysis or statement or a fiscal impact statement has been issued, and where any such written request, analysis, or statement may be inspected;

g. The current status of the proposed rule and any agency determinations with respect thereto;

h. Any known timetable for agency decisions or other action in the proceeding;

i. The date of the rule's adoption;

j. The date of the rule's filing, indexing, and publication;

k. The date on which the rule will become effective; and

l. Where the rule-making record may be inspected.

**281—2.4(17A) Notice of proposed rule making.**

**2.4(1) Contents.** At least 35 days before the adoption of a rule the agency shall cause Notice of Intended Action to be published in the Iowa Administrative Bulletin. The Notice of Intended Action shall include:

a. A brief explanation of the purpose of the proposed rule;

b. The specific legal authority for the proposed rule;

c. Except to the extent impracticable, the text of the proposed rule;

d. Where, when, and how persons may present their views on the proposed rule; and

e. Where, when, and how persons may demand an oral proceeding on the proposed rule if the notice does not already provide for one.

Where inclusion of the complete text of a proposed rule in the Notice of Intended Action is impracticable, the agency shall include in the notice a statement fully describing the specific subject matter of the omitted portion of the text of the proposed rule, the specific issues to be addressed by that omitted text of the proposed rule, and the range of possible choices being considered by the agency for the resolution of each of those issues.

**2.4(2) Incorporation by reference.** A proposed rule may incorporate other materials by reference only if it complies with all of the requirements applicable to the incorporation by reference of other materials in an adopted rule that are contained in subrule 2.12(2) of this chapter.

**2.4(3) Copies of notices.** Persons desiring to receive copies of future Notices of Intended Action by subscription must file with the agency a written request indicating the name and address to which such notices should be sent. Within seven days after submission of a Notice of Intended Action to the administrative rules coordinator for publication in the Iowa Administrative Bulletin, the agency shall mail or electronically transmit a copy of that notice to subscribers who have filed a written request for either mailing or electronic transmittal with the agency for Notices of Intended Action. The written request shall be accompanied by payment of the subscription price which may cover the full cost of the subscription service, including its administrative overhead and the cost of copying and mailing the Notices of Intended Action for a period of ten days.

**281—2.5(17A) Public participation.**

**2.5(1) Written comments.** For at least 20 days after publication of the Notice of Intended Action, persons may submit argument, data, and views, in writing, on the proposed rule. Such written submissions should identify the proposed rule to which they relate and should be submitted to Department

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of Education, Legal Consultant's Office, Grimes State Office Building, Des Moines, Iowa 50319-0146 or the person designated in the Notice of Intended Action.

**2.5(2) Oral proceedings.** The agency may, at any time, schedule an oral proceeding on a proposed rule. The agency shall schedule an oral proceeding on a proposed rule if, within 20 days after the published Notice of Intended Action, a written request for an opportunity to make oral presentations is submitted to the agency by the administrative rule review committee, a governmental subdivision, an agency, an association having not less than 25 members, or at least 25 persons. That request must also contain the following additional information:

1. A request by one or more individual persons must be signed by each of them and include the address and telephone number of each of them.

2. A request by an association must be signed by an officer or designee of the association and must contain a statement that the association has at least 25 members and the address and telephone number of the person signing that request.

3. A request by an agency or governmental subdivision must be signed by an official having authority to act on behalf of the entity and must contain the address and telephone number of the person signing that request.

**2.5(3) Conduct of oral proceedings.**

a. **Applicability.** This subrule applies only to those oral rule-making proceedings in which an opportunity to make oral presentations is authorized or required by Iowa Code section 17A.4(1)"b" as amended by 1998 Iowa Acts, chapter 1202, section 8, or this chapter.

b. **Scheduling and notice.** An oral proceeding on a proposed rule may be held in one or more locations and shall not be held earlier than 20 days after notice of its location and time is published in the Iowa Administrative Bulletin. That notice shall also identify the proposed rule by ARC number and citation to the Iowa Administrative Bulletin.

c. **Presiding officer.** The agency, a member of the agency, or another person designated by the agency who will be familiar with the substance of the proposed rule, shall preside at the oral proceeding on a proposed rule. If the agency does not preside, the presiding officer shall prepare a memorandum for consideration by the agency summarizing the contents of the presentations made at the oral proceeding unless the agency determines that such a memorandum is unnecessary because the agency will personally listen to or read the entire transcript of the oral proceeding.

d. **Conduct of proceeding.** At an oral proceeding on a proposed rule, persons may make oral statements and make documentary and physical submissions, which may include data, views, comments or arguments concerning the proposed rule. Persons wishing to make oral presentations at such a proceeding are encouraged to notify the agency at least one business day prior to the proceeding and indicate the general subject of their presentations. At the proceeding, those who participate shall indicate their names and addresses, identify any persons or organizations they may represent, and provide any other information relating to their participation deemed appropriate by the presiding officer. Oral proceedings shall be open to the public and shall be recorded by stenographic or electronic means.

(1) At the beginning of the oral proceeding, the presiding officer shall give a brief synopsis of the proposed rule, a statement of the statutory authority for the proposed rule, and the reasons for the agency decision to propose the rule. The presiding officer may place time limitations on individual

oral presentations when necessary to ensure the orderly and expeditious conduct of the oral proceeding. To encourage joint oral presentations and to avoid repetition, additional time may be provided for persons whose presentations represent the views of other individuals as well as their own views.

(2) Persons making oral presentations are encouraged to avoid restating matters which have already been submitted in writing.

(3) To facilitate the exchange of information, the presiding officer may, where time permits, open the floor to questions or general discussion.

(4) The presiding officer shall have the authority to take any reasonable action necessary for the orderly conduct of the meeting.

(5) Physical and documentary submissions presented by participants in the oral proceeding shall be submitted to the presiding officer. Such submissions become the property of the agency.

(6) The oral proceeding may be continued by the presiding officer to a later time without notice other than by announcement at the hearing.

(7) Participants in an oral proceeding shall not be required to take an oath or to submit to cross-examination. However, the presiding officer in an oral proceeding may question participants and permit the questioning of participants by other participants about any matter relating to that rule-making proceeding, including any prior written submissions made by those participants in that proceeding; but no participant shall be required to answer any question.

(8) The presiding officer in an oral proceeding may permit rebuttal statements and request the filing of written statements subsequent to the adjournment of the oral presentations.

**2.5(4) Additional information.** In addition to receiving written comments and oral presentations on a proposed rule according to the provisions of this rule, the agency may obtain information concerning a proposed rule through any other lawful means deemed appropriate under the circumstances.

**2.5(5) Accessibility.** The agency shall schedule oral proceedings in rooms accessible to and functional for persons with physical disabilities. Persons who have special requirements should contact the Legal Consultant's Office, Department of Education, Grimes State Office Building, Des Moines, Iowa 50319-0146 or telephone (515)281-5295 in advance to arrange access or other needed services.

**281—2.6(17A) Regulatory analysis.**

**2.6(1) Definition of small business.** A "small business" is defined in 1998 Iowa Acts, chapter 1202, section 10(7).

**2.6(2) Mailing list.** Small businesses or organizations of small businesses may be registered on the agency's small business impact list by making a written application addressed to Legal Consultant's Office, Department of Education, Grimes State Office Building, Des Moines, Iowa 50319-0146. The application for registration shall state:

a. The name of the small business or organization of small businesses;

b. Its address;

c. The name of a person authorized to transact business for the applicant;

d. A description of the applicant's business or organization. An organization representing 25 or more persons who qualify as a small business shall indicate that fact.

e. Whether the registrant desires copies of Notices of Intended Action at cost, or desires advance notice of the sub-

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ject of all or some specific category of proposed rule making affecting small business.

The agency may at any time request additional information from the applicant to determine whether the applicant is qualified as a small business or as an organization of 25 or more small businesses. The agency may periodically send a letter to each registered small business or organization of small businesses asking whether that business or organization wishes to remain on the registration list. The name of a small business or organization of small businesses will be removed from the list if a negative response is received, or if no response is received within 30 days after the letter is sent.

**2.6(3) Time of mailing.** Within seven days after submission of a Notice of Intended Action to the administrative rules coordinator for publication in the Iowa Administrative Bulletin, the agency shall mail to all registered small businesses or organizations of small businesses, in accordance with their request, either a copy of the Notice of Intended Action or notice of the subject of that proposed rule making. In the case of a rule that may have an impact on small business adopted in reliance upon Iowa Code section 17A.4(2), the agency shall mail notice of the adopted rule to registered businesses or organizations prior to the time the adopted rule is published in the Iowa Administrative Bulletin.

**2.6(4) Qualified requesters for regulatory analysis—economic impact.** The agency shall issue a regulatory analysis of a proposed rule that conforms to the requirements of 1998 Iowa Acts, chapter 1202, section 10(2a), after a proper request from:

- a. The administrative rules coordinator;
- b. The administrative rules review committee.

**2.6(5) Qualified requesters for regulatory analysis—business impact.** The agency shall issue a regulatory analysis of a proposed rule that conforms to the requirements of 1998 Iowa Acts, chapter 1202, section 10(2b), after a proper request from:

- a. The administrative rules review committee;
- b. The administrative rules coordinator;
- c. At least 25 or more persons who sign the request provided that each represents a different small business;
- d. An organization representing at least 25 small businesses. That organization shall list the name, address and telephone number of not less than 25 small businesses it represents.

**2.6(6) Time period for analysis.** Upon receipt of a timely request for a regulatory analysis the agency shall adhere to the time lines described in 1998 Iowa Acts, chapter 1202, section 10(4).

**2.6(7) Contents of request.** A request for a regulatory analysis is made when it is mailed or delivered to the agency. The request shall be in writing and satisfy the requirements of 1998 Iowa Acts, chapter 1202, section 10(1).

**2.6(8) Contents of concise summary.** The contents of the concise summary shall conform to the requirements of 1998 Iowa Acts, chapter 1202, section 10(4,5).

**2.6(9) Publication of a concise summary.** The agency shall make available to the maximum extent feasible, copies of the published summary in conformance with 1998 Iowa Acts, chapter 1202, section 10(5).

**2.6(10) Regulatory analysis contents—rules review committee or rules coordinator.** When a regulatory analysis is issued in response to a written request from the administrative rules review committee, or the administrative rules coordinator, the regulatory analysis shall conform to the requirements of 1998 Iowa Acts, chapter 1202, section 10(2a), un-

less a written request expressly waives one or more of the items listed in the section.

**2.6(11) Regulatory analysis contents—substantial impact on small business.** When a regulatory analysis is issued in response to a written request from the administrative rules review committee, the administrative rules coordinator, at least 25 persons signing that request who each qualify as a small business or by an organization representing at least 25 small businesses, the regulatory analysis shall conform to the requirements of 1998 Iowa Acts, chapter 1202, section 10(2b).

**281—2.7(17A,25B) Fiscal impact statement.**

**2.7(1)** A proposed rule that mandates additional combined expenditures exceeding \$100,000 by all affected political subdivisions or agencies and entities which contract with political subdivisions to provide services must be accompanied by a fiscal impact statement outlining the costs associated with the rule. A fiscal impact statement must satisfy the requirements of Iowa Code section 25B.6.

**2.7(2)** If the agency determines at the time it adopts a rule that the fiscal impact statement upon which the rule is based contains errors, the agency shall, at the same time, issue a corrected fiscal impact statement and publish the corrected fiscal impact statement in the Iowa Administrative Bulletin.

**281—2.8(17A) Time and manner of rule adoption.**

**2.8(1)** Time of adoption. The agency shall not adopt a rule until the period for making written submissions and oral presentations has expired. Within 180 days after the later of the publication of the Notice of Intended Action, or the end of oral proceedings thereon, the agency shall adopt a rule pursuant to the rule-making proceeding or terminate the proceeding by publication of a notice to that effect in the Iowa Administrative Bulletin.

**2.8(2)** Consideration of public comment. Before the adoption of a rule, the agency shall consider fully all of the written submissions and oral submissions received in that rule-making proceeding or any memorandum summarizing such oral submissions, and any regulatory analysis or fiscal impact statement issued in that rule-making proceeding.

**2.8(3)** Reliance on agency expertise. Except as otherwise provided by law, the agency may use its own experience, technical competence, specialized knowledge, and judgment in the adoption of a rule.

**281—2.9(17A) Variance between adopted rule and published notice of proposed rule adoption.**

**2.9(1)** The agency shall not adopt a rule that differs from the rule proposed in the Notice of Intended Action on which the rule is based unless:

- a. The differences are within the scope of the subject matter announced in the Notice of Intended Action and are in character with the issues raised in that notice; and
- b. The differences are a logical outgrowth of the contents of that Notice of Intended Action and the comments submitted in response thereto; and
- c. The Notice of Intended Action provided fair warning that the outcome of that rule-making proceeding could be the rule in question.

**2.9(2)** In determining whether the Notice of Intended Action provided fair warning that the outcome of that rule-making proceeding could be the rule in question, the agency shall consider the following factors:

- a. The extent to which persons who will be affected by the rule should have understood that the rule-making proceeding on which it is based could affect their interests;

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b. The extent to which the subject matter of the rule or the issues determined by the rule are different from the subject matter or issues contained in the Notice of Intended Action; and

c. The extent to which the effects of the rule differ from the effects of the proposed rule contained in the Notice of Intended Action.

2.9(3) The agency shall commence a rule-making proceeding within 60 days of its receipt of a petition for rule making seeking the amendment or repeal of a rule that differs from the proposed rule contained in the Notice of Intended Action upon which the rule is based, unless the agency finds that the differences between the adopted rule and the proposed rule are so insubstantial as to make such a rule-making proceeding wholly unnecessary. A copy of any such finding and the petition to which it responds shall be sent to petitioner, the administrative rules coordinator, and the administrative rules review committee, within three days of its issuance.

2.9(4) Concurrent rule-making proceedings. Nothing in this rule disturbs the discretion of the agency to initiate, concurrently, several different rule-making proceedings on the same subject with several different published Notices of Intended Action.

**281—2.10(17A) Exemptions from public rule-making procedures.**

2.10(1) Omission of notice and comment. To the extent the agency for good cause finds that public notice and participation are unnecessary, impracticable, or contrary to the public interest in the process of adopting a particular rule, the agency may adopt that rule without publishing advance Notice of Intended Action in the Iowa Administrative Bulletin and without providing for written or oral public submissions prior to its adoption. The agency shall incorporate the required finding and a brief statement of its supporting reasons in each rule adopted in reliance upon this subrule.

2.10(2) Public proceedings on rules adopted without them. The agency may, at any time, commence a standard rule-making proceeding for the adoption of a rule that is identical or similar to a rule it adopts in reliance upon subrule 2.10(1). Upon written petition by a governmental subdivision, the administrative rules review committee, an agency, the administrative rules coordinator, an association having not less than 25 members, or at least 25 persons, the agency shall commence a standard rule-making proceeding for any rule specified in the petition that was adopted in reliance upon subrule 2.10(1). Such a petition must be filed within one year of the publication of the specified rule in the Iowa Administrative Bulletin as an adopted rule. The rule-making proceeding on that rule must be commenced within 60 days of the receipt of such a petition. After a standard rule-making proceeding commenced pursuant to this subrule, the agency may either readopt the rule it adopted without benefit of all usual procedures on the basis of subrule 2.10(1), or may take any other lawful action, including the amendment or repeal of the rule in question, with whatever further proceedings are appropriate.

**281—2.11(17A) Concise statement of reasons.**

2.11(1) General. When requested by a person, either prior to the adoption of a rule or within 30 days after its publication in the Iowa Administrative Bulletin as an adopted rule, the agency shall issue a concise statement of reasons for the rule. Requests for such a statement must be in writing and be delivered to Legal Consultant's Office, Department of Education, Grimes State Office Building, Des Moines,

Iowa 50319-0146. The request should indicate whether the statement is sought for all or only a specified part of the rule. Requests will be considered made on the date received.

2.11(2) Contents. The concise statement of reasons shall contain:

a. The reasons for adopting the rule;

b. An indication of any change between the text of the proposed rule contained in the published Notice of Intended Action and the text of the rule as finally adopted, with the reasons for any such change;

c. The principal reasons urged in the rule-making proceeding for and against the rule, and the agency's reasons for overruling the arguments made against the rule.

2.11(3) Time of issuance. After a proper request, the agency shall issue a concise statement of reasons by the later of the time the rule is adopted or 35 days after receipt of the request.

**281—2.12(17A) Contents, style, and form of rule.**

2.12(1) Contents. Each rule adopted by the agency shall contain the text of the rule and, in addition:

a. The date the agency adopted the rule;

b. A brief explanation of the principal reasons for the rule-making action if such reasons are required by 1998 Iowa Acts, chapter 1202, section 8, or the agency in its discretion decides to include such reasons;

c. A reference to all rules repealed, amended, or suspended by the rule;

d. A reference to the specific statutory or other authority authorizing adoption of the rule;

e. Any findings required by any provision of law as a prerequisite to adoption or effectiveness of the rule;

f. A brief explanation of the principal reasons for the failure to provide for waivers to the rule if no waiver provision is included and a brief explanation of any waiver or special exceptions provided in the rule if such reasons are required by 1998 Iowa Acts, chapter 1202, section 8, or the agency in its discretion decides to include such reasons; and

g. The effective date of the rule.

2.12(2) Incorporation by reference. The agency may incorporate by reference in a proposed or adopted rule, and without causing publication of the incorporated matter in full, all or any part of a code, standard, rule, or other matter if the agency finds that the incorporation of its text in the agency proposed or adopted rule would be unduly cumbersome, expensive, or otherwise inexpedient. The reference in the agency proposed or adopted rule shall fully and precisely identify the incorporated matter by location, title, citation, date, and edition, if any; shall briefly indicate the precise subject and the general contents of the incorporated matter; and shall state that the proposed or adopted rule does not include any later amendments or editions of the incorporated matter. The agency may incorporate such matter by reference in a proposed or adopted rule only if the agency makes copies of it readily available to the public. The rule shall state how and where copies of the incorporated matter may be obtained at cost from this agency, and how and where copies may be obtained from the agency of the United States, this state, another state, or the organization, association, or persons, originally issuing that matter. The agency shall retain permanently a copy of any materials incorporated by reference in a rule of the agency.

If the agency adopts standards by reference to another publication, it shall provide a copy of the publication containing the standards to the administrative rules coordinator for deposit in the state law library and may make the standards available electronically.

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**2.12(3)** References to materials not published in full. When the administrative code editor decides to omit the full text of a proposed or adopted rule because publication of the full text would be unduly cumbersome, expensive, or otherwise inexpedient, the agency shall prepare and submit to the administrative code editor for inclusion in the Iowa Administrative Bulletin and Iowa Administrative Code a summary statement describing the specific subject matter of the omitted material. This summary statement shall include the title and a brief description sufficient to inform the public of the specific nature and subject matter of the proposed or adopted rules, and of significant issues involved in these rules. The summary statement shall also describe how a copy of the full text of the proposed or adopted rule, including any unpublished matter and any matter incorporated by reference, may be obtained from the agency. The agency will provide a copy of that full text at actual cost upon request and shall make copies of the full text available for review at the state law library and may make the standards available electronically.

At the request of the administrative code editor, the agency shall provide a proposed statement explaining why publication of the full text would be unduly cumbersome, expensive, or otherwise inexpedient.

**2.12(4)** Style and form. In preparing its rules, the agency shall follow the uniform numbering system, form, and style prescribed by the administrative rules coordinator.

**281—2.13(17A) Agency rule-making record.**

**2.13(1)** Requirement. The agency shall maintain an official rule-making record for each rule it proposes by publication in the Iowa Administrative Bulletin of a Notice of Intended Action, or adopts. The rule-making record and materials incorporated by reference must be available for public inspection.

**2.13(2)** Contents. The agency rule-making record shall contain:

a. Copies of all publications in the Iowa Administrative Bulletin with respect to the rule or the proceeding upon which the rule is based and any file-stamped copies of agency submissions to the administrative rules coordinator concerning that rule or the proceeding upon which it is based;

b. Copies of any portions of the agency's public rule-making docket containing entries relating to the rule or the proceeding upon which the rule is based;

c. All written petitions, requests, and submissions received by the agency, and all other written materials of a factual nature as distinguished from opinion that are relevant to the merits of the rule and that were created or compiled by the agency and considered by the director, in connection with the formulation, proposal, or adoption of the rule or the proceeding upon which the rule is based, except to the extent the agency is authorized by law to keep them confidential; provided, however, that when any such materials are deleted because they are authorized by law to be kept confidential, the agency shall identify in the record the particular materials deleted and state the reasons for that deletion;

d. Any official transcript of oral presentations made in the proceeding upon which the rule is based or, if not transcribed, the stenographic record or electronic recording of those presentations, and any memorandum prepared by a presiding officer summarizing the contents of those presentations;

e. A copy of any regulatory analysis or fiscal impact statement prepared for the proceeding upon which the rule is based;

f. A copy of the rule and any concise statement of reasons prepared for that rule;

g. All petitions for amendment or repeal or suspension of the rule;

h. A copy of any objection to the issuance of that rule without public notice and participation that was filed pursuant to Iowa Code section 17A.4(2) by the administrative rules review committee, the governor, or the attorney general;

i. A copy of any objection to the rule filed by the administrative rules review committee, the governor, or the attorney general pursuant to Iowa Code section 17A.4(4), and any agency response to that objection;

j. A copy of any significant written criticism of the rule, including a summary of any petitions for waiver of the rule; and

k. A copy of any executive order concerning the rule.

**2.13(3)** Effect of record. Except as otherwise required by a provision of law, the agency rule-making record required by this rule need not constitute the exclusive basis for agency action on that rule.

**2.13(4)** Maintenance of record. The agency shall maintain the rule-making record for a period of not less than five years from the later of the date the rule to which it pertains became effective, the date of the Notice of Intended Action, or the date of any written criticism as described in 2.13(2), "g," "h," "i," or "j."

**281—2.14(17A) Filing of rules.** The agency shall file each rule it adopts in the office of the administrative rules coordinator. The filing must be executed as soon after adoption of the rule as is practicable. At the time of filing, each rule must have attached to it any fiscal impact statement and any concise statement of reasons that was issued with respect to that rule. If a fiscal impact statement or statement of reasons for that rule was not issued until a time subsequent to the filing of that rule, the note or statement must be attached to the filed rule within five working days after the note or statement is issued. In filing a rule, the agency shall use the standard form prescribed by the administrative rules coordinator.

**281—2.15(17A) Effectiveness of rules prior to publication.**

**2.15(1)** Grounds. The agency may make a rule effective after its filing at any stated time prior to 35 days after its indexing and publication in the Iowa Administrative Bulletin if it finds that a statute so provides, the rule confers a benefit or removes a restriction on some segment of the public, or that the effective date of the rule is necessary to avoid imminent peril to the public health, safety, or welfare. The agency shall incorporate the required finding and a brief statement of its supporting reasons in each rule adopted in reliance upon this subrule.

**2.15(2)** Special notice. When the agency makes a rule effective prior to its indexing and publication in reliance upon the provisions of Iowa Code section 17A.5(2)"b"(3), the agency shall employ all reasonable efforts to make its contents known to the persons who may be affected by that rule prior to the rule's indexing and publication. The term "all reasonable efforts" requires the agency to employ the most effective and prompt means of notice rationally calculated to inform potentially affected parties of the effectiveness of the rule that is justified and practical under the circumstances considering the various alternatives available for this purpose, the comparative costs to the agency of utilizing each of those alternatives, and the harm suffered by affected persons from any lack of notice concerning the contents of the rule

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prior to its indexing and publication. The means that may be used for providing notice of such rules prior to their indexing and publication include, but are not limited to, any one or more of the following means: radio, newspaper, television, signs, mail, telephone, personal notice or electronic means.

A rule made effective prior to its indexing and publication in reliance upon the provisions of Iowa Code section 17A.5(2)"b"(3), shall include in that rule a statement describing the reasonable efforts that will be used to comply with the requirements of subrule 2.15(2).

**281—2.16(17A) General statements of policy.**

**2.16(1)** Compilation, indexing, public inspection. The agency shall maintain an official, current, and dated compilation that is indexed by subject, containing all of its general statements of policy within the scope of Iowa Code section 17A.2(10)"a," "c," "f," "g," "h," "k." Each addition to, change in, or deletion from the official compilation must also be dated, indexed, and a record thereof kept. Except for those portions containing rules governed by Iowa Code section 17A.2(7)"f," or otherwise authorized by law to be kept confidential, the compilation must be made available for public inspection and copying.

**2.16(2)** Enforcement of requirements. A general statement of policy subject to the requirements of this subsection shall not be relied on by the agency to the detriment of any person who does not have actual, timely knowledge of the contents of the statement until the requirements of subrule 2.16(1) are satisfied. This provision is inapplicable to the extent necessary to avoid imminent peril to the public health, safety, or welfare.

**281—2.17(17A) Review by agency of rules.**

**2.17(1)** Any interested person, association, agency, or political subdivision may submit a written request to the administrative rules coordinator requesting the agency to conduct a formal review of a specified rule. Upon approval of that request by the administrative rules coordinator, the agency shall conduct a formal review of a specified rule to determine whether a new rule should be adopted instead or the rule should be amended or repealed. The agency may refuse to conduct a review if it has conducted such a review of the specified rule within five years prior to the filing of the written request.

**2.17(2)** In conducting the formal review, the agency shall prepare within a reasonable time a written report summarizing its findings, its supporting reasons, and any proposed course of action. The report must include a concise statement of the agency's findings regarding the rule's effectiveness in achieving its objectives, including a summary of any available supporting data. The report shall also concisely describe significant written criticisms of the rule received during the previous five years, including a summary of any petitions for waiver of the rule received by the agency or granted by the agency. The report shall describe alternative solutions to resolve the criticisms of the rule, the reasons any were rejected, and any changes made in the rule in response to the criticisms as well as the reasons for the changes. A copy of the agency's report shall be sent to the administrative rules review committee and the administrative rules coordinator. The report must also be available for public inspection.

These rules are intended to implement Iowa Code section 256.7(3) and chapter 17A as amended by 1998 Iowa Acts, chapter 1202.

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**EDUCATION DEPARTMENT[281]**

**Notice of Intended Action**

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)"b."

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code section 256.7(5), the State Board of Education hereby gives Notice of Intended Action to rescind Chapter 3, "Declaratory Rulings," and to adopt Chapter 3, "Declaratory Orders," Iowa Administrative Code.

This new chapter will govern agency procedures for declaratory orders. This new chapter is being proposed to adopt the Uniform Rules on Agency Procedure which were amended to comply with 1998 Iowa Acts, chapter 1202.

A public hearing on the proposed amendment will be held on March 31, 1999, at 11 a.m. in the State Board Room, Grimes State Office Building, Des Moines, Iowa.

Written comments will be accepted until March 31, 1999, and may be directed to Ann Marie Brick, Department of Education, Grimes State Office Building, Des Moines, Iowa 50319-0146.

This amendment is intended to implement Iowa Code section 256.7(3) and chapter 17A as amended by 1998 Iowa Acts, chapter 1202.

The following chapter is proposed.

Rescind 281—Chapter 3 and adopt the following new chapter in lieu thereof:

**CHAPTER 3  
DECLARATORY ORDERS**

**281—3.1(17A) Petition for declaratory order.** Any person may file a petition with the department of education for a declaratory order as to the applicability to specified circumstances of a statute, rule, or order within the primary jurisdiction of the Department of Education, at the Grimes State Office Building, Second Floor, Des Moines, Iowa 50319-0146. A petition is deemed filed when it is received by that office. The department of education shall provide the petitioner with a file-stamped copy of the petition if the petitioner provides the agency an extra copy for this purpose. The petition must be typewritten or legibly handwritten in ink and must substantially conform to the following form:

**DEPARTMENT OF EDUCATION**

Petition by (Name of Petitioner) for a Declaratory Order on (Cite provisions of law involved).



**PETITION FOR  
DECLARATORY  
ORDER**

The petition must provide the following information:

- 1. A clear and concise statement of all relevant facts on which the order is requested.
- 2. A citation and the relevant language of the specific statutes, rules, policies, decisions, or orders, whose applicability is questioned, and any other relevant law.

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3. The questions petitioner wants answered, stated clearly and concisely.

4. The answers to the questions desired by the petitioner and a summary of the reasons urged by the petitioner in support of those answers.

5. The reasons for requesting the declaratory order and disclosure of the petitioner's interest in the outcome.

6. A statement indicating whether the petitioner is currently a party to another proceeding involving the questions at issue and whether, to the petitioner's knowledge, those questions have been decided by, are pending determination by, or are under investigation by, any governmental entity.

7. The names and addresses of other persons, or a description of any class of persons, known by petitioner to be affected by, or interested in, the questions presented in the petition.

8. Any request by petitioner for a meeting provided for by 3.7(17A).

The petition must be dated and signed by the petitioner or the petitioner's representative. It must also include the name, mailing address, and telephone number of the petitioner and petitioner's representative and a statement indicating the person to whom communications concerning the petition should be directed.

**281—3.2(17A) Notice of petition.** Within 15 days after receipt of a petition for a declaratory order, the department of education shall give notice of the petition to all persons not served by the petitioner pursuant to 3.6(17A) to whom notice is required by any provision of law. The department of education may also give notice to any other persons.

**281—3.3(17A) Intervention.**

**3.3(1)** Persons who qualify under any applicable provision of law as an intervenor and who file a petition for intervention within 15 days of the filing of a petition for declaratory order (after time for notice under 3.2(17A) and before 30-day time for agency action under 3.8(17A)) shall be allowed to intervene in a proceeding for a declaratory order.

**3.3(2)** Any person who files a petition for intervention at any time prior to the issuance of an order may be allowed to intervene in a proceeding for a declaratory order at the discretion of the department of education.

**3.3(3)** A petition for intervention shall be filed at the Office of the Director, Grimes State Office Building, Des Moines, Iowa 50319-0146. Such a petition is deemed filed when it is received by that office. The department of education will provide the petitioner with a file-stamped copy of the petition for intervention if the petitioner provides an extra copy for this purpose. A petition for intervention must be typewritten or legibly handwritten in ink and must substantially conform to the following form:

DEPARTMENT OF EDUCATION

Petition by (Name of Original Petitioner) for a Declaratory Order on (Cite provisions of law cited in original petition).



PETITION FOR INTERVENTION

The petition for intervention must provide the following information:

1. Facts supporting the intervenor's standing and qualifications for intervention.

2. The answers urged by the intervenor to the question or questions presented and a summary of the reasons urged in support of those answers.

3. Reasons for requesting intervention and disclosure of the intervenor's interest in the outcome.

4. A statement indicating whether the intervenor is currently a party to any proceeding involving the questions at issue and whether, to the intervenor's knowledge, those questions have been decided by, are pending determination by, or are under investigation by, any governmental entity.

5. The names and addresses of any additional persons, or a description of any additional class of persons, known by the intervenor to be affected by, or interested in, the questions presented.

6. Whether the intervenor consents to be bound by the determination of the matters presented in the declaratory order proceeding.

The petition must be dated and signed by the intervenor or the intervenor's representative. It must also include the name, mailing address, and telephone number of the intervenor and intervenor's representative, and a statement indicating the person to whom communications should be directed.

**281—3.4(17A) Briefs.** The petitioner or any intervenor may file a brief in support of the position urged. The department of education may request a brief from the petitioner, any intervenor, or any other person concerning the questions raised.

**281—3.5(17A) Inquiries.** Inquiries concerning the status of a declaratory order proceeding may be made to the Legal Consultant, Department of Education, Grimes State Office Building, Des Moines, Iowa 50139-0146.

**281—3.6(17A) Service and filing of petitions and other papers.**

**3.6(1)** When service required. Except where otherwise provided by law, every petition for declaratory order, petition for intervention, brief, or other paper filed in a proceeding for a declaratory order shall be served upon each of the parties of record to the proceeding, and on all other persons identified in the petition for declaratory order or petition for intervention as affected by or interested in the questions presented, simultaneously with their filing. The party filing a document is responsible for service on all parties and other affected or interested persons.

**3.6(2)** Filing—when required. All petitions for declaratory orders, petitions for intervention, briefs, or other papers in a proceeding for a declaratory order shall be filed with the Legal Consultant, Department of Education, Grimes State Office Building, Des Moines, Iowa 50319-0146. All petitions, briefs, or other papers that are required to be served upon a party shall be filed simultaneously with the department of education.

**3.6(3)** Method of service, time of filing, and proof of mailing. Method of service, time of filing, and proof of mailing shall be as provided by 281—6.11(17A).

**281—3.7(17A) Consideration.** Upon request by petitioner, the department of education must schedule a brief and informal meeting between the original petitioner, all intervenors, and the department of education, a member of the department, or a member of the staff of the department, to discuss the questions raised. The department of education may solicit comments from any person on the questions raised. Also, comments on the questions raised may be submitted to the department by any person.

**281—3.8(17A) Action on petition.**

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**3.8(1)** Within the time allowed by 1998 Iowa Acts, chapter 1202, section 13(5), after receipt of a petition for a declaratory order, the director of the department of education or designee shall take action on the petition as required by 1998 Iowa Acts, chapter 1202, section 13(5).

**3.8(2)** The date of issuance of an order or of a refusal to issue an order is as defined in 281—6.2(290,17A).

**281—3.9(17A) Refusal to issue order.**

**3.9(1)** The department of education shall not issue a declaratory order where prohibited by 1998 Iowa Acts, chapter 1202, section 13(1), and may refuse to issue a declaratory order on some or all questions raised for the following reasons:

1. The petition does not substantially comply with the required form.

2. The petition does not contain facts sufficient to demonstrate that the petitioner will be aggrieved or adversely affected by the failure of the department of education to issue an order.

3. The department of education does not have jurisdiction over the questions presented in the petition.

4. The questions presented by the petition are also presented in a current rule making, contested case, or other agency or judicial proceeding that may definitively resolve them.

5. The questions presented by the petition would more properly be resolved in a different type of proceeding or by another body with jurisdiction over the matter.

6. The facts or questions presented in the petition are unclear, overbroad, insufficient, or otherwise inappropriate as a basis upon which to issue an order.

7. There is no need to issue an order because the questions raised in the petition have been settled due to a change in circumstances.

8. The petition is not based upon facts calculated to aid in the planning of future conduct but is, instead, based solely upon prior conduct in an effort to establish the effect of that conduct or to challenge an agency decision already made.

9. The petition requests a declaratory order that would necessarily determine the legal rights, duties, or responsibilities of other persons who have not joined in the petition, intervened separately, or filed a similar petition and whose position on the questions presented may fairly be presumed to be adverse to that of petitioner.

10. The petitioner requests the department of education to determine whether a statute is unconstitutional on its face.

**3.9(2)** A refusal to issue a declaratory order must indicate the specific grounds for the refusal and constitutes final agency action on the petition.

**3.9(3)** Refusal to issue a declaratory order pursuant to this provision does not preclude the filing of a new petition that seeks to eliminate the grounds for the refusal to issue a ruling.

**281—3.10(17A) Contents of declaratory order—effective date.** In addition to the order itself, a declaratory order must contain the date of its issuance, the name of petitioner and all intervenors, the specific statutes, rules, policies, decisions, or orders involved, the particular facts upon which it is based, and the reasons for its conclusion.

A declaratory order is effective on the date of issuance.

**281—3.11(17A) Copies of orders.** A copy of all orders issued in response to a petition for a declaratory order shall be mailed promptly to the original petitioner and all intervenors.

**281—3.12(17A) Effect of a declaratory order.** A declaratory order has the same status and binding effect as a final or-

der issued in a contested case proceeding. It is binding on the department of education, the petitioner, and any intervenors who consent to be bound and is applicable only in circumstances where the relevant facts and the law involved are indistinguishable from those on which the order was based. As to all other persons, a declaratory order serves only as precedent and is not binding on the department of education. The issuance of a declaratory order constitutes final agency action on the petition.

These rules are intended to implement Iowa Code section 256.7(3) and chapter 17A as amended by 1998 Iowa Acts, chapter 1202.

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## EDUCATION DEPARTMENT[281]

## Notice of Intended Action

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)“b.”

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code section 256.7(5), the State Board of Education hereby gives Notice of Intended Action to rescind Chapter 4, “Agency Procedure for Rule Making,” Iowa Administrative Code.

This chapter will be replaced by a new Chapter 2, in which all procedures for rule making will be combined into one chapter.

Since this process does not affect the public, no public hearing will be held. However, written comments will be accepted until March 31, 1999, and may be directed to Ann McCarthy, Department of Education, Grimes State Office Building, Des Moines, Iowa 50319-0146.

This amendment is intended to implement Iowa Code section 256.7(3).

The following amendment is proposed:

Rescind and reserve **281—Chapter 4.**

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## EDUCATION DEPARTMENT[281]

## Notice of Intended Action

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)“b.”

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code section 256.7(5), the State Board of Education hereby gives Notice of Intended Action to amend Chapter 6, “Appeal Procedures,” Iowa Administrative Code.

The proposed amendments reflect the changes required by the amendments to the Uniform Rules on Agency Procedure in 1998 Iowa Acts, chapter 1202.

## EDUCATION DEPARTMENT[281](cont'd)

A public hearing will be held on March 31, 1999, at 10 a.m. in the State Board Room, Grimes State Office Building, Des Moines, Iowa.

Written comments will be accepted until March 31, 1999, and may be directed to Ann Marie Brick, Department of Education, Grimes State Office Building, Des Moines, Iowa 50319-0146.

These amendments are intended to implement Iowa Code section 290.1 and chapter 17A as amended by 1998 Iowa Acts, chapter 1202.

The following amendments are proposed.

ITEM 1. Renumber rule **281—6.1(256)** as **281—6.2(290,17A)** and adopt the following new definitions in alphabetical order:

“Contested case” means a proceeding defined by Iowa Code section 17A.2(5) and includes any matter defined as a no factual dispute contested case under 1998 Iowa Acts, chapter 1202, section 14.

“Default” means a dismissal of the appeal due to nonappearance at the hearing, either telephonically or in person, or for failure to request a continuance of the appeal hearing. Exceptions may be granted at the discretion of the presiding officer.

“Department” means the department of education.

“Issuance” means the date of mailing of a decision or order or date of delivery if service is by other means unless another date is specified in the order.

“Party” means each person or agency named or admitted as a party or properly seeking and entitled as of right to be admitted as a party.

“Presiding officer” means the director of the department of education or the designated administrative law judge.

ITEM 2. Amend rule **281—6.2(290)** as follows:

**281—6.2(290) 281—6.1(290) Type Scope of appeal.** The rules of this chapter are applicable to all hearing requests seeking appellate review by the state board of education, the director of education, or the department of education.

ITEM 3. Amend subrule **6.3(3)** as follows:

**6.3(3)** The director or designee shall send written notice by certified mail, return receipt requested, at least ten days prior to the hearing, unless the ten-day period is waived by all parties, to all persons known to be interested. Such notice shall include the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing is to be held; a reference to the particular sections of the statutes and rules involved; and a short and plain statement of the matters asserted. A copy of the appeal hearing rules shall be included with the notice.

*The notice of hearing shall contain the following information: identification of all parties including the name, address and telephone number of the person who will act as advocate for the agency or the state and of parties' counsel where known; reference to the procedural rules governing conduct of the contested case proceeding; reference to the procedural rules governing informal settlement; and identification of the presiding officer, if known. If not known, a description of who will serve as presiding officer (e.g., director of the department or administrative law judge from the department of inspections and appeals).*

ITEM 4. Rescind subrules **6.3(4)** and **6.3(5)**.

ITEM 5. Renumber rule **281—6.4(290)** as **281—6.8(290)** and adopt the following new rule **281—6.4(17A)** in lieu thereof:

**281—6.4(17A) Continuances.** Unless otherwise provided, applications for continuances shall be made to the presiding officer.

**6.4(1)** A written application for a continuance shall:

- a. Be made at the earliest possible time and no less than seven days before the hearing except in case of unanticipated emergencies;
- b. State the specific reasons for the request; and
- c. Be signed by the requesting party or the party's representative.

An oral application for a continuance may be made if the presiding officer waives the requirement for a written motion. However, a party making such an oral application for a continuance must confirm that request by written application within five days after the oral request unless that requirement is waived by the presiding officer. No application for continuance shall be made or granted without notice to all parties except in an emergency where notice is not feasible. The agency may waive notice of such requests for a particular case or an entire class of cases.

**6.4(2)** In determining whether to grant a continuance, the presiding officer may consider:

- a. Prior continuances;
- b. The interests of all parties;
- c. The likelihood of informal settlement;
- d. The existence of an emergency;
- e. Any objection;
- f. Any applicable time requirements;
- g. The existence of a conflict in the schedules of counsel, parties, or witnesses;
- h. The timeliness of the request; and
- i. Other relevant factors.

The presiding officer may require documentation of any grounds for continuance.

ITEM 6. Renumber rule **281—6.5(17A)** as **281—6.9(17A)** and adopt the following new rule **281—6.5(17A)** in lieu thereof:

**281—6.5(17A) Intervention.**

**6.5(1) Motion.** A motion for leave to intervene in a contested case proceeding shall state the grounds for the proposed intervention, the position and interest of the proposed intervenor, and the possible impact of intervention on the proceeding. A proposed answer or petition in intervention shall be attached to the motion. Any party may file a response within 14 days of service of the motion to intervene unless the time period is extended or shortened by the presiding officer.

**6.5(2) When filed.** Motion for leave to intervene shall be filed as early in the proceeding as possible to avoid adverse impact on existing parties or the conduct of the proceeding. Unless otherwise ordered, a motion for leave to intervene shall be filed before the prehearing conference, if any, or at least 20 days before the date scheduled for hearing. Any later motion must contain a statement of good cause for the failure to file in a timely manner. Unless inequitable or unjust, an intervenor shall be bound by any agreement, arrangement, or other matter previously raised in the case. Requests by untimely intervenors for continuances which would delay the proceeding will ordinarily be denied.

**6.5(3) Grounds for intervention.** The movant shall demonstrate that: (a) intervention would not unduly prolong the proceedings or otherwise prejudice the rights of existing parties; (b) the movant is likely to be aggrieved or adversely affected by a final order in the proceeding; and (c) the interests

## EDUCATION DEPARTMENT[281](cont'd)

of the movant are not adequately represented by existing parties.

6.5(4) Effect of intervention. If appropriate, the presiding officer may order consolidation of the petitions and briefs of different parties whose interests are aligned with each other and limit the number of representatives allowed to participate actively in the proceedings. A person granted leave to intervene is a party to the proceeding. The order granting intervention may restrict the issues that may be raised by the intervenor or otherwise condition the intervenor's participation in the proceeding.

ITEM 7. Renumber rule 281—6.6(17A) as 281—6.10(17A) and adopt the following new rule 281—6.6(17A) in lieu thereof:

**281—6.6(17A) Motions.**

6.6(1) No technical form for motions is required. However, prehearing motions must be in writing, state the grounds for relief, and state the relief sought.

6.6(2) Any party may file a written response to a motion within ten days after the motion is served, unless the time period is extended or shortened by rules of the agency or the presiding officer. The presiding officer may consider a failure to respond within the required time period in ruling on a motion.

6.6(3) The presiding officer may schedule oral argument on any motion.

6.6(4) Motions pertaining to the hearing, except motions for summary judgment, must be filed and served at least ten days prior to the date of hearing unless there is good cause for permitting later action or the time for such action is lengthened or shortened by rule of the agency or an order of the presiding officer.

6.6(5) Motions for summary judgment. Motions for summary judgment shall comply with the requirements of Iowa Rule of Civil Procedure 237 and shall be subject to disposition according to the requirements of that rule to the extent such requirements are not inconsistent with the provisions of this rule or any other provision of law governing the procedure in contested cases.

Motions for summary judgment must be filed and served at least 45 days prior to the scheduled hearing date, or other time period determined by the presiding officer. Any party resisting the motion shall file and serve a resistance within 15 days, unless otherwise ordered by the presiding officer, from the date a copy of the motion was served. The time fixed for hearing or nonoral submission shall be not less than 20 days after the filing of the motion, unless a shorter time is ordered by the presiding officer. A summary judgment order rendered on all issues in a contested case is subject to rehearing pursuant to rule 6.20(17A) and appeal pursuant to rule 6.21(17A).

ITEM 8. Rescind rule 281—6.7(17A) and adopt the following new rule 281—6.7(17A) in lieu thereof:

**281—6.7(17A) Disqualification.**

6.7(1) A presiding officer or other person shall withdraw from participation in the making of any proposed or final decision in a contested case if that person:

a. Has a personal bias or prejudice concerning a party or a representative of a party;

b. Has personally investigated, prosecuted or advocated in connection with that case, the specific controversy underlying that case, another pending factually related contested case, or a pending factually related controversy that may culminate in a contested case involving the same parties;

c. Is subject to the authority, direction or discretion of any person who has personally investigated, prosecuted or advocated in connection with that contested case, the specific controversy underlying that contested case, or a pending factually related contested case or controversy involving the same parties;

d. Has acted as counsel to any person who is a private party to that proceeding within the past two years;

e. Has a personal financial interest in the outcome of the case or any other significant personal interest that could be substantially affected by the outcome of the case;

f. Has a spouse or relative within the third degree of relationship that: (1) is a party to the case, or an officer, director or trustee of a party; (2) is a lawyer in the case; (3) is known to have an interest that could be substantially affected by the outcome of the case; or (4) is likely to be a material witness in the case; or

g. Has any other legally sufficient cause to withdraw from participation in the decision making in that case.

6.7(2) The term "personally investigated" means taking affirmative steps to interview witnesses directly or to obtain documents or other information directly. The term "personally investigated" does not include general direction and supervision of assigned investigators, unsolicited receipt of information which is relayed to assigned investigators, review of another person's investigative work product in the course of determining whether there is probable cause to initiate a proceeding, or exposure to factual information while performing other agency functions, including fact gathering for purposes other than investigation of the matter which culminates in a contested case. Factual information relevant to the merits of a contested case received by a person who later serves as presiding officer in that case shall be disclosed if required by Iowa Code section 17A.17(3) and subrules 6.7(3) and 6.14(9).

6.7(3) In a situation where a presiding officer or other person knows of information which might reasonably be deemed to be a basis for disqualification and decides voluntary withdrawal is unnecessary, that person shall submit the relevant information for the record by affidavit and shall provide for the record a statement of the reasons for the determination that withdrawal is unnecessary.

6.7(4) If a party asserts disqualification on any appropriate ground, including those listed in subrule 6.7(1), the party shall file a motion supported by an affidavit pursuant to Iowa Code section 1998 Iowa Acts, chapter 1202, section 19(7). The motion must be filed as soon as practicable after the reason alleged in the motion becomes known to the party.

If, during the course of the hearing, a party first becomes aware of evidence of bias or other grounds for disqualification, the party may move for disqualification but must establish the grounds by the introduction of evidence into the record.

If the presiding officer determines that disqualification is appropriate, the presiding officer or other person shall withdraw. If the presiding officer determines that withdrawal is not required, the presiding officer shall enter an order to that effect.

ITEM 9. Renumber rule 281—6.8(17A) as 281—6.12(17A).

ITEM 10. Amend renumbered rule 281—6.8(290) by rescinding subrule 6.8(3) and adopting new subrules 6.8(3) and 6.8(4) in lieu thereof:

6.8(3) Motion to quash or modify. The presiding officer may quash or modify a subpoena for any lawful reason upon

## EDUCATION DEPARTMENT[281](cont'd)

motion in accordance with the Iowa Rules of Civil Procedure. A motion to quash or modify a subpoena shall be set for argument promptly.

**6.8(4)** Telephone proceedings. The presiding officer may resolve preliminary procedural motions by telephone conference in which all parties have an opportunity to participate. Other telephone proceedings may be held with the consent of all parties. The presiding officer will determine the location of the parties and witnesses for telephone hearings. The convenience of the witnesses or parties, as well as the nature of the case, will be considered when location is chosen.

ITEM 11. Rescind rule **281—6.9(17A)**.

ITEM 12. Renumber rule **281—6.10(17A)** as rule **281—6.15(17A)**.

ITEM 13. Renumber rule **281—6.11(290,17A)** as **281—6.17(290,17A)** and adopt the following **new** rule **281—6.11(17A)** in lieu thereof:

**281—6.11(17A) Waiver of procedures.** Unless otherwise precluded by law, the parties in a contested case proceeding may waive any provision of this chapter. However, the agency in its discretion may refuse to give effect to such a waiver when it deems the waiver to be inconsistent with the public interest.

ITEM 14. Amend rule **281—6.12(290)** as follows:

**281—6.12(290) 281—6.18(290) Finality of decision.** The decision is final upon board approval of the ~~administrative law judge's~~ *presiding officer's* decision.

ITEM 15. Renumber rule **281—6.13(17A)** as **281—6.20(17A)**, amend renumbered rule **281—6.20(17A)** by substituting the words "presiding officer" for "administrative law judge" wherever they appear, and reserve rule **281—6.13**.

ITEM 16. Renumber rule **281—6.14(17A)** as rule **281—6.21(17A)** and adopt the following **new** rule **281—6.14(17A)** in lieu thereof:

**281—6.14(17A) Ex parte communication.**

**6.14(1)** Prohibited communications. Unless required for the disposition of ex parte matters specifically authorized by statute, following issuance of the notice of hearing, there shall be no communication, directly or indirectly, between the presiding officer and any party or representative of any party or any other person with a direct or indirect interest in such case in connection with any issue of fact or law in the case except upon notice and opportunity for all parties to participate. This does not prohibit persons jointly assigned such tasks from communicating with each other. Nothing in this provision is intended to preclude the presiding officer from communicating with members of the agency or seeking the advice or help of persons other than those with a personal interest in, or those engaged in personally investigating as defined in subrule 6.7(2), prosecuting, or advocating in, either the case under consideration or a pending factually related case involving the same parties as long as those persons do not directly or indirectly communicate to the presiding officer any ex parte communications they have received of a type that the presiding officer would be prohibited from receiving or that furnish, augment, diminish, or modify the evidence in the record.

**6.14(2)** Prohibitions on ex parte communications commence with the issuance of the notice of hearing in a contested case and continue for as long as the case is pending.

**6.14(3)** Written, oral or other forms of communication are "ex parte" if made without notice and opportunity for all parties to participate.

**6.14(4)** To avoid prohibited ex parte communications notice must be given in a manner reasonably calculated to give all parties a fair opportunity to participate. Where permitted, oral communications may be initiated through conference telephone call including all parties or their representatives.

**6.14(5)** Persons who jointly act as presiding officer in a pending contested case may communicate with each other without notice or opportunity for parties to participate.

**6.14(6)** The executive director or other persons may be present in deliberations or otherwise advise the presiding officer without notice or opportunity for parties to participate as long as they are not disqualified from participating in the making of a proposed or final decision under any provision of law and they comply with subrule 6.14(1).

**6.14(7)** Communications with the presiding officer involving uncontested scheduling or procedural matters do not require notice or opportunity for parties to participate. Parties should notify other parties prior to initiating such contact with the presiding officer when feasible, and shall notify other parties when seeking to continue hearings or other deadlines pursuant to rule 6.4(17A).

**6.14(8)** Disclosure of prohibited communications. A presiding officer who receives a prohibited ex parte communication during the pendency of a contested case must initially determine if the effect of the communication is so prejudicial that the presiding officer should be disqualified. If the presiding officer determines that disqualification is warranted, a copy of any prohibited written communication, all written responses to the communication, a written summary stating the substance of any prohibited oral or other communication not available in written form for disclosure, all responses made, and the identity of each person from whom the presiding officer received a prohibited ex parte communication shall be submitted for inclusion in the record under seal by protective order or disclosed. If the presiding officer determines that disqualification is not warranted, such documents shall be submitted for inclusion in the record and served on all parties. Any party desiring to rebut the prohibited communication must be allowed the opportunity to do so upon written request filed within ten days after notice of the communication.

**6.14(9)** Promptly after being assigned to serve as presiding officer at any stage in a contested case proceeding, a presiding officer shall disclose to all parties material factual information received through ex parte communication prior to such assignment unless the factual information has already been or shortly will be disclosed pursuant to Iowa Code section 17A.13(2) or through discovery. Factual information contained in an investigative report or similar document need not be separately disclosed by the presiding officer as long as such documents have been or will shortly be provided to the parties.

**6.14(10)** The presiding officer may render a proposed or final decision imposing appropriate sanctions for violations of this rule including default, a decision against the offending party, censure, or suspension or revocation of the privilege to practice before the agency. Violation of ex parte communication prohibitions by agency personnel shall be reported to the legal consultant for the department of education

## EDUCATION DEPARTMENT[281](cont'd)

for possible sanctions including censure, suspension, dismissal, or other disciplinary action.

ITEM 17. Adopt **new** rule 281—6.16(17A) as follows:

**281—6.16(17A) Recording costs.** Upon request, the department of education shall provide a copy of the whole or any portion of the record at cost. The cost of preparing a copy of the record or of transcribing the hearing record shall be paid by the requesting party.

Parties who request that a hearing be recorded by certified shorthand reporters rather than by electronic means shall bear the cost of that recordation, unless otherwise provided by law.

ITEM 18. Amend renumbered rule **281—6.17(290,17A)** by substituting the words “presiding officer” for “administrative law judge” wherever they appear.

ITEM 19. Adopt **new** rule 281—6.19(17A) as follows:

**281—6.19(17A) Default.**

**6.19(1)** If a party fails to appear or participate in a contested case proceeding after proper service of notice, the presiding officer may, if no adjournment is granted, enter a default decision or proceed with the hearing and render a decision in the absence of the party.

**6.19(2)** Where appropriate and not contrary to law, any party may move for default against a party who has requested the contested case proceeding and has failed to file a required pleading or has failed to appear after proper service.

**6.19(3)** Default decisions or decisions rendered on the merits after a party has failed to appear or participate in a contested case proceeding become final agency action unless, within 15 days after the date of notification or mailing of the decision, a motion to vacate is filed and served on all parties or an appeal of a decision on the merits is timely initiated within the time provided. A motion to vacate must state all facts relied upon by the moving party which establish that good cause existed for that party’s failure to appear or participate at the contested case proceeding. Each fact so stated must be substantiated by at least one sworn affidavit of a person with personal knowledge of each such fact, which affidavit(s) must be attached to the motion.

**6.19(4)** The time for further appeal of a decision for which a timely motion to vacate has been filed is stayed pending a decision on the motion to vacate.

**6.19(5)** Properly substantiated and timely filed motions to vacate shall be granted only for good cause shown. The burden of proof as to good cause is on the moving party. Adverse parties shall have ten days to respond to a motion to vacate. Adverse parties shall be allowed to conduct discovery as to the issue of good cause and to present evidence on the issue prior to a decision on the motion, if a request to do so is included in that party’s response.

**6.19(6)** “Good cause” for purposes of this rule shall have the same meaning as “good cause” for setting aside a default judgment under Iowa Rule of Civil Procedure 236.

**6.19(7)** A decision denying a motion to vacate is subject to further appeal within the time limit allowed for further appeal of a decision on the merits in the contested case proceeding.

**6.19(8)** If a motion to vacate is granted and no timely interlocutory appeal has been taken, the presiding officer shall issue another notice of hearing and the contested case shall proceed accordingly.

**6.19(9)** A default decision may award any relief consistent with the request for relief made in the petition and em-

braced in its issues but, unless the defaulting party has appeared, it cannot exceed the relief demanded.

**6.19(10)** A default decision may provide either that the default decision is to be stayed pending a timely motion to vacate or that the default decision is to take effect immediately.

ITEM 20. Amend renumbered rule **281—6.21(17A)** by substituting the words “presiding officer” for “administrative law judge” wherever they appear.

ITEM 21. Adopt the following **new** rule:

**281—6.22(17A) Emergency adjudicative proceedings.**

**6.22(1)** Necessary emergency action. To the extent necessary to prevent or avoid immediate danger to the public health, safety, or welfare and, consistent with the Constitution and other provisions of law, the department may issue a written order in compliance with Iowa Code section 17A.18 to suspend a license in whole or in part, order the cessation of any continuing activity, order affirmative action, or take other action within the jurisdiction of the department by emergency adjudicative order. Before issuing an emergency adjudicative order the department shall consider factors including, but not limited to, the following:

a. Whether there has been a sufficient factual investigation to ensure that the department is proceeding on the basis of reliable information;

b. Whether the specific circumstances which pose immediate danger to the public health, safety or welfare have been identified and determined to be continuing;

c. Whether the person required to comply with the emergency adjudicative order may continue to engage in other activities without posing immediate danger to the public health, safety or welfare;

d. Whether imposition of monitoring requirements or other interim safeguards would be sufficient to protect the public health, safety or welfare; and

e. Whether the specific action contemplated by the department is necessary to avoid the immediate danger.

**6.22(2)** Issuance of order.

a. An emergency adjudicative order shall contain findings of fact, conclusions of law, and policy reasons to justify the determination of an immediate danger in the department’s decision to take immediate action.

b. The written emergency adjudicative order shall be immediately delivered to persons who are required to comply with the order by utilizing one or more of the following procedures:

(1) Personal delivery;

(2) Certified mail, return receipt requested, to the last address on file with the department;

(3) Certified mail to the last address on file with the department;

(4) First-class mail to the last address on file with the department; or

(5) Fax. Fax may be used as the sole method of delivery if the person required to comply with the order has filed a written request that department orders be sent by fax and has provided a fax number for that purpose.

c. To the degree practicable, the department shall select the procedure for providing written notice that best ensures prompt, reliable delivery.

**6.22(3)** Oral notice. Unless the written emergency adjudicative order is provided by personal delivery on the same day that the order issues, the department shall make reasonable immediate efforts to contact by telephone the persons who are required to comply with the order.

EDUCATION DEPARTMENT[281](cont'd)

6.22(4) Completion of proceedings. After the issuance of an emergency adjudicative order, the department shall proceed as quickly as feasible to complete any proceedings that would be required if the matter did not involve an immediate danger.

Issuance of a written emergency adjudicative order shall include notification of the date on which departmental proceedings are scheduled for completion. After issuance of an emergency adjudicative order, continuance of further agency proceedings to a later date will be granted only in compelling circumstances upon application in writing.

ITEM 22. Amend 281—Chapter 6, implementation clause, as follows:

These rules are intended to implement Iowa Code sections 17A.11 to 17A.17, 256.7(6), 275.16, 282.18, 282.18(5) as amended by 1994 Iowa Acts, chapter 1175, section 10, 282.32, 285.12, and Iowa Code chapter 290 and chapter 17A as amended by 1998 Iowa Acts, chapter 1202.

ARC 8761A

ENGINEERING AND LAND SURVEYING EXAMINING BOARD[193C]

Notice of Intended Action

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)“b.”

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code section 542B.6, the Engineering and Land Surveying Examining Board hereby gives Notice of Intended Action to amend Chapter 1, “Administration,” and Chapter 2, “Minimum Standards for Property Surveys,” and to rescind Chapter 4, “Discipline and Professional Conduct of Licensees,” Iowa Administrative Code, and adopt a new Chapter 4 with the same title.

The amendments to Chapter 1 change the definition of “practice of engineering” to reflect the definition found in Iowa Code section 542B.2 and clarify the education and work experience requirements to become licensed as a professional engineer, as well as incorporate changes required by Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202.

The amendment to Chapter 2 clarifies procedures a surveyor must perform when surveying a plat for assessment and taxation purposes.

Chapter 4 is rescinded and replaced by a new chapter which implements changes to the Uniform Rules on Agency Procedure required by amendments to the Administrative Procedure Act in 1998 Iowa Acts, chapter 1202.

Comments on the proposed amendments may be made on or before March 30, 1999, to the Executive Secretary, 1918 S.E. Hulsizer, Ankeny, Iowa 50021; telephone (515)281-7360 or fax (515)281-7411. E-mail may be sent to gleen.coates@comm7.state.ia.us.

These amendments are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202, and Iowa Code chapters 252J, 272C, and 542B.

The following amendments are proposed.

ITEM 1. Amend subrule 1.1(3), first sentence, as follows:

1.1(3) Practice of engineering. The practice of engineering means any service or creative work, the adequate performance of which requires engineering education, training, and experience in the application of special knowledge of the mathematical, physical, and engineering sciences, such as consultation, investigation, evaluation, planning, design, and design coordination of engineering works and systems, planning the use of land and water, performing engineering surveys and studies, and the review of construction for the purpose of monitoring compliance with drawings and specifications, any of which embraces such services or creative work, either public or private, in connection with any utilities, structures, buildings, machines, equipment, processes, work systems, projects, and industrial or consumer products of a mechanical, electrical, hydraulic, pneumatic, or thermal nature insofar as they involve safeguarding life, health and or property including other such professional services as may be necessary to the planning, progress and completion of the services identified in this subrule.

ITEM 2. Rescind rule 193C—1.2(17A) and adopt in lieu thereof the following new rule 193C—1.2(17A):

193C—1.2(17A) Petition for declaratory order. Any person may file a petition with the board for a declaratory order as to the applicability to specified circumstances of a statute, rule, or order within the primary jurisdiction of the board at the board’s offices. A petition is deemed filed when it is received by that office. The board shall provide the petitioner with a file-stamped copy of the petition if the petitioner provides the board an extra copy for this purpose. The petition must be typewritten or legibly handwritten in ink and must substantially conform to the following form:

ENGINEERING AND LAND SURVEYING EXAMINING BOARD

Petition by (Name of Petitioner) for a Declaratory Order on (Cite provisions of law involved). } PETITION FOR DECLARATORY ORDER

The petition must provide the following information:

- 1. A clear and concise statement of all relevant facts on which the order is requested.
2. A citation and the relevant language of the specific statutes, rules, policies, decisions, or orders whose applicability is questioned, and any other relevant law.
3. The questions the petitioner wants answered, stated clearly and concisely.
4. The answers to the questions desired by the petitioner and a summary of the reasons urged by the petitioner in support of those answers.
5. The reasons for requesting the declaratory order and disclosure of the petitioner’s interest in the outcome.
6. A statement indicating whether the petitioner is currently a party to another proceeding involving the questions at issue and whether, to the petitioner’s knowledge, those questions have been directed by, are pending determination by, or are under investigation by, any governmental entity.
7. The names and addresses of other persons, or a description of any class of persons, known by petitioner to be affected by, or interested in, the questions in the petition.
8. Any request by petitioner for a meeting provided for by subrule 1.2(6).

ENGINEERING AND LAND SURVEYING EXAMINING BOARD[193C](cont'd)

The petition must be dated and signed by the petitioner or the petitioner's representative. It must also include the name, mailing address, and telephone number of the petitioner and petitioner's representative, and a statement indicating the person to whom communications concerning the petition should be directed.

1.2(1) Notice of petition. Within ten days after receipt of a petition for a declaratory order, the board shall give notice of the petition to all persons not served by the petitioner pursuant to subrule 1.2(5) to whom notice is required by any provision of law. The board may also give notice to any other persons.

1.2(2) Intervention.

a. Persons who qualify under any applicable provision of law as an intervenor and who file a petition for intervention within 20 days of the filing of a petition for declaratory order shall be allowed to intervene in a proceeding for a declaratory order.

b. Any person who files a petition for intervention at any time prior to the issuance of an order may be allowed to intervene in a proceeding for a declaratory order at the discretion of the board.

c. A petition for intervention shall be filed at the board's offices. Such a petition is deemed filed when it is received by that office. The board will provide the petitioner with a file-stamped copy of the petition for intervention if the petitioner provides an extra copy for this purpose. A petition for intervention must be typewritten or legibly handwritten in ink and must substantially conform to the following form:

ENGINEERING AND LAND SURVEYING EXAMINING BOARD

Petition by (Name of Original Petitioner) for a Declaratory Order on (Cite provisions of law cited in original petition).



PETITION FOR INTERVENTION

The petition for intervention must provide the following information:

1. Facts supporting the intervenor's standing and qualifications for intervention.
2. The answers urged by the intervenor to the question or questions presented and a summary of the reasons urged in support of those answers.
3. Reasons for requesting intervention and disclosure of the intervenor's interest in the outcome.
4. A statement indicating whether the intervenor is currently a party to any proceeding involving the questions at issue and whether, to the intervenor's knowledge, those questions have been decided by, are pending determination by, or are under investigation by, any governmental entity.
5. The names and addresses of any additional persons, or a description of any additional class of persons, known by the intervenor to be affected by, or interested in, the questions presented.
6. Whether the intervenor consents to be bound by the determination of the matters presented in the declaratory order proceeding.

The petition must be dated and signed by the intervenor or the intervenor's representative. It must also include the name, mailing address, and telephone number of the intervenor and intervenor's representative, and a statement indicating the person to whom communications should be directed.

1.2(3) Briefs. The petitioner or intervenor may file a brief in support of the position urged. The board may request a

brief from the petitioner, any intervenor, or any other person concerning the questions raised in the petition.

1.2(4) Inquiries. Inquiries concerning the status of a declaratory order proceeding may be made to the executive secretary of the board at the board's offices.

1.2(5) Service and filing of petitions and other papers.

a. When service required. Except where otherwise provided by law, every petition for declaratory order, petition for intervention, brief, or other paper filed in a proceeding for a declaratory order shall be served upon each of the parties of record to the proceeding, and on all other persons identified in the petition for declaratory order or petition for intervention as affected by or interested in the questions presented, simultaneously with their filing. The party filing a document is responsible for service on all parties and other affected or interested persons.

b. Filing—when required. All petitions for declaratory orders, petitions for intervention, briefs, or other papers in a proceeding for a declaratory order shall be filed with the board at the board's offices. All petitions, briefs, or other papers that are required to be served upon a party shall be filed simultaneously with the board.

c. Method of service, time of filing, and proof of mailing. Method of service, time of filing, and proof of mailing shall be as provided by subrule 4.24(5).

1.2(6) Board consideration. Upon request by petitioner, the board must schedule a brief and informal meeting between the original petitioner, all intervenors, and the board, a member of the board, or a member of the staff of the board to discuss the questions raised. The board may solicit comments from any person on the questions raised. Also, comments on the questions raised may be submitted to the board by any person.

1.2(7) Action on petition. Within the time allowed by 1998 Iowa Acts, chapter 1202, section 13(5), after receipt of a petition for a declaratory order, the board shall take action on the petition within 30 days after receipt as required by 1998 Iowa Acts, chapter 1202, section 13(5). The date of issuance of an order or of a refusal to issue an order is as defined in 193C—4.2(17A).

1.2(8) Refusal to issue order. The board shall not issue a declaratory order where prohibited by 1998 Iowa Acts, chapter 1202, section 13(1), and may refuse to issue a declaratory order on some or all questions raised for the following reasons:

- a. The petition does not substantially comply with the required form.
- b. The petition does not contain facts sufficient to demonstrate that the petitioner will be aggrieved or adversely affected by the failure of the board to issue an order.
- c. The board does not have jurisdiction over the questions presented in the petition.
- d. The questions presented by the petition are also presented in current rule making, contested case, or other board or judicial proceeding that may definitively resolve them.
- e. The questions presented by the petition would more properly be resolved in a different type of proceeding or by another body with jurisdiction over the matter.
- f. The facts or questions presented in the petition are unclear, overbroad, insufficient, or otherwise inappropriate as a basis upon which to issue an order.
- g. There is no need to issue an order because the questions raised in the petition have been settled due to a change in circumstances.
- h. The petition is not based upon facts calculated to aid in the planning of future conduct but is, instead, based solely

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upon prior conduct in an effort to establish the effect of that conduct or to challenge a board decision already made.

i. The petition requests a declaratory order that would necessarily determine the legal rights, duties, or responsibilities of other persons who have not joined in the petition, intervened separately, or filed a similar petition and whose position on the questions presented may fairly be presumed to be adverse to that of petitioner.

j. The petitioner requests the board to determine whether a statute is unconstitutional on its face.

A refusal to issue a declaratory order must indicate the specific grounds for the refusal and constitutes final board action on the petition. Refusal to issue a declaratory order pursuant to this provision does not preclude the filing of a new petition that seeks to eliminate the grounds for refusal to issue a ruling.

**1.2(9) Contents of declaratory order—effective date.** In addition to the order itself, a declaratory order must contain the date of its issuance, the name of petitioner, and all intervenors, the specific statutes, rules, policies, decisions, or orders involved, the particular facts upon which it is based, and the reasons for its conclusion. A declaratory order is effective on the date of issuance.

**1.2(10) Copies of orders.** A copy of all orders issued in response to a petition for a declaratory order shall be mailed promptly to the original petitioner and all intervenors.

**1.2(11) Effect of a declaratory order.** A declaratory order has the same status and binding effect as a final order issued in a contested case proceeding. It is binding on the board, the petitioner and any intervenors and is applicable only in circumstances where the relevant facts and the law involved are indistinguishable from those on which the order was based. As to all other persons, a declaratory order serves only as precedent and is not binding on the board. The issuance of a declaratory order constitutes final board action on the petition.

ITEM 3. Amend rule 193C—1.4(542B) as follows:

Amend numbered paragraph “2” as follows:

2. Work project description. An applicant for an initial licensure as a professional engineer or land surveyor must include with the application a statement of approximately 200 words describing a significant project on which the applicant worked closely during the last 12 months. The statement shall describe the applicant’s degree of responsibility for the project; it shall identify the project’s owner and its location. The statement shall be signed and dated. *Criteria the board shall use in evaluating the acceptability of the project as qualifying experience for the applicant shall include but not be limited to the following: (1) the degree to which the project and the experience described has progressed from assignments typical of initial assignments to those more nearly expected of a licensed professional; (2) the scope and quality of the professional tutelage experienced by the applicant; (3) the technical decisions required of the applicant in the project; and (4) the professional decisions required of the applicant. The board reserves the right to contact the employer and the person providing tutelage on the project for information about the project experience presented to the applicant.*

Amend subrule 1.4(1) as follows:

**1.4(1) Education and experience prerequisites.** The board generally will require the minimum number of years set forth below before an applicant will be permitted to take either the Fundamentals or the Professional Examination. *Only engineering programs accredited by the Engineering Accreditation Commission (EAC) of the Accreditation Board*

*for Engineering and Technology (ABET), programs that have been evaluated by an agency or body acceptable to the board as substantially equivalent, or engineering programs that are strongly associated with and related to EAC/ABET-accredited programs may be considered as qualifying education for licensure as a professional engineer. Engineering technology or other technology programs are not qualifying education for licensure as a professional engineer.*

Only experience preceding the cutoff date for the examination application will be considered in the evaluation of applications for examinations.

Amend subrule 1.4(2), paragraph “d,” second unnumbered paragraph, as follows:

Teaching of engineering or surveying and mapping subjects at the level of assistant professor or higher in an accredited engineering or surveying and mapping program or research may be considered as experience, provided *the applicant’s immediate supervisor is a licensed professional engineer or land surveyor as applicable in the jurisdiction in which the college or university is located. If the applicant’s immediate supervisor is not a licensed professional, a program of mentoring or peer review by a licensed engineer or land surveyor acceptable to the board must be demonstrated. Applicants using teaching or research as experience must have a minimum of ~~one year~~ four years of acceptable experience ~~has been~~ obtained in research, industry, consulting or land surveying. At least one year of that acceptable experience must be full-time professional level engineering or land surveying experience outside academic employment. The board shall consider the length of time in each assignment, the complexity of the project(s) presented, the degree of responsibility of the applicant within the project, and the correspondence of the experience presented outside academic employment with respect to typical professional practice and other factors the board deems relevant.* The board reserves the right to contact employers for information about the applicant’s professional experience and competence.

ITEM 4. Amend subrule 2.5(5) as follows:

**2.5(5)** The plat shall show that record title boundaries, centerlines, and other boundary lines were retraced to monuments found or placed by the surveyor. The surveyor shall retrace ~~the~~ those exterior lines of a section *which divide a metes and bounds described parcel* to determine acreage for assessment and taxation purposes.

ITEM 5. Rescind 193C—Chapter 4 and adopt the following new chapter in lieu thereof:

CHAPTER 4  
DISCIPLINE AND PROFESSIONAL  
CONDUCT OF LICENSEES

**193C—4.1(542B) General statement.** Protection of the life, health or property of the people in Iowa requires that the board deal with cases involving malpractice or violation of Iowa Code chapter 542B.

**193C—4.2(17A) Definitions.**

“Issuance” means the date of mailing of a decision or order or the date of delivery if service is by other means unless another date is specified in the order.

“Proposed decision” means the presiding officer’s recommended findings of fact, conclusions of law, decision, and order on a contested case in which the board did not preside.

**193C—4.3(542B) Reprimands, probation, license suspension or license revocation.** Acts or omissions on the part of a licensee that are grounds for a reprimand, period of

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probation, license suspension or license revocation are as follows:

4.3(1) Acts or offenses defined in Iowa Code section 542B.21.

4.3(2) Acts or omissions which constitute negligence or carelessness that licensees must report to the board as defined in rule 4.4(542B).

4.3(3) Unethical conduct including, but not limited to, violation of the code of professional conduct in rule 4.8(542B).

4.3(4) Failure to respond within 30 days to written communications from the board and to make available any relevant records with respect to an inquiry or complaint about the licensee's unprofessional conduct. The period of 30 days shall commence on the date when such communication was sent from the board by registered or certified mail with return receipt requested to the address appearing in the last licensure.

4.3(5) Failure to comply with a warning from the board with respect to licensee behavior.

This rule is intended to implement Iowa Code section 542B.21.

**193C—4.4(542B) Reporting of acts or omissions.** Licensees shall report acts or omissions by a licensee which constitute negligence or carelessness. For the purposes of this rule, negligence or carelessness shall mean demonstrated unreasonable lack of skill in the performance of engineering or land surveying services by failure of a licensee to maintain a reasonable standard of care in the licensee's practice of engineering or land surveying. In the evaluation of reported acts or omissions, the board shall determine if the engineer or land surveyor has applied learning, skill and ability in a manner consistent with the standards of the professions ordinarily possessed and practiced in the same profession at the same time. Standards referred to in the immediately preceding sentence shall include any minimum standards adopted by this board and any standards adopted by recognized national or state engineering or land surveying organizations.

**193C—4.5(542B) Peer review committees.** The board may appoint a peer review committee for the investigation of a complaint about the acts or omissions of one or more licensees.

4.5(1) **Membership.** A committee shall consist of one or more licensed engineers or licensed land surveyors or both, as determined by the board, who are selected for their knowledge and experience in the type of engineering or land surveying involved in the complaint. The following are ineligible for membership:

a. Members of the engineering and land surveying examining board.

b. Relatives of the respondent or complainant.

c. Individuals employed by the same firm or governmental unit as the respondent or complainant.

4.5(2) **Authority.** The committee's investigation may include activities such as interviewing the complainant, the respondent, individuals with knowledge of the alleged violation, and individuals with knowledge of the respondent's reputation in the community; gathering documents; site visits; and independent analyses as deemed necessary.

The committee may not hire legal counsel, investigators, secretarial help or any other assistance without written authorization from the board.

4.5(3) **Compensation.** Committee members may receive per diem compensation equal to that received by board members for performing board duties. Committee members may

be paid reasonable and necessary expenses that are incurred for travel, meals and lodging while performing committee duties within established budget limitations.

4.5(4) **Reports.** Each peer review committee shall submit a written report to the board within a reasonable period of time. The report shall recommend dismissal of the complainant, further investigation or disciplinary proceedings. If further investigation or disciplinary proceedings are recommended, supporting information shall be submitted to the secretary.

The peer review committee may be discharged at the pleasure of the board. The board may dismiss individual members of a committee or add new members at any time. Committee members may be required to testify in the event of formal disciplinary proceedings.

4.5(5) **Investigator.** In addition to or as an alternative to a peer review committee, the board may hire one or more investigators.

**193C—4.6(542B) Disputes between licensees and clients.**

Reports from the insurance commissioner or other agencies on the results of judgments or settlements of disputes arising from malpractice claims or other actions between professional engineers or land surveyors and their clients may be referred to an investigator or peer review committee. The investigator or peer review committee shall investigate the report for violation of the statutes or rules governing the practice or conduct of the licensee. The investigator or peer review committee shall advise the board of any probable violations.

**193C—4.7(542B) Practice of engineering or land surveying by firms.** A firm shall not directly or by implication offer professional engineering services to the public unless it is owned or managed by, or regularly employs, one or more licensed professional engineers who directly control and personally supervise all professional engineering work performed by the firm.

A firm shall not directly or by implication offer land surveying services to the public unless it is owned or managed by, or regularly employs, one or more licensed land surveyors who directly control and personally supervise all land surveying work performed by the firm.

A firm may not satisfy these requirements by hiring a licensed professional engineer or land surveyor on an as-needed, occasional, or consulting basis, whether an employee or independent contractor.

"To offer" shall mean to advertise in any medium, or to infer in writing or orally that these services are being performed by owners or permanent employees of that firm. Nothing in this rule is intended to prevent a firm from truthfully offering services as a project manager, administrator, or coordinator of a multidisciplinary project.

For purposes of this rule, the term "firm" includes regular corporations, professional corporations, registered limited liability partnerships, partnerships, limited liability companies, private practitioners employing others, persons or entities using fictitious or assumed names, or other business entities.

This rule is intended to implement Iowa Code section 542B.26.

**193C—4.8(542B) Code of professional conduct.** In order to establish and maintain a high standard of integrity, skills and practice in the professions of engineering and land surveying, and to safeguard the life, health, or property of the public, the following code of professional conduct shall be

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binding upon every person holding a certificate of licensure as a professional engineer or land surveyor in this state.

The code of professional conduct as promulgated herein is an exercise of the police power vested in the board by virtue of the Acts of the legislature, and as such the board is authorized to establish conduct, policy, and practices.

All persons licensed under Iowa Code chapter 542B are charged with having knowledge of the existence of this code of professional conduct and shall be deemed to be familiar with its several provisions and to understand them. Such knowledge shall encompass the understanding that the practices of engineering and land surveying are a privilege, as opposed to a right, and the licensee shall be forthright and candid in statements or written response to the board or its representatives on matters pertaining to professional conduct.

**4.8(1) Responsibility to the public.** Licensees shall at all times conduct their professional practices in a manner that will protect life, health and property and enhance the public welfare. If their professional judgment is overruled under circumstances where life, health and property of the public are endangered, they shall inform their employer or client of the possible consequences, shall notify such other proper authority as may be appropriate, and shall withdraw from further services on the project.

Licensees shall neither approve nor certify engineering or land surveying documents that may be harmful to the public life, health and property and that are not in conformity with accepted engineering or land surveying standards.

**4.8(2) Competency for assignments.** Licensees shall undertake to perform engineering or land surveying assignments only when qualified by education and experience in the specific technical field of professional engineering or land surveying involved. Licensees shall engage or advise engaging experts and specialists whenever the client or employer's interests are best served by such service.

Licensees may accept an assignment on a project requiring education or experience outside their field of competence, but only to the extent that their services are restricted to those phases of the project in which they are qualified. All other phases of such projects shall be under the responsible charge of qualified associates, consultants or employees holding a valid Iowa license.

**4.8(3) Truth in reports and testimony.** Licensees, when serving as expert or technical witnesses before any court, commission, or other tribunal, shall express an opinion only when it is founded upon adequate knowledge of the facts in issue, upon a background of technical competence in the subject matter, and upon honest conviction of the accuracy and propriety of their testimony. Under these circumstances, should knowledge be inadequate, the licensee must so state.

Licensees shall be objective and truthful in all professional reports, statements or testimony. All relevant and pertinent information shall be included in such reports, statements or testimony.

**4.8(4) Conflicts of interest.** Licensees shall not issue statements, criticisms or arguments on engineering or land surveying matters connected with public policy which are influenced or paid for by an interested party, or parties, unless they have prefaced their comments by explicitly identifying themselves, by disclosing the identities of the party or parties on whose behalf they are speaking, and by revealing the existence of any pecuniary interest.

Licensees shall avoid all known conflicts of interest with their employers or clients and, when unforeseen conflicts arise, shall promptly inform their employers or clients of any

business association, interest, or circumstances which could influence judgment or the quality of services.

Licensees shall not accept compensation, financial or otherwise, from more than one party for services on the same project, unless the circumstances are fully disclosed to, and agreed to, by all interested parties.

Licensees shall act in professional matters for each employer or client as faithful agents or trustees and shall maintain full confidentiality on all matters in which the welfare of the public is not endangered.

**4.8(5) Unethical or illegal conduct.** Licensees shall not pay or offer to pay, either directly or indirectly, any commission, political contribution, gift, or other consideration in order to secure work, exclusive of securing positions through employment agencies.

Licensees, as employers, shall refrain from engaging in any discriminatory practice prohibited by law and shall, in the conduct of their business, employ personnel upon the basis of merit.

Licensees shall not solicit or accept gratuities, directly or indirectly, from contractors, their agents, or other parties dealing with their clients or employers in connection with work for which they are responsible.

Licensees shall not solicit or accept an engineering or land surveying contract from a governmental body when a principal or officer of their organization serves as a member.

Licensees shall not associate with or permit the use of their names or firms in a business venture by any person or firm which they know, or have reason to believe, is engaging in business or professional practice of a fraudulent or dishonest nature.

Licensees shall not use association with nonengineers, corporations or partnerships as "cloaks" for unethical acts. Licensees shall not violate any local, state or federal criminal law in the conduct of professional practice.

Licensees shall not violate licensure laws of any state or territory.

Licensees shall not represent themselves as licensed land surveyors or professional engineers and shall not place firm name, logo or title block on a Real Property Inspection Report.

**4.8(6) Standards of integrity.** Licensees shall answer all questions of a duly constituted investigative body of the state of Iowa concerning alleged violations by another person or firm.

Licensees shall admit and accept their own errors when proven wrong and shall refrain from distorting or altering the facts to justify their own decisions.

If licensees have knowledge or reason to believe that another person or firm may be in violation of any Iowa regulations regarding conduct of professional engineering or land surveying practice, they shall present such information to the engineering and land surveying examining board in writing and shall cooperate with the board in furnishing further information or assistance required by the board.

Licensees shall not assist in the application of an individual known by the licensee to be unqualified for licensure by reason of education, experience or character.

**193C—4.9(542B) Complaints and investigations.**

**4.9(1) Complaints.** The board shall, upon receipt of a complaint in writing, or may upon its own motion, pursuant to other evidence received by the board, review and investigate alleged acts or omissions which reasonably constitute cause under applicable law or administrative rule for licensee discipline.

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**4.9(2) Form and content.** A written complaint should include the following facts:

- a. The full name, address, and telephone number of complainant.
- b. The full name, address, and telephone number of respondent.
- c. A statement of the facts concerning the alleged acts or omissions.
- d. Identification of the statutes and administrative rules allegedly violated.
- e. Evidentiary supporting documentation.

The written complaint may be delivered personally or by mail to the secretary of the board. The current office address is 1918 S.E. Hulsizer, Ankeny, Iowa 50021.

**4.9(3) Investigation of allegations.** In order to determine if probable cause exists for a hearing on the complaint, the board may cause an investigation to be made into the allegations of the complaint. It may refer the complaint to a peer review committee or an investigator for investigation, review and report to the board.

**4.9(4) Informal discussion.** If the board considers it advisable, or if requested by the affected licensee, the board may grant the licensee an opportunity to appear before the board or a committee of the board for a voluntary informal discussion of the facts and circumstances of an alleged violation. The licensee may be represented by legal counsel at the informal discussion. The licensee is not required to attend the informal discussion. By electing to attend, the licensee waives the right to seek disqualification, based upon personal investigation of a board member or staff, from participating in making a contested case decision or acting as a presiding officer in a later contested case proceeding. Because an informal discussion constitutes a part of the board's investigation of a pending disciplinary case, the facts discussed at the informal discussion may be considered by the board in the event the matter proceeds to a contested case hearing and those facts are independently introduced into evidence. The board may seek a consent order at the time of the informal discussion. If the parties agree to a consent order, a statement of charges shall be filed simultaneously with the consent order.

**193C—4.10(542B) Informal settlement.** A contested case may be resolved by informal settlement. Negotiation of an informal settlement may be initiated by the assistant attorney general, the respondent, or the board. The board may designate a board member with authority to negotiate on behalf of the board. Negotiation shall be limited to the parties and the board's designee until presentation of a final, written form to the full board for approval.

**4.10(1) Informal settlement—waiver of notice and opportunity to be heard.** Consent to negotiation by the respondent constitutes a waiver of notice and opportunity to be heard pursuant to Iowa Code section 17A.17 during informal settlement negotiation. Thereafter, the prosecuting attorney is authorized to discuss informal settlement with the board's designee.

**4.10(2) Informal settlement—board approval.** All informal settlements are subject to approval of a majority of the full board. No informal settlement shall be presented to the board for approval except in final, written form executed by the respondent. If the board fails to approve the informal settlement, it shall be of no force or effect to either party.

**4.10(3) Informal settlement—disqualification of designee.** A board member who is designated to act in negotiation of an informal settlement is not disqualified from participating in the adjudication of the contested case.

This rule is intended to implement Iowa Code sections 542B.21, 542B.22 and 272C.6.

**193C—4.11(542B) Ruling on the initial inquiry.**

**4.11(1) Dismissal.** If a determination is made by the board that a complaint is without grounds or merit, the complaint shall be dismissed. A letter of explanation concerning the decision of the board shall be sent to the respondent and the complainant.

**4.11(2) Requirement of further inquiry.** If determination is made by the board to order further inquiry, the complaint and initial recommendations shall be provided to the investigator(s) along with a statement specifying the information deemed necessary.

**4.11(3) Acceptance of the case.** If a determination is made by the board to initiate disciplinary action, the board may enter into an informal settlement or recommend formal disciplinary proceedings.

This rule is intended to implement Iowa Code sections 542B.21, 542B.22 and 272C.6.

**193C—4.12(542B,272C) Statement of charges.** The statement of charges shall set forth the acts or omissions with which the respondent is charged including the statute(s) and rule(s) which are alleged to have been violated, and shall be in sufficient detail to enable the preparation of the respondent's defense.

**193C—4.13(17A) Time requirements.**

**4.13(1) Time shall be computed as provided in Iowa Code subsection 4.1(34).**

**4.13(2) For good cause, the presiding officer may extend or shorten the time to take any action, except as precluded by statute. Except for good cause stated in the record, before extending or shortening the time to take any action, the presiding officer shall afford all parties an opportunity to be heard or to file written arguments.**

**193C—4.14(17A) Requests for contested case proceeding.** Any person claiming an entitlement to a contested case proceeding shall file a written request for such a proceeding within the time specified by the particular rules or statutes governing the subject matter or, in the absence of such law, the time specified in the board action in question.

The request for a contested case proceeding shall state the name and address of the requester; identify the specific board action which is disputed and, where the requester is represented by counsel, identify the provisions of law or precedent requiring or authorizing the holding of a contested case proceeding in the particular circumstances involved, and include a short and plain statement of the issues of material fact in dispute.

**193C—4.15(542B,272C) Notice of hearing.** The board's notice of hearing shall fix the time and place for hearing and shall contain those items specified in Iowa Code section 17A.12(2). The notice shall also contain the following:

1. A statement of the time, place, and nature of the hearing;
2. A statement of the legal authority and jurisdiction under which the hearing is to be held;
3. A reference to the particular sections of the statutes and rules involved;
4. A short and plain statement of the matters asserted. If the board or other party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved. Thereafter, upon application, a more definite and detailed statement shall be furnished;

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5. Identification of all parties including the name, address and telephone number of the person who will act as advocate for the board or the state and identification of parties' counsel where known;

6. Reference to the procedural rules governing conduct of the contested case proceeding;

7. Reference to the procedural rules governing informal settlement;

8. Identification of the presiding officer, if known. If not known, a description of who will serve as presiding officer (i.e., the board, a panel of the board, or an administrative law judge from the department of inspections and appeals); and

9. Notification of the time period in which a party may request, pursuant to 1998 Iowa Acts, chapter 1202, section 15(1), and rule 4.18(17A), that the presiding officer be an administrative law judge.

10. A statement requiring the respondent to submit an answer of the type specified in rule 4.16(542B,272C) within 20 days after receipt of the notice of hearing.

**193C—4.16(542B,272C) Form of answer.** The answer shall contain the following information:

1. The name, address and telephone number of the respondent.

2. Specific statements regarding any or all allegations in the complaint which shall be in the form of admissions, denials, explanations, remarks or statements of mitigating circumstances.

3. Any additional facts or information which the respondent deems relevant to the complaint and which may be of assistance in the ultimate determination of the case.

**193C—4.17(542B,272C) Legal representation.** Every statement of charges and notice of hearing prepared by the board shall be reviewed and approved by the office of the attorney general which shall be responsible for the legal representation of the public interest in all proceedings before the board. The assistant attorney general assigned to prosecute a contested case before the board shall not represent the board in that case but shall represent the public interest.

**193C—4.18(17A) Presiding officer.**

4.18(1) Any party who wishes to request that the presiding officer assigned to render a proposed decision be an administrative law judge employed by the department of inspections and appeals must file a written request within 20 days after service of a notice of hearing which identifies or describes the presiding officer as the board or a panel of the board.

4.18(2) The board may deny the request only upon a finding that one or more of the following apply:

a. Neither the board nor any officer of the board under whose authority the contested case is to take place is a named party to the proceeding or a real party in interest to that proceeding.

b. There is a compelling need to expedite issuance of a final decision in order to protect the public health, safety, or welfare.

c. The case involves a disciplinary hearing to be held by the board pursuant to Iowa Code section 272C.6.

d. The case involves significant policy issues of first impression that are inextricably intertwined with the factual issues presented.

e. The demeanor of the witnesses is likely to be dispositive in resolving the disputed factual issues.

f. Funds are unavailable to pay the costs of an administrative law judge and an interboard appeal.

g. The request was not timely filed.

h. The request is not consistent with a specified statute.  
4.18(3) The board shall issue a written ruling specifying the grounds for its decision within 20 days after a request for an administrative law judge is filed.

4.18(4) Except as provided otherwise by another provision of law, all rulings by an administrative law judge acting as presiding officer are subject to appeal to the board. A party must seek any available intra-agency appeal in order to exhaust adequate administrative remedies.

4.18(5) Unless otherwise provided by law, agency heads and members of multimembered agency heads, when reviewing a proposed decision upon intra-agency appeal, shall have the powers of and shall comply with the provisions of this chapter which apply to presiding officers.

**193C—4.19(17A) Waiver of procedures.** Unless otherwise precluded by law, the parties in a contested case proceeding may waive any provision of this chapter. However, the board in its discretion may refuse to give effect to such a waiver when it deems the waiver to be inconsistent with the public interest.

**193C—4.20(17A) Telephone proceedings.** The presiding officer may resolve preliminary procedural motions by telephone conference in which all parties have an opportunity to participate. Other telephone proceedings may be held with the consent of all parties. The presiding officer will determine the location of the parties and witnesses for telephone hearings. The convenience of the witnesses or parties, as well as the nature of the case, will be considered when location is chosen.

**193C—4.21(17A) Disqualification.**

4.21(1) A presiding officer or other person shall withdraw from participation in the making of any proposed or final decision in a contested case if that person:

a. Has a personal bias or prejudice concerning a party or a representative of a party;

b. Has personally investigated, prosecuted or advocated in connection with that case, the specific controversy underlying that case, another pending factually related contested case, or a pending factually related controversy that may culminate in a contested case involving the same parties;

c. Is subject to the authority, direction or discretion of any person who has personally investigated, prosecuted or advocated in connection with that contested case, the specific controversy underlying that contested case, or a pending factually related contested case or controversy involving the same parties;

d. Has acted as counsel to any person who is a private party to that proceeding within the past two years;

e. Has a personal financial interest in the outcome of the case or any other significant personal interest that could be substantially affected by the outcome of the case;

f. Has a spouse or relative within the third degree of relationship that: (1) is a party to the case, or an officer, director or trustee of a party; (2) is a lawyer in the case; (3) is known to have an interest that could be substantially affected by the outcome of the case; or (4) is likely to be a material witness in the case; or

g. Has any other legally sufficient cause to withdraw from participation in the decision making in that case.

4.21(2) The term "personally investigated" means taking affirmative steps to interview witnesses directly or to obtain documents or other information directly. The term "personally investigated" does not include general direction and supervision of assigned investigators, unsolicited receipt of information which is relayed to assigned investigators, review

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of another person's investigative work product in the course of determining whether there is probable cause to initiate a proceeding, or exposure to factual information while performing other board functions, including fact gathering for purposes other than investigation of the matter which culminates in a contested case. Factual information relevant to the merits of a contested case received by a person who later serves as presiding officer in that case shall be disclosed if required by Iowa Code section 17A.17(3) and subrule 4.38(9).

**4.21(3)** In a situation where a presiding officer or other person knows of information which might reasonably be deemed to be a basis for disqualification and decides voluntary withdrawal is unnecessary, that person shall submit the relevant information for the record by affidavit and shall provide for the record a statement of the reasons for the determination that withdrawal is unnecessary.

**4.21(4)** If a party asserts disqualification on any appropriate ground, including those listed in subrule 4.21(1), the party shall file a motion supported by an affidavit pursuant to 1998 Iowa Acts, chapter 1202, section 19(7). The motion must be filed as soon as practicable after the reason alleged in the motion becomes known to the party. If, during the course of the hearing, a party first becomes aware of evidence of bias or other grounds for disqualification, the party may move for disqualification but must establish the grounds by the introduction of evidence into the record.

If the presiding officer determines that disqualification is appropriate, the presiding officer or other person shall withdraw. If the presiding officer determines that withdrawal is not required, the presiding officer shall enter an order to that effect. A party asserting disqualification may seek an interlocutory appeal under rule 4.40(17A) and seek a stay under rule 4.43(17A).

**193C—4.22(17A) Consolidation—severance.**

**4.22(1)** Consolidation. The presiding officer may consolidate any or all matters at issue in two or more contested case proceedings where: (a) the matters at issue involve common parties or common questions of fact or law; (b) consolidation would expedite and simplify consideration of the issues involved; and (c) consolidation would not adversely affect the rights of any of the parties to those proceedings.

**4.22(2)** Severance. The presiding officer may, for good cause shown, order any contested case proceedings or portions thereof severed.

**193C—4.23(17A) Amendments.** Any notice of hearing or statement of charges may be amended before a responsive pleading has been filed. Amendments to pleadings after a responsive pleading has been filed and to an answer may be allowed with the consent of the other parties or in the discretion of the presiding officer who may impose terms or grant a continuance.

**193C—4.24(17A) Service and filing of pleadings and other papers.**

**4.24(1)** When service required. Except where otherwise provided by law, every pleading, motion, document, or other paper filed in a contested case proceeding and every paper relating to discovery in such a proceeding shall be served upon each of the parties of record to the proceeding, including the person designated as advocate or prosecutor for the state or the board, simultaneously with their filing. Except for the original notice of hearing and an application for rehearing as provided in Iowa Code section 17A.16(2), the party filing a document is responsible for service on all parties.

**4.24(2)** Service—how made. Service upon a party represented by an attorney shall be made upon the attorney unless otherwise ordered. Service is made by delivery or by mailing a copy to the person's last-known address. Service by mail is complete upon mailing, except where otherwise specifically provided by statute, rule, or order.

**4.24(3)** Filing—when required. After the notice of hearing, all pleadings, motions, documents or other papers in a contested case proceeding shall be filed with the board. All pleadings, motions, documents or other papers that are required to be served upon a party shall be filed simultaneously with the board.

**4.24(4)** Filing—when made. Except where otherwise provided by law, a document is deemed filed at the time it is delivered to the board, delivered to an established courier service for immediate delivery to that office, or mailed by first-class mail or state interoffice mail to that office, so long as there is proof of mailing.

**4.24(5)** Proof of mailing. Proof of mailing includes either: a legible United States Postal Service postmark on the envelope, a certificate of service, a notarized affidavit, or a certification in substantially the following form:

I certify under penalty of perjury and pursuant to the laws of Iowa that, on (date of mailing), I mailed copies of (describe document) addressed to the Engineering and Land Surveying Examining Board and to the names and addresses of the parties listed below by depositing the same in (a United States post office mailbox with correct postage properly affixed or state interoffice mail).

(Date)

(Signature)

**193C—4.25(17A) Discovery.**

**4.25(1)** Discovery procedures applicable in civil actions are applicable in contested cases. Unless lengthened or shortened by these rules or by order of the presiding officer, time periods for compliance with discovery shall be as provided in the Iowa Rules of Civil Procedure.

**4.25(2)** Any motion relating to discovery shall allege that the moving party has previously made a good-faith attempt to resolve the discovery issues involved with the opposing party. Motions in regard to discovery shall be ruled upon by the presiding officer. Opposing parties shall be afforded the opportunity to respond within ten days of the filing of the motion unless the time is shortened as provided in subrule 4.25(1). The presiding officer may rule on the basis of the written motion and any response, or may order argument on the motion.

**4.25(3)** Evidence obtained in discovery may be used in the contested case proceeding if that evidence would otherwise be admissible in that proceeding.

**193C—4.26(17A) Subpoenas.** In connection with the investigation of a complaint, the board is authorized by law to subpoena books, papers, records, and any other real evidence, whether or not privileged or confidential under law, to help it determine whether it should institute a contested case proceeding (disciplinary hearing). After service of the notice of hearing under rule 4.15(542B,272C), the following procedures are available to the parties in order to obtain relevant and material evidence.

**4.26(1)** Board subpoenas for books, papers, records, and other real evidence will be issued to a party upon request. Subpoenas for witnesses may also be obtained. The executive secretary shall issue all subpoenas for both parties upon request. The request, which may be verbal or written, must

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specify the documents sought to be obtained and the names of the witnesses whose testimony is sought.

**4.26(2)** The presiding officer may quash or modify a subpoena for any lawful reason upon motion in accordance with the Iowa Rules of Civil Procedure. A motion to quash or modify a subpoena shall be set for argument promptly.

**4.26(3)** In the event of a refusal to obey a subpoena, either party or the board may petition the district court for its enforcement. Upon proper showing, the district court shall order the person to obey the subpoena and, if the person fails to obey the order of the court, the person may be found guilty of contempt of court.

**193C—4.27(17A) Motions.**

**4.27(1)** No technical form for motions is required. However, prehearing motions must be in writing, state the grounds for relief, and state the relief sought.

**4.27(2)** Any party may file a written response to a motion within ten days after the motion is served, unless the time period is extended or shortened by rules of the board or the presiding officer. The presiding officer may consider a failure to respond within the required time period in ruling on a motion.

**4.27(3)** The presiding officer may schedule oral argument on any motion.

**4.27(4)** Motions pertaining to the hearing, except motions for summary judgment, must be filed and served at least five days prior to the date of hearing unless there is good cause for permitting later action or the time for such action is lengthened or shortened by rule of the board or an order of the presiding officer.

**4.27(5)** Motions for summary judgment shall comply with the requirements of Iowa Rule of Civil Procedure 237 and shall be subject to disposition according to the requirements of that rule to the extent such requirements are not inconsistent with the provisions of this rule or any other provision of law governing the procedure in contested cases.

Motions for summary judgment must be filed and served at least 20 days prior to the scheduled hearing date, or other time period determined by the presiding officer. Any party resisting the motion shall file and serve a resistance within 10 days, unless otherwise ordered by the presiding officer, from the date a copy of the motion was served. The time fixed for hearing or nonoral submission shall be not less than 15 days after the filing of the motion, unless a shorter time is ordered by the presiding officer. A summary judgment order rendered on all issues in a contested case is subject to rehearing pursuant to rule 4.42(17A) and appeal pursuant to rule 4.41(17A).

**193C—4.28(17A) Prehearing conference.**

**4.28(1)** Any party may request a prehearing conference. A written request for prehearing conference or an order for prehearing conference on the presiding officer's own motion shall be filed not less than seven days prior to the hearing date. A prehearing conference shall be scheduled not less than three business days prior to the hearing date.

Written notice of the prehearing conference shall be given by the board to all parties. For good cause the presiding officer may permit variances from this rule.

**4.28(2)** Each party shall bring to the prehearing conference:

a. A final list of the witnesses who the party anticipates will testify at hearing. Witnesses not listed may be excluded from testifying unless there was good cause for the failure to include their names; and

b. A final list of exhibits which the party anticipates will be introduced at hearing. Exhibits other than rebuttal exhibits that are not listed may be excluded from admission into evidence unless there was good cause for the failure to include them.

c. Witness or exhibit lists may be amended subsequent to the prehearing conference within the time limits established by the presiding officer at the prehearing conference. Any such amendments must be served on all parties.

**4.28(3)** In addition to the requirements of subrule 4.28(2), the parties at a prehearing conference may:

- a. Enter into stipulations of law or fact;
- b. Enter into stipulations on the admissibility of exhibits;
- c. Identify matters which the parties intend to request be officially noticed;
- d. Enter into stipulations for waiver of any provision of law; and
- e. Consider any additional matters which will expedite the hearing.

**4.28(4)** Prehearing conferences shall be conducted by telephone unless otherwise ordered. Parties shall exchange and receive witness and exhibit lists in advance of a telephone prehearing conference.

**193C—4.29(17A) Continuances.** Unless otherwise provided, applications for continuances shall be made to the presiding officer.

**4.29(1)** A written application for a continuance shall:

- a. Be made at the earliest possible time and no less than seven days before the hearing except in case of unanticipated emergencies;
- b. State the specific reasons for the request; and
- c. Be signed by the requesting party or the party's representative.

An oral application for a continuance may be made if the presiding officer waives the requirement for a written motion. However, a party making such an oral application for a continuance must confirm that request by written application within five days after the oral request unless that requirement is waived by the presiding officer. No application for continuance shall be made or granted without notice to all parties except in an emergency where notice is not feasible. The board may waive notice of such requests for a particular case or an entire class of cases.

**4.29(2)** In determining whether to grant a continuance, the presiding officer may consider:

- a. Prior continuances;
- b. The interests of all parties;
- c. The likelihood of informal settlement;
- d. The existence of an emergency;
- e. Any objection;
- f. Any applicable time requirements;
- g. The existence of a conflict in the schedules of counsel, parties, or witnesses;
- h. The timeliness of the request; and
- i. Other relevant factors.

The presiding officer may require documentation of any grounds for continuance.

**193C—4.30(17A) Withdrawals.** A party requesting a contested case proceeding may withdraw that request prior to the hearing only in accordance with board rules. Unless otherwise provided, a withdrawal shall be with prejudice.

**193C—4.31(17A) Intervention.**

**4.31(1)** Motion. A motion for leave to intervene in a contested case proceeding shall state the grounds for the pro-

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posed intervention, the position and interest of the proposed intervenor, and the possible impact of intervention on the proceeding. A proposed answer or petition in intervention shall be attached to the motion. Any party may file a response within 14 days of service of the motion to intervene unless the time period is extended or shortened by the presiding officer.

**4.31(2)** When filed. Motion for leave to intervene shall be filed as early in the proceeding as possible to avoid adverse impact on existing parties or the conduct of the proceeding. Unless otherwise ordered, a motion for leave to intervene shall be filed before the prehearing conference, if any, or at least 20 days before the date scheduled for hearing. Any later motion must contain a statement of good cause for the failure to file in a timely manner. Unless inequitable or unjust, an intervenor shall be bound by any agreement, arrangement, or other matter previously raised in the case. Requests by untimely intervenors for continuances which would delay the proceeding will ordinarily be denied.

**4.31(3)** Grounds for intervention. The movant shall demonstrate that: (a) intervention would not unduly prolong the proceedings or otherwise prejudice the rights of existing parties; (b) the movant is likely to be aggrieved or adversely affected by a final order in the proceeding; and (c) the interests of the movant are not adequately represented by existing parties.

**4.31(4)** Effect of intervention. If appropriate, the presiding officer may order consolidation of the petitions and briefs of different parties whose interests are aligned with each other and limit the number of representatives allowed to participate actively in the proceedings. A person granted leave to intervene is a party to the proceeding. The order granting intervention may restrict the issues that may be raised by the intervenor or otherwise condition the intervenor's participation in the proceeding.

**193C—4.32(542B) Record of proceedings.** Oral proceedings shall be recorded either by mechanical or electrical means or by certified shorthand reporters. Oral proceedings or any part thereof shall be transcribed at the request of any party with the expense of the transcription charged to the requesting party. The recording or stenographic notes of oral proceedings or the transcription thereof shall be filed with and maintained for at least five years from the date of decision. Any party to a proceeding may record, at the party's own expense, stenographically or electronically, any portion or all of the proceedings.

This rule is intended to implement Iowa Code sections 542B.21, 542B.22 and 272C.6.

**193C—4.33(542B) Hearings.**

**4.33(1)** A hearing shall be conducted before the board or before a three-member hearing panel appointed by the board chairperson in accordance with Iowa Code section 272C.6(1). An administrative law judge may sit with the board or hearing panel to conduct the hearing. The administrative law judge shall be in control of the proceedings and shall have the power to administer oaths, to admit or execute testimony or other evidence, and to rule on all motions and objections.

**4.33(2)** When, in the opinion of a majority of the board, it is desirable to obtain specialists within an area of practice of the profession when holding disciplinary hearings, the board may appoint a panel of not less than three specialists not having a conflict of interest to make findings of fact and to report to the board. The findings shall not include any recommendation for or against licensee discipline.

**4.33(3)** The presiding officer and board members have the right to conduct a direct examination at the outset of a witness's testimony or at a later stage thereof. Direct examination and cross-examination by board members are subject to objections properly raised in accordance with the rules of evidence.

**4.33(4)** The hearing shall be open to the public unless the licensee or the licensee's attorney requests that the hearing be closed to the public.

This rule is intended to implement Iowa Code sections 542B.21, 542B.22 and 272C.6.

**193C—4.34(542B) Order of proceedings.** Before testimony is presented, the record shall show the identity of any board members present, hearing panel, or administrative law judge, and the identity of the primary parties and their representatives, and the fact that all testimony is being recorded.

Hearings shall generally follow the order established by these rules, subject to modification at the discretion of the board or of the panel of the board conducting the proceedings.

1. The presiding officer or designee shall read the specification of charges and the answer thereto, or other responsive pleading, filed by the respondent prior to the hearing. The respondent may waive the reading of the specification of charges.

2. The state's counsel representing the public interest before the board shall make an opening statement.

3. The respondent or respondents shall each be offered the opportunity to make an opening statement. A respondent may elect to reserve an opening statement until just prior to the presentation of evidence by the respondent.

4. The presentation of evidence on behalf of the state.

5. The presentation of evidence on behalf of the respondent(s).

6. Rebuttal evidence on behalf of the state.

7. Rebuttal evidence on behalf of the respondent(s).

8. Closing arguments first on behalf of the state, then on behalf of the respondent, and then on behalf of the state.

This rule is intended to implement Iowa Code sections 542B.21, 542B.22 and 272C.6.

**193C—4.35(542B) Rules of evidence—documentary evidence—official notice.**

**4.35(1)** The presiding officer shall rule on admissibility of evidence and may, where appropriate, take official notice of facts in accordance with all applicable requirements of law.

**4.35(2)** Stipulation of facts is encouraged. The presiding officer may make a decision based on stipulated facts.

**4.35(3)** Evidence in the proceeding shall be confined to the issues as to which the parties received notice prior to the hearing unless the parties waive their right to such notice or the presiding officer determines that good cause justifies expansion of the issues. If the presiding officer decides to admit evidence on issues outside the scope of the notice over the objection of a party who did not have actual notice of those issues, that party, upon timely request, shall receive a continuance sufficient to amend pleadings and to prepare on the additional issue.

**4.35(4)** The party seeking admission of an exhibit must provide opposing parties with an opportunity to examine the exhibit prior to the ruling on its admissibility. Evidence may be received in the form of copies or excerpts, if the original is not readily available. Upon request, parties shall be given the opportunity to compare the copy with the original, if available. Copies of documents shall be provided to oppos-

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ing parties. Copies may also be furnished to members of the board.

All exhibits admitted into evidence shall be appropriately marked and be made part of the record.

**4.35(5)** Any party may object to specific evidence or may request limits on the scope of any examination or cross-examination. Such an objection shall be accompanied by a brief statement of the grounds upon which it is based. The objection, the ruling on the objection, and the reasons for the ruling shall be noted in the record. The presiding officer may rule on the objection at the time it is made or may reserve a ruling until the written decision. Motions and offers to amend the pleadings may also be made at hearing and shall be noted in the record together with the rulings thereon.

**4.35(6)** Whenever evidence is ruled inadmissible, the party offering that evidence may submit an offer of proof on the record. The party making the offer of proof for excluded oral testimony shall briefly summarize the testimony or, with permission of the presiding officer, present the testimony. If the excluded evidence consists of a document or exhibit, it shall be marked as part of an offer of proof and inserted in the record.

**4.35(7)** Subject to the above requirements, if a witness is unavailable, and if a hearing will be expedited and the interests of the parties will not be prejudiced, any part of the evidence may be submitted in verified written form with both parties' consent.

**4.35(8)** Official notice may be taken of all facts of which judicial notice may be taken.

This rule is intended to implement Iowa Code sections 542B.21, 542B.22 and 272C.6.

**193C—4.36(542B) Decisions.** When five or more members of the board preside over the reception of the evidence at the hearing, their decision is a final decision if that decision receives the affirmative vote of five or more members of the board.

**4.36(1)** When a panel of three specialists presides over the reception of the evidence at the hearing, a transcript of the proceedings, together with exhibits presented and the findings of fact of the panel, shall be considered by the board at the earliest practicable time. The respondent or the respondent's attorney, upon notice prescribed by the board, shall have the opportunity to appear personally to present the respondent's position and arguments to the board. The decision of the board is a final decision.

**4.36(2)** When the hearing is conducted by a three-member panel of the board, their decision is a proposed decision and subject to the review provisions of rule 4.41(542B).

**4.36(3)** A proposed or final decision shall be in writing and shall consist of the following parts:

- a. A concise statement of the facts as presented by the parties.
- b. Findings of fact.
- c. Conclusions of law which shall be supported by cited authority or reasoned opinion.
- d. The decision or order which sets forth the action to be taken or the disposition of the case.

**4.36(4)** The decision may include one or more of the following:

- a. Exoneration of respondent.
- b. Revocation of license.
- c. Suspension of license until further order of the board or for a specified period.
- d. Nonrenewal of license.

e. Prohibition, until further order of the board or for a specific period, of engaging in specified procedures, methods or acts.

- f. Probation.
- g. Requirement of additional education or training.
- h. Requirement of reexamination.
- i. Issuance of a reprimand.
- j. Imposition of civil penalties.
- k. Issuance of citation and warning.
- l. Other sanctions allowed by law as may be appropriate.

This rule is intended to implement Iowa Code sections 542B.21, 542B.22 and 272C.6.

**193B—4.37(17A) Default.**

**4.37(1)** If a party fails to appear or participate in a contested case proceeding after proper service of notice, the presiding officer may, if no adjournment is granted, enter a default decision or proceed with the hearing and render a decision in the absence of the party.

**4.37(2)** Where appropriate and not contrary to law, any party may move for default against a party who has requested the contested case proceeding and has failed to file a required pleading or has failed to appear after proper service.

**4.37(3)** Default decisions or decisions rendered on the merits after a party has failed to appear or participate in a contested case proceeding become final board action unless, within 15 days after the date of notification or mailing of the decision, a motion to vacate is filed and served on all parties or an appeal of a decision on the merits is timely initiated within the time provided by rule 4.41(17A). A motion to vacate must state all facts relied upon by the moving party which establish that good cause existed for that party's failure to appear or participate at the contested case proceeding. Each fact so stated must be substantiated by at least one sworn affidavit of a person with personal knowledge of each such fact, which affidavit(s) must be attached to the motion.

**4.37(4)** The time for further appeal of a decision for which a timely motion to vacate has been filed is stayed pending a decision on the motion to vacate.

**4.37(5)** Properly substantiated and timely filed motions to vacate shall be granted only for good cause shown. The burden of proof as to good cause is on the moving party. Adverse parties shall have ten days to respond to a motion to vacate. Adverse parties shall be allowed to conduct discovery as to the issue of good cause and to present evidence on the issue prior to a decision on the motion, if a request to do so is included in that party's response.

**4.37(6)** "Good cause" for purposes of this rule shall have the same meaning as "good cause" for setting aside a default judgment under Iowa Rule of Civil Procedure 236.

**4.37(7)** A decision denying a motion to vacate is subject to further appeal within the time limit allowed for further appeal of a decision on the merits in the contested case proceeding. A decision granting a motion to vacate is subject to interlocutory appeal by the adverse party pursuant to rule 4.40(17A).

**4.37(8)** If a motion to vacate is granted and no timely interlocutory appeal has been taken, the presiding officer shall issue another notice of hearing and the contested case shall proceed accordingly.

**4.37(9)** A default decision may award any relief consistent with the request for relief made in the petition and embraced in its issues.

**4.37(10)** A default decision may provide either that the default decision is to be stayed pending a timely motion to

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vacate or that the default decision is to take effect immediately, subject to a request for stay under rule 4.43(17A).

**193C—4.38(17A) Ex parte communication.**

**4.38(1) Prohibited communications.** Unless required by the disposition of ex parte matters specifically authorized by statute, following issuance of the notice of hearing, there shall be no communication, directly or indirectly, between the presiding officer and any party or representative of any party or any other person with a direct or indirect interest in such case in connection with any issue of fact or law in the case except upon notice and opportunity for all parties to participate. This does not prohibit persons jointly assigned such tasks from communicating with each other. Nothing in this provision is intended to preclude the presiding officer from communicating with members of the board or seeking the advice or help of persons other than those with a personal interest in, or those engaged in personally investigating as defined in subrule 4.21(2), prosecuting, or advocating in, either the case under consideration or a pending factually related case involving the same parties as long as those persons do not directly or indirectly communicate to the presiding officer any ex parte communications they have received of a type that the presiding officer would be prohibited from receiving or that furnish, augment, diminish, or modify the evidence in the record.

**4.38(2) Prohibitions on ex parte communications commence with the issuance of the notice of hearing in a contested case and continue for as long as the case is pending.**

**4.38(3) Written, oral or other forms of communication are "ex parte" if made without notice and opportunity for all parties to participate.**

**4.38(4) To avoid prohibited ex parte communications, notice must be given in a manner reasonably calculated to give all parties a fair opportunity to participate. Notice of written communications shall be provided in compliance with rule 4.24(17A) and may be supplemented by telephone, facsimile, electronic mail or other means of notification. Where permitted, oral communications may be initiated through conference telephone call including all parties or their representatives.**

**4.38(5) Persons who jointly act as presiding officer in a pending contested case may communicate with each other without notice or opportunity for parties to participate.**

**4.38(6) The executive officer or other persons may be present in deliberations or otherwise advise the presiding officer without notice or opportunity for parties to participate as long as they are not disqualified from participating in the making of a proposed or final decision under any provision of law and they comply with subrule 4.38(1).**

**4.38(7) Communications with the presiding officer involving uncontested scheduling or procedural matters do not require notice or opportunity for parties to participate. Parties should notify other parties prior to initiating such contact with the presiding officer when feasible, and shall notify other parties when seeking to continue hearings or other deadlines pursuant to rule 4.29(17A).**

**4.38(8) Disclosure of prohibited communications.** A presiding officer who receives a prohibited ex parte communication during the pendency of a contested case must initially determine if the effect of the communication is so prejudicial that the presiding officer should be disqualified. If the presiding officer determines that disqualification is warranted, a copy of any prohibited written communication, all written responses to the communication, a written summary stating the substance of any prohibited oral or other communication not available in written form for disclosure, all re-

sponses made, and the identity of each person from whom the presiding officer received a prohibited ex parte communication shall be submitted for inclusion in the record under seal by protective order. If the presiding officer determines that disqualification is not warranted, such documents shall be submitted for inclusion in the record and served on all parties. Any party desiring to rebut the prohibited communication must be allowed the opportunity to do so upon written request filed within ten days after notice of the communication.

**4.38(9) Promptly after being assigned to serve as presiding officer at any stage in a contested case proceeding, a presiding officer shall disclose to all parties material factual information received through ex parte communication prior to such assignment unless the factual information has already been or shortly will be disclosed pursuant to Iowa Code section 17A.13(2) or through discovery. Factual information contained in an investigative report or similar document need not be separately disclosed by the presiding officer as long as such documents have been or will shortly be provided to the parties.**

**4.38(10) The presiding officer may render a proposed or final decision imposing appropriate sanctions for violations of this rule including default, a decision against the offending party, censure, or suspension or revocation of the privilege to practice before the board. Violation of ex parte communication prohibitions by board personnel shall be reported to the division administrator for possible sanctions including censure, suspension, dismissal, or other disciplinary action.**

**193C—4.39(17A) Recording costs.** Upon request, the board shall provide a copy of the whole or any portion of the record at cost. The cost of preparing a copy of the record or of transcribing the hearing record shall be paid by the requesting party.

Parties who request that a hearing be recorded by certified shorthand reporters rather than by electronic means shall bear the cost of that recordation, unless otherwise provided by law.

**193C—4.40(17A) Interlocutory appeals.** Upon written request of a party or on its own motion, the board may review an interlocutory order of the presiding officer. In determining whether to do so, the board shall weigh the extent to which its granting the interlocutory appeal would expedite final resolution of the case and the extent to which review of that interlocutory order by the board at the time it reviews the proposed decision of the presiding officer would provide an adequate remedy. Any request for interlocutory review must be filed within 14 days of issuance of the challenged order, but no later than the date for compliance with the order or the date of hearing, whichever is earlier.

**193C—4.41(17A) Appeals and review.**

**4.41(1) Appeal by party.** Any adversely affected party may appeal a proposed decision to the board within 30 days after issuance of the proposed decision.

**4.41(2) Review.** The board may initiate review of a proposed decision on its motion at any time within 30 days following the issuance of such a decision.

**4.41(3) Notice of appeal.** An appeal of a proposed decision is initiated by filing a timely notice of appeal with the board. The notice of appeal must be signed by the appealing party or a representative of that party and contain a certificate of service. The notice shall specify:

- a. The parties initiating the appeal;

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b. The proposed decision or order which is being appealed;

c. The specific findings or conclusions to which exception is taken and any other exceptions to the decision or order;

d. The relief sought;

e. The grounds for relief.

**4.41(4)** Requests to present additional evidence. A party may request the taking of additional evidence only by establishing that the evidence is material, that good cause existed for the failure to present the evidence at the hearing, and that the party has not waived the right to present the evidence. A written request to present additional evidence must be filed with the notice of appeal or, by a nonappealing party, within 14 days of service of the notice of appeal. The board may remand a case to the presiding officer for further hearing or may itself preside at the taking of additional evidence.

**4.41(5)** Scheduling. The board shall issue a schedule for consideration of the appeal.

**4.41(6)** Briefs and arguments. Unless otherwise ordered, within 20 days of the notice of appeal or order for review, each appealing party may file exceptions and briefs. Within 20 days thereafter, any party may file a responsive brief. Briefs shall cite any applicable legal authority and specify relevant portions of the record in that proceeding. Written requests to present oral argument shall be filed with the briefs. The board may resolve the appeal on the briefs or provide an opportunity for oral argument. The board may shorten or extend the briefing period as appropriate.

**193C—4.42(17A) Applications for rehearing.**

**4.42(1)** By whom filed. Any party to a contested case proceeding may file an application for rehearing from a final order.

**4.42(2)** Content of application. The application for rehearing shall state on whose behalf it is filed, the specific grounds for rehearing, and the relief sought. In addition, the application shall state whether the applicant desires reconsideration of all or part of the board decision on the existing record and whether, on the basis of the grounds enumerated in subrule 4.41(4), the applicant requests an opportunity to submit additional evidence.

**4.42(3)** Time of filing. The application shall be filed with the board within 20 days after issuance of the final decision.

**4.42(4)** Notice to other parties. A copy of the application shall be timely mailed by the applicant to all parties of record not joining therein. If the application does not contain a certificate of service, the board shall serve copies of the certificate of service on all parties.

**4.42(5)** Disposition. Any application for a rehearing shall be deemed denied unless the board grants the application within 20 days after its filing.

**193C—4.43(17A) Stays of board actions.**

**4.43(1)** When available.

a. Any party to a contested case proceeding may petition the board for a stay of an order issued in that proceeding or for other temporary remedies, pending review by the board. The petition shall be filed with the notice of appeal and shall state the reasons justifying a stay or other temporary remedy. The board may rule on the stay or authorize the presiding officer to do so.

b. Any party to a contested case proceeding may petition the board for a stay or other temporary remedies, pending judicial review of all or part of that proceeding. The petition shall state the reasons justifying a stay or other temporary remedy.

**4.43(2)** When granted. In determining whether to grant a stay, the presiding officer or board shall consider the factors listed in 1998 Iowa Acts, chapter 1202, section 23(5c).

**4.43(3)** Vacation. A stay may be vacated by the issuing authority upon application of the board or any other party.

**193C—4.44(17A) No factual dispute contested cases.** If the parties agree that no dispute of material fact exists as to a matter that would be a contested case if such a dispute of fact existed, the parties may present all relevant admissible evidence either by stipulation or otherwise as agreed by the parties, without necessity for the production of evidence at an evidentiary hearing. If such agreement is reached, a jointly submitted schedule detailing the method and timetable for submission of the record, briefs and oral argument should be submitted to the presiding officer for approval as soon as practicable. If the parties cannot agree, any party may file and serve a motion for summary judgment pursuant to the rules governing such motions.

**193C—4.45(17A) Emergency adjudicative proceedings.**

**4.45(1)** Necessary emergency action. To the extent necessary to prevent or avoid immediate danger to the public health, safety, or welfare, and consistent with the United States Constitution and Iowa Constitution and other provisions of law, the board may issue a written order in compliance with Iowa Code section 17A.18 to suspend a license in whole or in part, order the cessation of any continuing activity, order affirmative action, or take other action within the jurisdiction of the board by emergency adjudicative order. Before issuing an emergency adjudicative order the board shall consider factors including, but not limited to, the following:

a. Whether there has been a sufficient factual investigation to ensure that the board is proceeding on the basis of reliable information;

b. Whether the specific circumstances which pose immediate danger to the public health, safety or welfare have been identified and determined to be continuing;

c. Whether the person required to comply with the emergency adjudicative order may continue to engage in other activities without posing immediate danger to the public health, safety or welfare;

d. Whether imposition of monitoring requirements or other interim safeguards would be sufficient to protect the public health, safety or welfare; and

e. Whether the specific action contemplated by the board is necessary to avoid the immediate danger.

**4.45(2)** Issuance of order.

a. An emergency adjudicative order shall contain findings of fact, conclusions of law, and policy reasons to justify the determination of an immediate danger in the board's decision to take immediate action.

b. The written emergency adjudicative order shall be immediately delivered to persons who are required to comply with the order by utilizing one or more of the following procedures:

(1) Personal delivery;

(2) Certified mail, return receipt requested, to the last address on file with the board;

(3) Certified mail to the last address on file with the board;

(4) First-class mail to the last address on file with the board; or

(5) Fax. Fax may be used as the sole method of delivery if the person required to comply with the order has filed a

## ENGINEERING AND LAND SURVEYING EXAMINING BOARD[193C](cont'd)

written request that board orders be sent by fax and has provided a fax number for that purpose.

c. To the degree practicable, the board shall select the procedure for providing written notice that best ensures prompt, reliable delivery.

**4.45(3)** Oral notice. Unless the written emergency adjudicative order is provided by personal delivery on the same day that the order issues, the board shall make reasonable immediate efforts to contact by telephone the persons who are required to comply with the order.

**4.45(4)** Completion of proceedings. After the issuance of an emergency adjudicative order, the board shall proceed as quickly as feasible to complete any proceedings that would be required if the matter did not involve an immediate danger.

Issuance of a written emergency adjudicative order shall include notification of the date on which board proceedings are scheduled for completion. After issuance of an emergency adjudicative order, continuance of further board proceedings to a later date will be granted only in compelling circumstances upon application in writing.

**193C—4.46(542B,272C)** **Judicial review.** Judicial review of the board's decision may be sought in accordance with the terms of Iowa Code chapter 17A.

**193C—4.47(542B)** **Confidentiality.** At no time prior to the release of the final decision by the board shall any portion or the whole thereof be made public or be distributed to any persons other than the parties.

This rule is intended to implement Iowa Code sections 542B.21, 542B.22 and 272C.6.

**193C—4.48(542B)** **Notification of decision.** All parties to a proceeding shall be promptly furnished a copy of any final or proposed decision or order either in person or by first-class mail, or by telephone if necessary to ensure that the parties learn of the decision or order first.

This rule is intended to implement Iowa Code sections 542B.21, 542B.22 and 272C.6.

**193C—4.49(542B)** **Reinstatement.** Any person whose license to practice professional engineering or land surveying has been revoked, or suspended by the board, may appeal to the board for reinstatement in accordance with the terms and conditions of the order of revocation or suspension.

**4.49(1)** If the order of revocation or suspension did not establish terms and conditions upon which reinstatement might occur, or if the license was voluntarily surrendered, an initial application for reinstatement may not be made until one year has elapsed from the date of the secretary's order or the date of voluntary surrender.

**4.49(2)** All proceedings for reinstatement shall be initiated by the respondent, who shall file with the board an application for the reinstatement of the respondent's license. Such application shall be docketed in the original case in which the license was revoked, suspended, or relinquished. All proceedings upon the petition for reinstatement, including all matters preliminary and ancillary thereto, shall be subject to the same rules of procedure as other cases before the board.

**4.49(3)** An application for reinstatement shall allege facts which, if established, will be sufficient to enable the board to determine that the basis for the revocation or suspension of the respondent's license no longer exists and that it will be in the public interest for the license to be reinstated. The burden of proof to establish such facts shall be on the respondent.

**4.49(4)** An order of reinstatement shall be based upon a decision which incorporates findings of fact and conclusions of law, and must be based upon the affirmative vote of not fewer than five members of the board. This order will be published as provided for in rule 4.50(542B).

This rule is intended to implement Iowa Code sections 542B.21, 542B.22 and 272C.6.

**193C—4.50(542B)** **Publication of decisions.** Following suspension of a land surveyor's license, the county recorders and county auditors of the county of residence and immediately adjacent counties in Iowa shall be notified of the suspension by mail. Following revocation of a land surveyor's license, all county auditors in Iowa and the county recorders in the county of residence and immediately adjacent counties shall be notified by mail.

Other boards of examiners for engineers and land surveyors under the jurisdiction of the government of the United States of America shall be notified of the suspension or revocation of the license of a professional engineer or land surveyor. This notification may be through the National Council of Examiners for Engineering and Surveying or other national organizations recognized by the board. In addition, if the licensee is known to be registered in another nation in North America, the appropriate board(s) shall be notified of the action.

Information regarding informal settlements and disciplinary actions may be supplied to publications for widespread circulation in the state of Iowa and to appropriate engineering and land surveying publications that circulate within the state of Iowa.

**193C—4.51(272C)** **Disciplinary hearings—fees and costs.**

**4.51(1)** The board may charge a fee not to exceed \$75 for conducting a disciplinary hearing which results in disciplinary action taken against the licensee by the board. An order assessing a fee shall be included as part of the board's final decision. The order shall direct the licensee to deliver payment directly to the professional licensing and regulation division as provided in subrule 4.51(8).

**4.51(2)** In addition to this fee, the board may also recover from the licensee the costs for transcripts, witness fees and expenses, depositions, and medical examination fees. The board may assess these costs in the manner it deems most equitable.

**4.51(3)** Transcript.

a. The cost of the transcript includes the transcript of the original contested case hearing before the board, as well as transcripts of any other formal proceedings before the board which occur after the notice of the contested case hearing is filed.

b. In the event of an appeal to the full board from a proposed decision, the appealing party shall timely request and pay for the transcript necessary for use in the board appeal process. The board may assess the transcript costs against the licensee pursuant to Iowa Code section 272C.6(6) or against the requesting party pursuant to Iowa Code section 17A.12(7).

**4.51(4)** Witness fees and expenses.

a. The parties in a contested case shall be responsible for any witness fees and expenses incurred by witnesses appearing at the contested case hearing.

b. The board may assess a licensee the witness fees and expenses incurred by witnesses called to testify on behalf of the state of Iowa.

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c. The costs for lay witnesses shall be determined in accordance with Iowa Code section 622.69. For purposes of calculating the mileage expenses allowed under this section, the provisions of Iowa Code section 625.2 do not apply.

d. The costs for expert witnesses shall be determined in accordance with Iowa Code section 622.72. For purposes of calculating the mileage expenses allowed under this section, the provisions of Iowa Code section 625.2 do not apply.

e. The provisions of Iowa Code section 622.74 regarding advance payment of witness fees and the consequences of failure to make such payment are applicable with regard to witnesses who are subpoenaed by either party to testify at the hearing.

f. The board may assess as costs the meal and lodging expenses necessarily incurred by witnesses testifying at the request of the state of Iowa. Meal and lodging costs shall not exceed the reimbursement employees of the state of Iowa receive for these expenses under department of revenue and finance guidelines in effect on January 1, 1994.

**4.51(5) Depositions.**

a. The costs for depositions include the cost of transcripts, the daily charge of the court reporter for attending and transcribing the deposition, and all mileage and travel time charges of the court reporter for traveling to and from the deposition which are charged in the ordinary course of business.

b. Deposition costs for purposes of allocating costs against a licensee include only those deposition costs incurred by the state of Iowa. The licensee is directly responsible for the payment of deposition costs incurred by the licensee.

c. If the deposition is of an expert witness, the deposition cost includes a reasonable expert witness fee. This fee shall not exceed the expert's customary hourly or daily fee, and shall include the time reasonably and necessarily spent in connection with such depositions, including the time spent in travel to and from the deposition, but excluding time spent in preparation for that deposition.

**4.51(6)** Within ten days after conclusion of a contested case hearing and before issuance of any final decision assessing costs, the designated staff person shall certify any reimbursable costs to the board. The designated staff person shall calculate the specific costs, certify the cost calculated, and file the certification as part of the record in the contested case. A copy of the certification shall be served on each party of record at the time of filing.

**4.51(7)** A final decision of the board imposing disciplinary action against a licensee shall include the amount of any fee assessed, which shall not exceed \$75. If the board also assesses costs against the licensee, the final decision shall include a statement of costs delineating each category of costs and the amount assessed. The board shall specify the time period in which the fees and costs must be paid by the licensee.

a. A party must file an objection to any fees or costs imposed in a final decision in order to exhaust administrative remedies. An objection must be filed in the form of an application for rehearing pursuant to Iowa Code section 17A.16(2).

b. The application will be resolved by the board consistent with the procedures for ruling on an application for rehearing. Any dispute regarding the calculations of any fees or costs to be assessed may be resolved by the board upon receipt of the parties' written objections.

**4.51(8)** All fees and costs assessed pursuant to this chapter shall be in the form of a check or money order made pay-

able to the State of Iowa and delivered by the licensee to the professional licensing and regulation division.

**4.51(9)** Failure of a licensee to pay a fee and costs within the time specified in the board's decision shall constitute a violation of an order of the board and shall be grounds for disciplinary action.

**193C—4.52(252J) Certificates of noncompliance.** The board shall suspend or revoke a certificate of licensure upon the receipt of a certificate of noncompliance from the child support recovery unit of the department of human services according to the procedures in Iowa Code chapter 252J. In addition to the procedures set forth in chapter 252J, this rule shall apply.

**4.52(1)** The notice required by Iowa Code section 252J.8 shall be served upon the licensee by restricted certified mail, return receipt requested, or personal service in accordance with Rule of Civil Procedure 56.1. Alternatively, the licensee may accept service personally or through authorized counsel.

**4.52(2)** The effective date of revocation or suspension of a certificate of licensure, as specified in the notice required by section 252J.8, shall be 60 days following service of the notice upon the licensee.

**4.52(3)** The board's executive secretary is authorized to prepare and serve the notice required by section 252J.8 and is directed to notify the licensee that the certificate of licensure will be suspended, unless the license is already suspended on other grounds. In the event a license is on suspension, the executive secretary shall notify the licensee of the board's intent to revoke the certificate of licensure.

**4.52(4)** Licensees shall keep the board informed of all court actions, and all child support recovery unit actions taken under or in connection with chapter 252J, and shall provide the board copies, within seven days of filing or issuance, of all applications filed with the district court pursuant to section 252J.9, all court orders entered in such actions, and withdrawals of certificates of noncompliance by the child support recovery unit.

**4.52(5)** All board fees for license renewal or reinstatement must be paid by licensees before a certificate of licensure will be renewed or reinstated after the board has suspended or revoked a license pursuant to Iowa Code chapter 252J.

**4.52(6)** In the event a licensee files a timely district court action following service of a board notice pursuant to sections 252J.8 and 252J.9, the board shall continue with the intended action described in the notice upon the receipt of a court order lifting the stay, dismissing the action, or otherwise directing the board to proceed. For purposes of determining the effective date of suspension or revocation of a certificate of licensure, the board shall count the number of days before the action was filed and the number of days after the action was disposed of by the court.

**4.52(7)** The board shall notify the licensee in writing through regular first-class mail, or such other means as the board deems appropriate in the circumstances, within ten days of the effective date of the suspension or revocation of a certificate of licensure, and shall similarly notify the licensee or applicant when the certificate of licensure is issued or renewed following the board's receipt of a withdrawal of the certificate of noncompliance.

This rule is intended to implement Iowa Code chapter 252J.

**193C—4.53(261) Suspension or revocation of a certificate of licensure—student loan.** The board shall suspend or

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revoke a certificate of licensure upon receipt of a certificate of noncompliance from the college student aid commission according to the procedures set forth in Iowa Code section 261.126. In addition to those procedures, this rule shall apply.

**4.53(1)** The notice required by Iowa Code section 261.126 shall be served by restricted certified mail, return receipt requested, or by personal service in accordance with the Iowa Rules of Civil Procedure. Alternatively, the licensee may accept service personally or through authorized counsel.

**4.53(2)** The effective date of revocation or suspension of a certificate of licensure, as specified in the notice required by Iowa Code section 261.126, shall be 60 days following service of the notice upon the licensee.

**4.53(3)** The board's executive secretary is authorized to prepare and serve the notice required by Iowa Code section 261.126, and is directed to notify the licensee that the certificate of licensure will be suspended, unless the certificate of licensure is already suspended on other grounds. In the event a certificate of licensure is on suspension, the executive secretary shall notify the licensee of the board's intention to revoke the certificate of licensure.

**4.53(4)** Licensees shall keep the board informed of all court actions and all college student aid commission actions taken under or in connection with Iowa Code chapter 261 and shall provide the board copies, within seven days of filing or issuance, of all applications filed with the district court pursuant to Iowa Code section 261.127, all court orders entered in such actions, and withdrawals of certificates of noncompliance by the college student aid commission.

**4.53(5)** All board fees required for license renewal or license reinstatement must be paid by licensees and all continuing education requirements must be met before a certificate of licensure will be renewed or reinstated after the board has suspended or revoked a license pursuant to Iowa Code chapter 261.

**4.53(6)** In the event a licensee timely files a district court action following service of a board notice pursuant to Iowa Code sections 261.126 and 261.127, the board shall continue with the intended action described in the notice upon the receipt of a court order lifting the stay, dismissing the action, or otherwise directing the board to proceed. For purposes of determining the effective date of the denial of the issuance or renewal of a certificate of licensure, the board shall count the number of days before the action was filed and the number of days after the action was disposed of by the court.

**4.53(7)** The board shall notify the licensee in writing through regular first-class mail, or such other means as the board deems appropriate in the circumstances, within ten days of the effective date of the suspension or revocation of a certificate of licensure, and shall similarly notify the licensee when the certificate of licensure is reinstated following the board's receipt of a withdrawal of the certificate of noncompliance.

This rule is intended to implement Iowa Code chapters 17A, 252J, 272C, and Iowa Code sections 261.126 and 261.127.

**193C—4.54(272C) Impaired licensee review committee.** Pursuant to the authority of Iowa Code section 272C.3(1)"k," the engineering and land surveying examining board establishes the impaired licensee review committee.

**4.54(1) Definitions.** The following definitions are applicable wherever such terminology is used in the rules regarding the impaired licensee review committee.

"Committee" means the impaired licensee review committee.

"Contract" means the written document establishing the terms for participation in the impaired licensee program prepared by the committee.

"Impairment" means an inability to practice with reasonable safety and skill as a result of alcohol or drug abuse, dependency, or addiction, or any neuropsychological or physical disorder or disability.

"Licensee" means a person licensed under Iowa Code chapter 542B.

"Self-report" means the licensee's providing written or oral notification to the board that the practitioner has been or may be diagnosed as having an impairment prior to the board's receiving a complaint or report alleging the same from a second party.

**4.54(2) Purpose.** The impaired licensee review committee evaluates, assists, monitors and, as necessary, makes reports to the board on the recovery or rehabilitation of licensees who self-report impairments.

**4.54(3) Composition of the committee.** The chairperson of the board shall appoint the members of the committee. The membership of the committee includes, but is not limited to:

- a. One licensee, licensed under Iowa Code chapter 542B;
- b. One public member of the engineering and land surveying examining board;
- c. One licensed professional with expertise in substance abuse/addiction treatment programs.

**4.54(4) Eligibility.** To be eligible for participation in the impaired licensee recovery program, a licensee must meet all of the following criteria:

- a. The licensee must self-report an impairment or suspected impairment directly to the office of the board;
- b. The licensee must not have engaged in the unlawful diversion or distribution of controlled substances, or illegal substances;
- c. At the time of the self-report, the licensee must not already be under board order for an impairment or any other violation of the laws and rules governing the practice of the profession;
- d. The licensee has not caused harm or injury to a client;
- e. There is currently no board investigation of the licensee that the committee determines concerns serious matters related to the ability to practice with reasonable safety and skill or in accordance with the accepted standards of care;
- f. The licensee has not been subject to a civil or criminal sanction, or ordered to make reparations or remuneration by a government or regulatory authority of the United States, this or any other state or territory or foreign nation for actions that the committee determines to be serious infractions of the laws, administrative rules, or professional ethics related to the practice of engineering;
- g. The licensee has provided truthful information and fully cooperated with the board or committee.

**4.54(5) Meetings.** The committee shall meet as necessary in order to review licensee compliance, develop consent agreements for new referrals, and determine eligibility for continued monitoring.

**4.54(6) Terms of participation.** A licensee shall agree to comply with the terms for participation in the impaired licensee program established in a contract. Conditions placed upon the licensee and the duration of the monitoring period shall be established by the committee and communicated to the licensee in writing.

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4.54(7) Noncompliance. Failure to comply with the provisions of the agreement shall require the committee to make immediate referral of the matter to the board for the purpose of disciplinary action.

4.54(8) Practice restrictions. The committee may impose restrictions on the licensee's practice as a term of the contract until such time as it receives a report from an approved evaluator that the licensee is capable of practicing with reasonable safety and skill. As a condition of participating in the program, a licensee is required to agree to restricted practice in accordance with the terms specified in the contract. In the event that the licensee refuses to agree to or comply with the restrictions established in the contract, the committee shall refer the licensee to the board for appropriate action.

4.54(9) Limitations. The committee establishes the terms and monitors a participant's compliance with the program specified in the contract. The committee is not responsible for participants who fail to comply with the terms of or successfully complete the impaired licensee program. Participation in the program under the auspices of the committee shall not relieve the board of any duties and shall not divest the board of any authority or jurisdiction otherwise provided. Any violation of the statutes or rules governing the practice of the licensee's profession by a participant shall be referred to the board for appropriate action.

4.54(10) Confidentiality. The committee is subject to the provisions governing confidentiality established in Iowa Code section 272C.6. Accordingly, information in the possession of the board or the committee about licensees in the program shall not be disclosed to the public. Participation in the impaired licensee program under the auspices of the committee is not a matter of public record.

This rule is intended to implement Iowa Code chapter 272C.

ARC 8744A

## ENVIRONMENTAL PROTECTION COMMISSION[567]

### Notice of Intended Action

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)"b."

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code section 455B.133, the Environmental Protection Commission hereby gives Notice of Intended Action to amend Chapter 20, "Scope of Title—Definitions—Forms—Rules of Practice," Chapter 21, "Compliance," Chapter 22, "Controlling Pollution," Chapter 23, "Emission Standards for Contaminants," and Chapter 25, "Measurement of Emissions," Iowa Administrative Code.

Item 1 adds the definition of "preparatory work" to identify what type of work may be conducted prior to issuance of a construction permit, amends the definition of "excess emission" to provide clarification, and updates the Code of Federal Regulations (CFR) reference for "volatile organic compound" to exclude methyl acetate, since it has been delisted by the U.S. Environmental Protection Agency (EPA).

Item 2 makes the "responsible official," rather than the person completing the application, responsible for the application for variance. This revision improves the consistency among requests, claims, and applications required in rules pertaining to air quality.

Item 3 excludes the emission guidelines, national emission standards for hazardous air pollutants, prevention of significant deterioration, and case-by-case MACT from variances.

Item 4 allows for facilities meeting certain conditions to be able to initiate "preparatory work" prior to the issuance of the construction permit.

Item 5 exempts certain pyrolysis cleaning furnaces from the requirement to apply for a construction permit.

Item 6 adds clarification for those facilities wanting to get credit for emission reductions made as a result of the installation of control equipment.

Item 7 broadens the exemption for storage tanks.

Item 8 provides clarification for facilities claiming exemption for the installation of control equipment, or construction, modification or alteration done that does not result in a net emission increase.

Item 9 corrects the name of the air construction permit application and also deletes the requirement for the applications to be prepared by or under the direct supervision of a professional engineer.

Item 10 makes corrections to a CFR reference and brings the reference for 40 CFR Part 51, Appendix W, up to date.

Item 11 updates the reference to 40 CFR Sec. 81.316 for the redesignation of Muscatine County to attainment for sulfur dioxide.

Item 12 updates references to 40 CFR Parts 51 and 63. 40 CFR Part 51 was amended through the delisting of methyl acetate as a volatile organic compound. 40 CFR Part 63 was amended. Three national emission standards for hazardous air pollutants (NESHAPs) were promulgated for flexible polyurethane foam production, pharmaceutical production, and pulp and paper production (noncombustion). Corrections, clarifications, revision of limits and record-keeping and reporting requirements, and addition of standards and definitions for the following NESHAPs: aerospace manufacturing, HON, industrial process cooling towers, petroleum refineries, polymer and resins (group IV), pulp and paper production (noncombustion), secondary lead smelters, wood furniture manufacturing operations, and gasoline distribution (stage 1). The update also includes the promulgation of the NESHAP for primary aluminum reduction plants, which was adopted by reference in a previous rule making.

Item 13 updates references to 40 CFR Parts 60 and 63. 40 CFR Part 60 was amended by corrections and clarifications to the following new source performance standards: municipal solid waste landfills, NO<sub>x</sub> emissions from new fossil fuel fired steam generating units, and residential wood heaters. Revisions and corrections were also made to the guidelines to control existing sources for municipal solid waste landfills. Amendments made to 40 CFR Part 63 are the same as those stated in Item 12.

Items 14 and 15 update the reference to 40 CFR Sec. 81.316. Refer to Item 11.

Item 16 clarifies the certification requirement for obtaining a permit by rule for spray booths by referencing the allowable emission rate of 0.01 gr/scf of exhaust gas.

Item 17 provides clarification to the definition of a "major source." The department has considered fugitive emissions of hazardous air pollutants in determining whether a source exceeds the major source thresholds. This amendment will

## ENVIRONMENTAL PROTECTION COMMISSION[567](cont'd)

make the rules consistent with current implementation practices and federal regulations.

Item 18 removes December 9, 1999, as the deadline for deferment. It also updates references to 40 CFR Parts 60 and 63. Items 12 and 13 address amendments to those parts.

Item 19 updates the reference to 40 CFR Part 60, Subpart AAA.

Item 20 adds ozone to the list of insignificant activities that must be included in the Title V operating permit application, and provides clarification by striking reference to the Title V fee, which is not being required for insignificant activities.

Item 21 adds language to clarify that no Title V fee will be calculated for insignificant activities.

Item 22 updates references to 40 CFR Parts 73 and 76. 40 CFR Part 73 was amended by rescinding some sections that dealt with the allocation of SO<sub>2</sub> allowances and making other minor corrections and revisions. 40 CFR Part 76 was amended by rescinding 40 CFR Sec. 76.16, which covers alternative compliance that states may petition for the owners or operators of certain classes of coal-fired utility units.

Item 23 updates the reference to 40 CFR Sec. 73.10, Tables 2 and 3. Table 2 had minor revisions.

Items 24, 25, and 26 update references to 40 CFR Parts 73 and 76. Refer to Item 22.

Item 27 updates the reference to 40 CFR Part 73. Refer to Item 22.

Item 28 removes the eligibility deadline for voluntary operating permits for those sources subject to 111 and 112 of the Clean Air Act. It also clarifies when these facilities would be required to obtain a Title V operating permit.

Item 29 removes the eligibility deadline for operating permit by rule for small sources for those sources subject to 111 and 112 of the Clean Air Act.

Item 30 provides clarification to the definition of de minimis emissions and to the record-keeping requirements for stationary sources with de minimis emissions.

Item 31 provides clarification to the record-keeping requirements for non-de minimis sources.

Item 32 updates the reference to 40 CFR Part 60. Refer to Item 13.

Item 33 updates the reference to 40 CFR Part 63. Refer to Item 12. It also excludes several sections from the general adoption by reference of 40 CFR Part 63, which belong to Subpart A, General Provisions. The U.S. Environmental Protection Agency has determined that these sections are not delegable to state programs.

Item 34 adopts by reference new NESHAPs that were promulgated for flexible polyurethane foam production, pharmaceutical production, and pulp and paper (noncombustion).

Item 35 updates the reference to 40 CFR Part 60. Refer to Item 13.

Item 36 provides clarification for when existing municipal solid waste landfills, subject to the emission guidelines, are required to submit their Title V application to the Department.

Items 37 and 38 provide minor corrections to the municipal solid waste landfill emission guidelines.

Item 39 makes minor correction in the definition of a hospital/medical/infectious waste incinerator.

Item 40 provides a definition for a bona fide training fire.

Item 41 establishes a default emission standard of 0.1 grain per standard cubic foot of exhaust gas for the emission of particulate matter as a replacement for the allowable rate of emission based on process weight rate.

Item 42 references alternative visible emissions limit procedures for NSPS facilities that cannot meet the specified opacity, but comply with applicable mass emission limits.

Item 43 establishes a maximum sulfur content for Number 1 and Number 2 fuel oil that may be combusted.

Item 44 establishes a maximum sulfur content for natural gas that may be combusted.

Item 45 provides clarification due to Table 1's no longer being used as the default emission standard for particulate matter.

Item 46 establishes a deadline for which quarterly reports of continuous monitoring information are required to be submitted to the Department.

Item 47 updates the reference to 40 CFR Part 60. Refer to Item 13.

Any person may make written suggestions or comments on the proposed amendments on or before April 9, 1999. Written comments should be directed to Scott Vander Hart, Department of Natural Resources, Air Quality Bureau, 7900 Hickman Avenue, Suite 1, Urbandale, Iowa 50322, fax (515)242-5094, or by electronic mail to svander@max.state.ia.us.

A public hearing will be held on April 9, 1999, at 1 p.m. in the East Conference Room, Air Quality Bureau, 7900 Hickman Avenue, Suite 1, Urbandale, Iowa, at which time comments may be submitted orally or in writing.

Any persons who intend to attend a public hearing and have special requirements, such as those related to hearing or mobility should contact the Department of Natural Resources to advise the Department of any specific needs.

These amendments may impact small business.

These amendments are intended to implement Iowa Code section 455B.133.

The following amendments are proposed.

ITEM 1. Amend rule **567—20.2(455B)**, definitions of "Excess emission," and "Volatile organic compound," and add the new definition for "Preparatory work" in alphabetical order, as follows:

"Excess emission" means any emission which exceeds *either* the applicable emission standard prescribed in 567—Chapter 23 or rule 567—22.5(455B), *or any emission limit specified in a permit or order.*

"Preparatory work" means *moving dirt, installing foundations, erecting buildings or locating equipment.*

"Volatile organic compound" means any compound included in the definition of volatile organic compound found at 40 CFR Section 51.100(s) as amended through ~~September 24, 1997~~ April 9, 1998.

ITEM 2. Amend subrule **21.2(1)**, paragraph "a," subparagraph (6), as follows:

(6) Each application shall contain certification by a responsible official as defined in rule 567—22.100(455B) of truth and accuracy. This certification shall state that, based on information and belief formed after reasonable inquiry, the statements and information provided are true and accurate ~~bear the signature of the person making the application, following an affirmation that all statements are true and correct.~~

ITEM 3. Amend **21.2(3)**, paragraph "c," as follows:

c. Variance from any new source performance standards, emission guidelines, national emission standards for hazardous air pollutants, PSD, or a case-by-case MACT are not allowed. No variance shall be granted to a source to which ~~23.1(2) applies~~ 567—22.1(1) "b," 567—22.4(455B),

## ENVIRONMENTAL PROTECTION COMMISSION[567](cont'd)

567—23.1(2), 567—23.1(3), 567—23.1(4), or 567—23.1(5) apply.

ITEM 4. Amend subrule 22.1(1) as follows:

22.1(1) Permit required. Unless exempted in subrule 22.1(2) or to meet the parameters established in paragraph "c" of this subrule, no person shall construct, install, reconstruct or alter any equipment, control equipment or anaerobic lagoon without first obtaining a construction permit, or conditional permit, or permit pursuant to 22.8(455B), or permits required pursuant to 22.4(455B) and 22.5(455B) as required in this subrule. A permit shall be obtained prior to the initiation of construction, installation or alteration of any portion of the stationary source or anaerobic lagoon.

a. Existing sources. Sources built prior to September 23, 1970, are not subject to this subrule, unless they have been modified, reconstructed, or altered on or after September 23, 1970.

b. New or reconstructed major sources of hazardous air pollutants. No person shall construct or reconstruct a major source of hazardous air pollutants, as defined in 40 CFR 63.2 and 40 CFR 63.41 as amended through December 27, 1996, unless a construction permit has been obtained from the department, which requires maximum achievable control technology for new sources to be applied. The permit shall be obtained prior to the initiation of construction or reconstruction of the major source.

c. Preparatory work. New, reconstructed, or modified sources may initiate preparatory work, as defined in 567—20.2(455B), prior to issuance of the construction permit by the department if they meet the conditions stated in subparagraphs (1) through (3) below. The applicant must assume any liability for preparatory work conducted on a source.

(1) The applicant has submitted a construction permit application to the department, as specified in subrule 22.1(3);

(2) The applicant has notified the department of the applicant's intentions in writing five working days prior to conducting preparatory work; and

(3) The source is not subject or potentially subject to 567—22.4(455B), 567—23.1(2), 567—23.1(3), 567—23.1(4), 567—23.1(5), or paragraph "b" of this subrule.

The applicant will be required to make any modification to the source that may be imposed in the issued construction permit. In no case will the applicant be allowed to hook up the equipment to the exhaust stack or operate the equipment in any way that may emit any pollutant prior to receiving a construction permit.

ITEM 5. Amend 22.1(2), paragraph "e," as follows:

e. Incinerators and pyrolysis cleaning furnaces with a rated refuse burning capacity of less than 25 pounds per hour. Pyrolysis cleaning furnace exemption is limited to those units that use only natural gas or propane. Salt bath units are not included in this exemption.

ITEM 6. Amend subrule 22.1(2), paragraph "i," introductory paragraph, as follows:

i. Construction, modification or alteration to equipment which will not result in a net potential emissions increase (as defined in 22.5(1)"f") of more than 1.0 lb/hr of any regulated air pollutant (as defined in 22.100(455B)). Emission reduction achieved through the unpermitted installation of control equipment does not establish a limit to potential emissions.

ITEM 7. Amend subrule 22.1(2), paragraph "m," as follows:

m. Gasoline storage tanks with a capacity of 5,000 gallons or less and an annual throughput less than 40,000 gallons, and coolant, diesel fuel, detergents, fuel oil, LPG, lubricating oils, and other nonhazardous air pollutant emitting storage tanks with a capacity of less than 10,570 gallons and an annual throughput less than 40,000 gallons.

ITEM 8. Amend subrule 22.1(2), paragraph "s," subparagraph (1), as follows:

(1) A detailed emissions estimate of the actual and potential emissions, specifically noting increases or decreases, for the project for all regulated pollutants (as defined in 22.100(455B)), accompanied by documentation of the basis for the emission estimate;

ITEM 9. Amend 22.1(3), paragraph "b," introductory paragraph, as follows:

b. Construction permit applications. Each application for a construction permit shall be submitted to the department on the form "Application for a Permit to Install or Alter Equipment or Control Equipment Air Construction Permit Application." Final plans and specifications for the proposed equipment or related control equipment shall be submitted with the application for a permit and shall be prepared by or under the direct supervision of a professional engineer registered in the state of Iowa in conformance with Iowa Code chapter 542B. The application for a permit to construct shall include the following information:

ITEM 10. Amend subrule 22.4(1) as follows:

22.4(1) Federal rules 40 CFR 52.21(a) (Plan Approval Disapproval), 52.21(q) (Public Participation), 52.21(s) (Environmental Impact Statement), and 52.21(u) (Delegation of Authority) are not adopted by reference. Also, for the purposes of 40 CFR 52.21(1)(l), the department adopts by reference Appendix W to 40 CFR 51, Guideline on Air Quality Models (Revised), as adopted August 9, 1995 March 12, 1996.

ITEM 11. Amend subrule 22.5(2), introductory paragraph, as follows:

22.5(2) Applicability. Areas designated as attainment, nonattainment, or unclassified are as listed in 40 CFR §81.316 as amended through March 10, 1994 March 19, 1998.

ITEM 12. Amend subrule 22.5(4), paragraph "g," as follows:

g. Reduction credits. Credit for an emissions reduction can be claimed to the extent that the administrator and the department have not: (1) relied on it in issuing any permit under regulations approved pursuant to 40 CFR Parts 51 (amended through September 24, 1997 April 9, 1998), 55 (amended through August 4, 1997), 63 (amended through August 11, 1997 December 28, 1998), 70 (amended through November 26, 1997), or 71 (amended through October 22, 1997); (2) relied on it in demonstrating attainment or reasonable further progress; or (3) the reduction is not otherwise required under the Clean Air Act. Incidental emissions reductions which are not otherwise required under the Act shall be creditable as emissions reductions for such purposes if such emissions reductions meet the requirements of subrule 22.5(3).

ITEM 13. Amend subrule 22.5(6), paragraph "c," as follows:

c. State implementation plan, new source performance standards, and emission standards for hazardous air pollutants. A major stationary source or major modification shall meet each applicable emissions limitation under the state im-

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plementation plan and each applicable emissions standard of performance under 40 CFR Parts 60 (amended through ~~June 12, 1997~~ *November 24, 1998*), 61 (amended through October 14, 1997), and 63 (amended through ~~August 11, 1997~~ *December 28, 1998*).

ITEM 14. Amend rule 567—22.6(455B) as follows:

**567—22.6(455B) Nonattainment area designations.** Section 107(d) of the federal Clean Air Act, 42 U.S.C. §7457(d), requires each state to submit to the administrator of the federal Environmental Protection Agency a list of areas, that exceed the ambient air quality standards, that are lower than those standards, or that cannot be classified on the basis of current data. A list of Iowa's nonattainment area designations is found at 40 CFR Part 81.316 as amended through ~~March 10, 1994~~ *March 19, 1998*. The commission uses the document entitled "Criteria for Revising Nonattainment Area Designations" (June 14, 1979) to determine when and to what extent the list will be revised and resubmitted.

ITEM 15. Amend subrule 22.7(1), introductory paragraph, as follows:

**22.7(1) Applicability.** The owner or operator of any source located in an area with attainment or unclassified status (as published at 40 CFR §81.316 amended through ~~March 10, 1994~~ *March 19, 1998*) or located in an area with an approved State Implementation Plan (SIP) demonstrating attainment by the statutory deadline may apply for an alternative set of emission limits if:

ITEM 16. Amend subrule 22.8(1), paragraph "e," as follows:

e. Facilities which claim to be permitted by provisions of this rule must submit to the department a written statement as follows:

"I certify that all paint booths at the facility and listed below are in compliance with all applicable requirements of 567 IAC 22.8(1) and all other applicable requirements, including but not limited to the allowable emission rate for painting and surface coating operations of 0.01 gr/scf of exhaust gas as specified in 567—23.4(13). I understand that this equipment shall be deemed permitted under the terms of 567 IAC 22.8(1) only if all applicable requirements of 567 IAC 22.8(1) are met. This certification is based on information and belief formed after reasonable inquiry; the statements and information in this document are true, accurate, and complete."

The certification must be signed by one of the following individuals.

(1) For corporations, a principal executive officer of at least the level of vice president, or a responsible official as defined at 567 IAC 22.100(455B).

(2) For partnerships, a general partner.

(3) For sole proprietorships, the proprietor.

(4) For municipal, state, county, or other public facilities, the principal executive officer or the ranking elected official.

ITEM 17. Amend rule 567—22.100(455B), definition of "Major source," paragraph "2," as follows:

2. A major source of hazardous air pollutants according to Section 112 of the Act as follows:

For pollutants other than radionuclides, any stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit, in the aggregate, 10 tpy or more of any hazardous air pollutant which has been listed pursuant to Section 112(b) of the Act and these rules or 25 tpy or more of any combination of such hazardous air pollutants. Notwith-

standing the previous sentence, emissions from any oil or gas exploration or production well (with its associated equipment) and emission from any pipeline compressor or pump station shall not be aggregated with emissions from other similar units, whether or not such units are in a contiguous area or under common control, to determine whether such units or stations are major sources.

*For Title V purposes, all fugitive emissions of hazardous air pollutants are to be considered in determining whether a stationary source is a major source.*

For radionuclides, "major source" shall have the meaning specified by the administrator by rule as of January 18, 1994.

ITEM 18. Amend subrule 22.101(2) as follows:

**22.101(2) Title V deferred stationary sources.** The requirement to obtain a Title V permit is deferred for all sources listed in 22.101(1) that are not major sources, affected sources, or solid waste incineration units required to obtain a permit pursuant to Section 129(e) of the Act, until ~~December 9, 1999~~, unless by the final promulgation of a federal standard to which the source is subject under the provisions of 40 CFR Part 60 (as amended through ~~September 15, 1997~~ *November 24, 1998*), 40 CFR Part 63 (as amended through ~~August 11, 1997~~ *December 28, 1998*), or 567—subrule 23.1(5), a source is required to obtain a Title V permit. Each source receiving a deferral under the provisions of this rule shall submit a Title V permit application to the department within 12 months of the date when the requirement to obtain a Title V permit is no longer deferred for that source.

ITEM 19. Amend subrule 22.102(1) as follows:

**22.102(1) Residential wood heaters** required to obtain a Title V permit solely because they are subject to 40 CFR 60, Subpart AAA, as amended to ~~June 29, 1995~~ *November 24, 1998*.

ITEM 20. Amend subrule 22.103(2) as follows:

**22.103(2) Insignificant activities** which must be included in Title V operating permit applications.

a. The following are insignificant if not needed to determine the applicability of or to impose any applicable requirement and if the total plantwide potential emissions from these insignificant activities do not exceed the level specified in paragraph 22.103(2)"b."

(1) An emission unit which has the potential to emit less than:

4000 lbs per year of carbon monoxide,

1600 lbs per year of nitrogen oxides,

1600 lbs per year of sulfur dioxides,

1000 lbs per year of particulate matter,

600 lbs per year of PM-10,

1600 lbs per year of volatile organic compounds,

1600 lbs per year of ozone,

24 lbs per year of lead,

120 lbs per year of fluorides,

280 lbs per year of sulfuric acid mists,

400 lbs per year of total reduced sulfur compounds,

20 lbs per year of any hazardous air pollutant except high-risk pollutants, or

20 lbs per year of any high-risk air pollutant divided by the weighting factor established in the definition of "High risk pollutant" in 567—22.100(455B).

(2) A storage tank which contains no volatile organic compounds above a vapor pressure of 0.75 pounds per square inch at the normal operating temperature of the tank when other emissions from the tank do not exceed the levels in subparagraph 22.103(2)"a"(1).

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(3) Insignificant activities which are exempted because of size or production rate must be listed in the application.

b. Emission rate in tons per year:

Carbon monoxide	100.0
Nitrogen dioxide	40.0
Sulfur dioxide	40.0
Particulate matter	25.0
PM-10	15.0
Volatile organic compounds	40.0
Ozone	40.0
Lead	0.6
Fluorides	3.0
Sulfuric acid mist	7.0
Total reduced sulfur compounds	10.0

Sum of hazardous air pollutants (aggregate of the weighted high-risk and non-high-risk hazardous air pollutants) 0.5

c. Regardless of the classification of an activity as insignificant, an application for a Title V operating permit cannot omit information needed to determine the applicability of, or to impose, any applicable requirement or to evaluate the fee amount required pursuant to rule 22.106(455B).

d. The following are insignificant if not needed to determine the applicability of or to impose any applicable requirement.

(1) Fuel-burning equipment for indirect heating and re-heating furnaces using natural or liquefied petroleum gas with a capacity of less than 10 million Btu per hour input per combustion unit.

(2) Fuel-burning equipment for indirect heating with a capacity of less than 1 million Btu per hour input per combustion unit when burning coal, untreated wood, or fuel oil.

(3) Incinerators with a rated refuse burning capacity of less than 25 pounds per hour.

(4) Gasoline, diesel fuel, or oil storage tanks with a capacity of 1,000 gallons or less and an annual throughput of less than 40,000 gallons.

ITEM 21. Amend rule 567—22.106(455B) by adding the following **new** subrule:

**22.106(7)** Insignificant activities. No fee shall be required to be paid for insignificant activities, as defined in rule 22.103(455B).

ITEM 22. Amend rule 567—22.120(455B) by amending the following definitions:

“Acid rain program” means the national sulfur dioxide and nitrogen oxides air pollution control and emissions reduction program established in accordance with Title IV of the Act, rules 22.120(455B) to 22.147(455B), 40 CFR Parts 72, ~~73~~, 75, 77, 78 as amended through October 24, 1997, 73 as amended through September 28, 1998, and 76 as amended through December 19, 1996 May 1, 1998, and regulations implementing Sections 407 and 410 of the Act.

“Authorized account representative” means a responsible natural person who is authorized, in accordance with 40 CFR Part 73 as amended through October 24, 1997 September 28, 1998, to transfer and otherwise dispose of allowances held in an allowance tracking system general account; or, in the case of a unit account, the designated representative of the owners and operators of the affected unit.

“Compliance certification” means a submission to the department or the administrator that is required by rules 22.120(455B) to 22.147(455B), by 40 CFR Parts 72, ~~73~~, 75, 77, 78 as amended through October 24, 1997, 73 as amended through September 28, 1998, and 76 as amended through December 19, 1996 May 1, 1998, or by regulations imple-

menting Sections 407 or 410 of the Act to report an affected source or an affected unit's compliance or noncompliance with a provision of the acid rain program and that is signed and verified by the designated representative in accordance with Subpart B of 40 CFR Part 72 as amended through October 24, 1997, rules 22.146(455B) and 22.147(455B), and the acid rain program regulations generally.

ITEM 23. Amend subrule 22.122(1), paragraph “b,” as follows:

b. An existing unit that is identified in Table 2 or 3 of 40 CFR 73.10 as amended through October 24, 1997 September 28, 1998, and any other existing utility unit, except a unit under subrule 22.122(2).

ITEM 24. Amend subrule 22.125(7), paragraph “g,” as follows:

g. Each violation of a provision of rules 22.120(455B) to 22.147(455B) and 40 CFR Parts 72, ~~73~~, 75, 77, 78 as amended through October 24, 1997, 73 as amended through September 28, 1998, and 76 as amended through December 19, 1996 May 1, 1998, and regulations implementing Sections 407 and 410 of the Act by an affected source or affected unit, or by an owner or operator or designated representative of such source or unit, shall be a separate violation of the Act.

ITEM 25. Amend rule 567—22.134(455B) as follows:

**567—22.134(455B) Acid rain permit shield.** Each affected unit operated in accordance with the acid rain permit that governs the unit and that was issued in compliance with Title IV of the Act, as provided in rules 22.120(455B) to 22.146(455B), rule 567—25.2(455B), or 40 CFR Parts 72, ~~73~~, 75, 77, 78 as amended through October 24, 1997, 73 as amended through September 28, 1998, and 76 as amended through December 19, 1996 May 1, 1998, and the regulations implementing Section 407 of the Act, shall be deemed to be operating in compliance with the acid rain program, except as provided in paragraph 22.125(7)“f.”

ITEM 26. Amend subrule 22.139(1) as follows:

**22.139(1)** Appeals of the acid rain portion of a Title V operating permit issued by the department that do not challenge or involve decisions or actions of the administrator under 40 CFR Parts 72, ~~73~~, 75, 77, 78 as amended through October 24, 1997, 73 as amended through September 28, 1998, and 76 as amended through December 19, 1996 May 1, 1998, and Sections 407 and 410 of the Act and regulations implementing Sections 407 and 410 shall be conducted according to the procedures in Iowa Code chapter 17A and 561—Chapter 7, as adopted by reference at 567—Chapter 7. Appeals of the acid rain portion of such a permit that challenge or involve such decisions or actions of the administrator shall follow the procedures under 40 CFR Part 78 as amended through October 24, 1997, and Section 307 of the Act. Such decisions or actions include, but are not limited to, allowance allocations, determinations concerning alternative monitoring systems, and determinations of whether a technology is a qualifying repowering technology.

ITEM 27. Amend subrule 22.144(1) as follows:

**22.144(1)** Upon recordation by the administrator under 40 CFR Part 73 as amended through October 24, 1997 September 28, 1998, all allowance allocations to, transfers to, and deductions from an affected unit's allowance tracking system account; and

ITEM 28. Amend subrule 22.201(2), paragraph “b,” as follows:

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b. Sources which are not major sources but subject to a standard or other requirement under 567—subrule 23.1(2) (standards of performance for new stationary sources) or Section 111 of the Act; or 567—subrule 23.1(3) (emission standards for hazardous air pollutants), 567—subrule 23.1(4) (emission standards for hazardous air pollutants for source categories) or Section 112 of the Act are eligible for a voluntary operating permit ~~only until December 9, 1999, unless by final promulgation of a federal standard to which the source is subject under 40 CFR Part 60 or 40 CFR Part 63, a source is required to obtain a Title V permit.~~ These sources shall be required to obtain a Title V operating permit when the deferment period specified in 567—subrule 22.101(2) has expired ~~or as required by no longer applies, or a standard is promulgated under 40 CFR Part 60 or 63 to which the source is subject.~~

ITEM 29. Amend subrule 22.300(3), paragraphs “b” and “c,” as follows:

b. Sources which meet the registration criteria established in 22.300(2)“a” and meet all applicable requirements of rule 22.300(455B), and are subject to a standard or other requirement under 567—subrule 23.1(2) (standards of performance for new stationary sources) or Section 111 of the Act are eligible for an operating permit by rule for small sources ~~only until five years from December 9, 1999.~~ These sources shall be required to obtain a Title V operating permit when the deferment period specified in subrule 22.101(2) has expired ~~or no longer applies.~~ Sources subject to standards contained in Section 111 or 112 of the Act shall not be eligible to obtain a ~~voluntary~~ *small source* operating permit unless they are also exempted from Title V by rule 22.102(455B).

c. Sources which meet the registration criteria established in 22.300(2)“a” and meet all applicable requirements of rule 22.300(455B), and are subject to a standard or other requirement under 567—subrule 23.1(3) (emissions standards for hazardous air pollutants), 567—subrule 23.1(4) (emissions standards for hazardous air pollutants for source categories) or Section 112 of the Act are eligible for an operating permit by rule for small sources ~~only until five years from December 9, 1999, or until the final promulgation of a federal standard under 40 CFR Part 60 or 40 CFR Part 63 to which the source is subject, whichever is earlier.~~ These sources shall be required to obtain a Title V or voluntary operating permit when the deferment period specified in subrule 22.101(2) has expired or no longer applies.

ITEM 30. Amend subrule 22.300(4), paragraph “b,” as follows:

b. Record keeping for de minimis sources. Upon registration with the department the owner or operator of a stationary source eligible to register for an operating permit by rule for small sources shall comply with all applicable record-keeping requirements of this rule. The record-keeping requirements of this rule shall not replace any record-keeping requirement contained in ~~an operating or a~~ construction permit or in a local, state, or federal rule or regulation.

(1) De minimis sources shall *always* maintain an annual log of each raw material used and its amount, ~~and each product produced and its production rate.~~ The annual log and all related material safety data sheets (MSDS) for all materials shall be maintained for a period of not less than *the most current* five years. The annual log will begin on the date the small source operating permit application is submitted, then on an annual basis, based on a calendar year.

(2) Within 30 days of a written request by the state or the U.S. EPA, the owner or operator of a stationary source not maintaining records pursuant to subrule 22.300(7) shall demonstrate that the stationary source’s emissions or throughput is not in excess of the applicable quantities set forth in paragraph “a” above.

ITEM 31. Amend subrule 22.300(7) as follows:

**22.300(7)** Record-keeping requirements for non-de minimis sources. Upon registration with the department the owner or operator of a stationary source eligible to register for an operating permit by rule for small stationary sources shall comply with all applicable record-keeping requirements in this rule. The record-keeping requirements of this rule shall not replace any record-keeping requirement contained in any operating permit, a construction permit, or in a local, state, or federal rule or regulation. *The owner or operator of the stationary source may submit an alternative record-keeping proposal in writing to the department if the source feels an alternative record will more accurately demonstrate compliance with 22.300(6) “a.” The department must approve, deny or modify the proposal and notify the source of its decision in writing. The source will not have a complete registration until the department has taken action on the proposal.*

a. A stationary source previously covered by the provisions in 22.300(4) shall comply with the applicable provisions of subrule 22.300(7) (record-keeping requirements) and subrule 22.300(8) (reporting requirements) if the stationary source exceeds the quantities specified in paragraph 22.300(4)“a.”

b. The owner or operator of a stationary source subject to this rule shall keep and maintain records, *as specified in 22.300(7)“c” below*, for each permitted emission unit *and each piece of emission control equipment* sufficient to determine actual emissions. Such information shall be ~~summarized in a monthly log~~, maintained on site for five years, and be made available to local, state, or U.S. EPA staff upon request.

c. Record-keeping requirements for emission units and emission control ~~units equipment.~~ *Record-keeping requirements for emission units are specified below in 22.300(7)“c”(1) through 22.300(7)“c”(4). Record-keeping requirements for emissions control equipment are specified in 22.300(7)“c”(5).*

(1) Coating/solvent emission unit. The owner or operator of a stationary source subject to this rule that contains a coating/solvent emission unit not permitted under 22.8(1) (permit by rule for spray booths) or uses a coating, solvent, ink or adhesive shall keep and maintain the following records:

1. A current list of all coatings, solvents, inks and adhesives in use. This list shall include: ~~information on the manufacturer, brand, product name or code, VOC content in grams per liter or pounds per gallon, hazardous air pollutant content in grams per liter or pounds per gallon, or manufacturer’s product specifications, material VOC content reports or laboratory analyses providing this information; material safety data sheets (MSDS), manufacturer’s product specifications, and material VOC content reports for each solvent (including solvents used in cleanup and surface preparation), coating, ink, and adhesive used showing at least the product manufacturer, product name and code, VOC and hazardous air pollutant content.~~

2. A description of any equipment used during and after coating/solvent application, including type, make and model; maximum design process rate or throughput; *and* control

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device(s) type and description (if any); ~~and a description of the coating/solvent application/drying method(s) employed;~~

3. A monthly log of the consumption of each solvent (including solvents used in cleanup and surface preparation), coating, ink, and adhesive used; and

4. All purchase orders, invoices, and other documents to support information in the monthly log.

(2) Organic liquid storage unit. The owner or operator of a stationary source subject to this rule that contains an organic liquid storage unit shall keep and maintain the following records:

1. A monthly log identifying the liquid stored and monthly throughput; and

2. Information on the tank design and specifications including control equipment.

(3) Combustion emission unit. The owner or operator of a stationary source subject to this rule that contains a combustion emission unit shall keep and maintain the following records:

1. Information on equipment type, make and model, maximum design process rate or maximum power input/output, minimum operating temperature (for thermal oxidizers) and capacity, ~~control device(s) type and description (if any)~~ and all source test information; and

2. A monthly log of ~~hours of operation~~, fuel type, fuel usage, fuel heating value (for nonfossil fuels; in terms of Btu/lb or Btu/gal), and percent sulfur for fuel oil and coal, ~~and percent nitrogen for coal.~~

(4) Emission control unit. The owner or operator of a stationary source subject to this rule that contains an emission control unit shall keep and maintain the following records:

1. Information on equipment type and description, make and model, and emission units served by the control unit;

2. Information on equipment design including, where applicable: pollutant(s) controlled; control effectiveness; ~~and maximum design or rated capacity; inlet and outlet temperatures, and concentrations for each pollutant controlled; catalyst data (type, material, life, volume, space velocity, ammonia injection rate and temperature); baghouse data (design, cleaning method, fabric material, flow rate, air/cloth ratio); electrostatic precipitator data (number of fields, cleaning method, and power input); scrubber data (type, design, sorbent type, pressure drop); other design data as appropriate including any available;~~ all source test information ~~and manufacturer's design/repair/maintenance manual;~~ and

3. A monthly log of hours of operation including notation of any control equipment breakdowns, upsets, repairs, maintenance and any other deviations from design parameters.

(5) General emission unit. The owner or operator of a stationary source subject to this rule that contains an emission unit not included in subparagraph (1), (2), or (3) above shall keep and maintain the following records:

1. Information on the process and equipment including the following: equipment type description, make and model; ~~and maximum design process rate or throughput; control device(s) type and description (if any);~~

2. A monthly log of operating hours, ~~and each raw material used and its amount, each product produced and its production rate;~~ and

3. Purchase orders, invoices, ~~and or~~ other documents to support information in the monthly log.

ITEM 32. Amend subrule 23.1(2), introductory paragraph, as follows:

23.1(2) New source performance standards. The federal standards of performance for new stationary sources, as de-

defined in 40 Code of Federal Regulations Part 60 as amended or corrected through ~~September 15, 1997~~ *November 24, 1998*, and 40 CFR Part 503 as adopted on October 25, 1995, are adopted by reference, except §60.530 through §60.539b, and shall apply to the following affected facilities. The corresponding 40 CFR Part 60 subpart designation is in parentheses. Reference test methods (Appendix A), performance specifications (Appendix B), determination of emission rate change (Appendix C), quality assurance procedures (Appendix F) and the general provisions (Subpart A) of 40 CFR Part 60 also apply to the affected facilities.

ITEM 33. Amend subrule 23.1(4), introductory paragraph, as follows:

23.1(4) Emission standards for hazardous air pollutants for source categories. The federal standards for emissions of hazardous air pollutants for source categories, 40 Code of Federal Regulations Part 63 as amended through ~~August 11, 1997~~ *December 28, 1998*, are adopted by reference, except 40 CFR §§63.6(g) and (h)(9), 63.7(e)(2)(ii) and (f), 63.8(f), 63.10(f), 63.12, 63.14, 63.15, 63.40(a), 63.42(a), (b), 63.43(c), (f)-(m), 63.560(b), (e)(2), (3), and 63.562(c), (d), and shall apply to the following affected facilities. The corresponding 40 CFR Part 63 Subpart designation is in parentheses. 40 CFR Part 63 Subpart B incorporates the requirements of Clean Air Act Sections 112(g) and 112(j) and does not adopt standards for a specific affected facility. Test methods (Appendix A), sources defined for early reduction provisions (Appendix B), and determination of the fraction biodegraded ( $F_{bio}$ ) in the biological treatment unit (Appendix C) of Part 63 also apply to the affected activities or facilities. For the purpose of this subrule "Hazardous air pollutant" has the same meaning found in 567—22.100(455B). For the purposes of this subrule a "major source" means any stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit considering controls, in the aggregate, 10 tons per year or more of any hazardous air pollutant or 25 tons per year or more of any combination of hazardous air pollutants, unless a lesser quantity is established, or in the case of radionuclides, where different criteria are employed. For the purposes of this subrule an "area source" means any stationary source of hazardous air pollutants that is not a major stationary source as defined in this paragraph. Paragraph 23.1(4)"a," general provisions (Subpart A) of Part 63, shall apply to owners or operators who are subject to subsequent subparts of 40 CFR 63 (except when otherwise specified in a particular subpart or in a relevant standard) as adopted by reference below.

ITEM 34. Amend subrule 23.1(4) by adding the following new paragraphs:

s. Emission standards for hazardous air pollutants for pulp and paper (noncombustion). These standards apply to pulping and bleaching process sources at kraft, soda, sulfite, and stand-alone semichemical pulp mills. Affected sources include pulp mills and integrated mills (mills that manufacture pulp and paper/paperboard) that chemically pulp wood fiber (using kraft, sulfite, soda, or semichemical methods); pulp secondary fiber; pulp nonwood fiber; and mechanically pulp wood fiber. (Subpart S)

bg. Emission standards for hazardous air pollutants for pharmaceutical manufacturing. These standards apply to producers of finished dosage forms of drugs, for example, tablets, capsules, and solutions, that contain an active ingredient generally, but not necessarily, in association with inactive ingredients. Pharmaceuticals include components

## ENVIRONMENTAL PROTECTION COMMISSION[567](cont'd)

whose intended primary use is to furnish pharmacological activity or other direct effect in the diagnosis, cure, mitigation, treatment, or prevention of disease, or to affect the structure or any function of the body of humans or other animals. The regulations do not apply to research and development facilities. (Subpart GGG)

bi. Emission standards for hazardous air pollutants for flexible polyurethane foam production. These standards apply to producers of slabstock, molded, and rebond flexible polyurethane foam. The regulations do not apply to processes dedicated exclusively to the fabrication (i.e., gluing or otherwise bonding foam pieces together) of flexible polyurethane foam or to research and development. (Subpart III)

ITEM 35. Amend subrule 23.1(5), introductory paragraph, as follows:

23.1(5) Emission guidelines. The emission guidelines and compliance times for existing sources, as defined in 40 Code of Federal Regulations Part 60 as amended through ~~September 15, 1997~~ November 24, 1998, shall apply to the following affected facilities. The corresponding 40 CFR Part 60 subpart designation is in parentheses. The control of the designated pollutants will be in accordance with federal standards established in Sections 111 and 129 of the Act and 40 CFR Part 60, Subpart B (Adoption and Submittal of State Plans for Designated Facilities), and the applicable subpart(s) for the existing source. Reference test methods (Appendix A), performance specifications (Appendix B), determination of emission rate change (Appendix C), quality assurance procedures (Appendix F) and the general provisions (Subpart A) of 40 CFR Part 60 also apply to the affected facilities.

ITEM 36. Amend subrule 23.1(5), paragraph "a," subparagraph (2), by adding the following new numbered paragraph "3":

3. For MSW landfills subject to 567—subrule 22.101(1) only because of applicability to subparagraph 23.1(5)"a"(2), the following apply for obtaining and maintaining a Title V operating permit under 567—22.104(455B):

The owner or operator of an MSW landfill with a design capacity less than 2.5 million megagrams or 2.5 million cubic meters is not required to obtain an operating permit for the landfill.

The owner or operator of an MSW landfill with a design capacity greater than or equal to 2.5 million megagrams and 2.5 million cubic meters on or before June 22, 1998, becomes subject to the requirements of 567—subrule 22.105(1) on September 20, 1998. This requires the landfill to submit a Title V permit application to the Air Quality Bureau, Iowa Department of Natural Resources, no later than September 20, 1999.

The owner or operator of a closed MSW landfill does not have to maintain an operating permit for the landfill if either of the following conditions are met: the landfill was never subject to the requirement for a control system under subparagraph 23.1(5)"a"(3); or the owner or operator meets the conditions for control system removal specified in 40 CFR § 60.752(b)(2)(v).

ITEM 37. Amend subrule 23.1(5), paragraph "a," subparagraph (3), paragraphs "1" and "2," as follows:

1. MSW landfill emissions at each MSW landfill meeting the conditions below shall be controlled. *A design capacity report must be submitted to the director by November 18, 1997.*

The landfill has accepted waste at any time since November 8, 1987, or has additional design capacity available for future waste deposition.

The landfill has a design capacity greater than or equal to 2.5 million megagrams or 2.5 million cubic meters, ~~which must be provided to the administrator in a design capacity report by November 18, 1997.~~ The landfill may calculate design capacity in either megagrams or cubic meters for comparison with the exemption values. Any density conversions shall be documented and submitted with the report. *All calculations used to determine the maximum design capacity must be included in the design capacity report.*

The landfill has a nonmethane organic compound (NMOC) emission rate of 50 megagrams per year or more. If the MSW landfill's design capacity exceeds the established thresholds in 23.1(5)"a"(3)"1," the NMOC emission rate calculations must be provided with the design capacity report.

2. *The planning and installation of a collection and control system shall meet the conditions provided in 40 CFR 60.752(b)(2)(ii) at each MSW landfill meeting the conditions in 23.1(5)"a"(3)"1."*

ITEM 38. Amend subrule 23.1(5), paragraph "a," subparagraph (6), numbered paragraph "1," as follows:

1. Except as provided for under 23.1(5)"a"(6)"2," planning, awarding of contracts, and installation of MSW landfill air emission collection and control equipment capable of meeting the emission guidelines established under 23.1(5)"a"(3) shall be accomplished ~~by February 20, 2000~~ *within 30 months after the date the initial NMOC emission rate report shows NMOC emissions greater than or equal to 50 megagrams per year.*

ITEM 39. Amend subrule 23.1(5), paragraph "b," subparagraph (1), definition of "Hospital/medical/infectious waste incinerator," as follows:

"Hospital/medical/infectious waste incinerator" or "HMIWI" means any device that combusts any amount or combination of hospital or medical/~~or~~ infectious waste.

ITEM 40. Amend subrule 23.2(3), paragraph "g," as follows:

g. Training fires. Fires set for the purpose of bona fide training of public or industrial employees in firefighting methods, provided that written notification is postmarked or delivered to the director at least ten working days before such action commences. Notification shall be made in accordance with 40 CFR Section 61.145, "Standard for demolition and renovation," of the asbestos National Emission Standards for Hazardous Air Pollutants, as amended through January 16, 1991. All asbestos-containing materials shall be removed prior to the training fire. Asphalt shingles may be burned in a training fire only if the notification to the director contains testing results indicating that none of the layers of the asphalt shingles contain asbestos. Each fire department may conduct no more than two training fires per calendar year where asphalt roofing has not been removed, provided that for each of those training fires the asphalt roofing material present has been tested to ensure that it does not contain asbestos. Rubber tires may not be burned during a training fire. *For the purposes of this paragraph a "bona fide training fire" shall be considered a training fire conducted on a standing structure in accordance with National Fire Protection Association (NFPA) 1403, Standard on Live Fire Training Evolutions in Structures (1992 Edition).*

## ENVIRONMENTAL PROTECTION COMMISSION[567](cont'd)

ITEM 41. Amend subrule 23.3(2), paragraph "a," as follows:

a. ~~Process weight~~ *General emission rate.*

(1) ~~The After July 21, 1999, the emission of particulate matter from any process shall not exceed the amount determined from Table I, except as provided in 567—21.2(455B), 23.1(455B), 23.4(455B), and 567—Chapter 24. If the director determines that a process complying with the emission rates specified in Table I is causing or will cause air pollution in a specific area of the state, an emission standard of 0.1 grain per dry standard cubic foot of exhaust gas may be imposed, except as provided in 567—21.2(455B), 23.1(455B), 23.4(455B), and 567—Chapter 24.~~

(2) *For sources permitted prior to July 21, 1999, the emission of particulate matter from any process shall not exceed the amount established in the permit, if the amount was determined from Table 1, based on an emission standard of 0.1 grain per standard cubic foot of exhaust gas, or established from standards provided in 23.1(455B) and 23.4(455B).*

ITEM 42. Amend subrule 23.3(2), paragraph "d," by adding the following new subparagraph (7):

(7) Alternate visible emissions limit for NSPS sources. If an emission unit can operate in compliance with the mass emission limits specified in the standards adopted in subrule 23.1(2), and exceeds the visible emissions limit established for that emission unit, then the owner or operator may request an alternate visible emissions limit by following the procedure outlined in 40 CFR Section 60.11, as amended through February 24, 1997.

ITEM 43. Amend subrule 23.3(3), paragraph "b," as follows:

b. Sulfur dioxide from use of liquid fuels.

(1) *No person shall allow, cause, or permit the combustion of number 1 or number 2 fuel oil exceeding a sulfur content of 0.5 percent by weight.*

(2) No person shall allow, cause, or permit the emission of sulfur dioxide into the atmosphere in an amount greater than 2.5 pounds of sulfur dioxide, replicated maximum three-hour average, per million Btu of heat input from a liquid fuel-burning unit.

(3) Notwithstanding this paragraph, a fossil fuel-fired steam generator to which 23.1(2)"a," 23.1(2)"z" or 23.1(2)"ccc" applies shall comply with 23.1(2)"a," 23.1(2)"z" or 23.1(2)"ccc."

ITEM 44. Amend subrule 23.3(3) by relettering paragraphs "c," "d," and "e" as paragraphs "d," "e," and "f," respectively, and adding new paragraph "c" as follows:

c. Sulfur dioxide from use of natural gas. No person shall allow, cause, or permit the combustion of natural gas exceeding a sulfur content of 25 grains per 100 cubic feet of gas.

ITEM 45. Amend subrule 23.4(4), as follows:

**23.4(4)** Cupolas for metallurgical melting. The emissions of particulate matter from all new foundry cupolas, and from all existing foundry cupolas with a process weight rate in excess of 20,000 pounds per hour, shall not exceed the amount ~~determined from Table I of these rules, specified in paragraph 23.3(2) "a,"~~ except as provided in 567—Chapter 24.

The emissions of particulate matter from all existing foundry cupolas with a process weight rate less than or equal to 20,000 pounds per hour shall not exceed the amount deter-

mined from Table II of these rules, except as provided in 567—Chapter 24.

ITEM 46. Amend subrule 25.1(6) as follows:

**25.1(6)** Reporting of continuous monitoring information. The owner or operator of any source affected by 25.1(1) to 25.1(4) shall ~~report~~ *provide quarterly reports* to the director, *no later than 30 calendar days following the end of the calendar quarter*, on forms provided by the director, ~~on a quarterly basis, all~~ *All* periods of recorded emissions in excess of the applicable standards, the results of all calibrations and zero checks and performance evaluations occurring during the reporting period, and any periods of monitoring equipment malfunctions or source upsets and any apparent reasons for these malfunctions and upsets *shall be included in the report.*

ITEM 47. Amend subrule 25.1(10), paragraph "a," as follows:

a. An affected source is subject to a new source performance standard promulgated in 40 CFR Part 60 as amended through ~~September 15, 1997~~ *November 24, 1998.*

**ARC 8757A**

## INSPECTIONS AND APPEALS DEPARTMENT[481]

### Notice of Intended Action

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)"b."

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code section 135B.7, the Department of Inspections and Appeals gives Notice of Intended Action to amend Chapter 51, "Hospitals," Iowa Administrative Code.

The amendments modify food and nutrition services rules by updating references to the United States Food and Drug Administration's Food Code.

Interested persons may make written comments or suggestions on the proposed amendments on or before March 30, 1999. Written materials should be addressed to the Director, Department of Inspections and Appeals, Lucas State Office Building, East Twelfth and Grand Avenue, Des Moines, Iowa 50319-0083, or faxed to (515)242-6863. E-mail may be sent to [rwalsh@max.state.ia.us](mailto:rwalsh@max.state.ia.us).

These amendments are intended to implement Iowa Code chapter 135B.

The following amendments are proposed.

ITEM 1. Amend subrule 51.20(2) as follows:

Amend paragraph "j," subparagraph (2), as follows:

(2) Dry or staple items shall be stored at least six inches (15 cm) above the floor in a ventilated room, not subject to sewage or wastewater backflow, contamination by condensation, leakage, rodents or vermin in accordance with the Food Code, 1995 1997 Edition, U.S. Department of Health and Human Services, Public Health Service, Food and Drug Administration, Washington, D.C. 20204.

Amend paragraph "k," introductory paragraph, as follows:

## INSPECTIONS AND APPEALS DEPARTMENT[481](cont'd)

k. Sanitation. Unless otherwise indicated, the sanitary provisions of the 1995 1997 Food Code shall apply.

ITEM 2. Amend subrule 51.20(4), paragraph "a," subparagraph (3), as follows:

(3) Fixed and mobile equipment in the food service area shall meet the American Institute of Architects Guidelines for Construction and Equipment of Hospital and Medical Facilities, 1996-1997 Edition, and the 1995 1997 Food Code. Equipment shall be located to ensure sanitary and safe operation, and shall be of sufficient size to handle the needs of the hospital.

## ARC 8747A

NATURAL RESOURCE  
COMMISSION[571]

## Notice of Intended Action

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)"b."

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code subsection 455A.5(6), the Natural Resource Commission hereby gives Notice of Intended Action to amend Chapter 51, "Game Management Areas," Iowa Administrative Code.

These rules give the regulations for public use of state game management areas. These amendments prohibit a boat from being anchored away from shore and left unattended unless it is attached to a legal buoy and delete Cayler Prairie from wildlife areas in Dickinson County where only nontoxic shot can be used.

Any interested person may make written suggestions or comments on the proposed amendments on or before April 17, 1999. Such written materials should be directed to the Wildlife Bureau Chief, Department of Natural Resources, Wallace State Office Building, Des Moines, Iowa 50319-0034; fax (515)281-6794. Persons who wish to convey their views orally should contact the Division at (515)281-6156 or at the Division offices on the fourth floor of the Wallace State Office Building.

There will be a public hearing on April 17, 1999, at 10 a.m. at the State Forest Nursery, 2404 South Duff, Ames, Iowa, at which time persons may present their views either orally or in writing. At the hearing, persons will be asked to give their names and addresses for the record and to confine their remarks to the subject of the amendments.

Any persons who intend to attend a public hearing and have special requirements such as hearing or mobility impairments should contact the Department of Natural Resources and advise of specific needs.

These amendments are intended to implement Iowa Code sections 456A.24 and 481A.6.

The following amendments are proposed.

ITEM 1. Amend subrule 51.5(2), paragraph "b," as follows:

b. Prohibited use. Portable blinds shall be prohibited from one-half hour after sunset until midnight each day. Portable blinds which are built on, or are part of, a boat shall be considered as removed from an area when the boat and blind are tied up or moored at an approved access site. *No boat*

*shall be anchored away from shore and left unattended unless it is attached to a legal buoy.*

ITEM 2. Amend rule 571—51.9(481A) as follows:

**571—51.9(481A) Use of nontoxic shot on wildlife areas.** It shall be unlawful to hunt any migratory game bird or resident game or furbearers, except deer and turkeys, or target shoot with a shotgun while having in one's possession any shot other than nontoxic shot approved by the U.S. Fish and Wildlife Service on the following wildlife areas:

<u>County</u>	<u>Wildlife Area</u>
Boone	Harrier Marsh
Buena Vista	All state and federal areas except Bluebird Access
Cerro Gordo	All state and federal areas
Clay	All state and federal areas except Burr Access, Dry Mud Lake, Little Sioux, Highbridge, Fen Valley, and the Ocheyedon wildlife area target shooting range
Dickinson	All state and federal areas except <del>Cayler Prairie</del> and the Spring Run target shooting range
Emmet	All state and federal areas except Birge Lake, Grass Lake, Ryan Lake, and the East Des Moines River Access
Greene	All state and federal areas except Rippey Access and McMahan Access
Guthrie	McCord Pond, Lakin Slough and Bays Branch, except the target shooting range at Bays Branch
Hamilton	Little Wall Lake, Gordon Marsh and Bauer Slough
Hancock	All state and federal areas except Schuld and Goodell
Humboldt	All state and federal areas except Bradgate Access and Willows Access
Kossuth	All state and federal areas except Seneca Access
Osceola	All state and federal areas
Palo Alto	All state and federal areas
Pocahontas	All state and federal areas except Kalsow Prairie
Polk	Paul Errington Marsh
Sac	All state and federal areas except White Horse Access and Sac City Access
Winnebago	All state and federal areas
Worth	All state and federal areas except Brights Lake
Wright	All state and federal areas except White Tail Flats

ARC 8748A

NATURAL RESOURCE COMMISSION[571]

Notice of Intended Action

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)“b.”

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code subsection 455A.5(6), the Natural Resource Commission hereby gives Notice of Intended Action to amend Chapter 52, “Wildlife Refuges,” Iowa Administrative Code.

This amendment adds the Chichaqua Area and the Cottonwood Area to the list of wildlife refuges.

Any interested person may make written suggestions or comments on the proposed amendment on or before April 23, 1999. Such written materials should be directed to the Wildlife Bureau Chief, Department of Natural Resources, Wallace State Office Building, Des Moines, Iowa 50319-0034; fax (515)281-6794. Persons who wish to convey their views orally should contact the Wildlife Bureau at (515)281-6156 or the Wildlife Bureau offices on the fourth floor of the Wallace State Office Building.

There will be a public hearing on April 17, 1999, at 10 a.m. at the State Forest Nursery, 2404 S. Duff, Ames, Iowa, at which time persons may present their views either orally or in writing. At the hearing, persons will be asked to give their names and addresses for the record and to confine their remarks to the subject of the amendment.

Any persons who intend to attend a public hearing and have special requirements such as hearing or mobility impairments should contact the Department of Natural Resources and advise of specific needs.

This amendment is intended to implement Iowa Code sections 481A.5, 481A.6, 481A.8 and 481A.39.

The following amendment is proposed.

Amend subrule 52.1(2), paragraph “a,” as follows:

a. Restrictions. The following areas under the jurisdiction of the department of natural resources are established as game refuges where posted. It shall be unlawful to hunt, pursue, kill, trap, or take any wild animal, bird, or game on these areas at any time, and no one shall carry firearms thereon, except where and when specifically authorized by the department of natural resources. It shall also be unlawful to trespass in any manner on the following areas, where posted, between the dates of September 10 and December 31 of each year, both dates inclusive, except that department personnel and law enforcement officials may enter the area at any time in performance of their duties, and hunters, under the supervision of department staff, may enter when specifically authorized by the department of natural resources.

Table with 2 columns: Area and County. Rows include Lake Icaria (Adams), Rathbun Area (Appanoose), Wildlife Exhibit Area (Boone), Sweet Marsh (Bremer), Storm Lake Islands (Buena Vista), Big Marsh (Butler), South Twin Lake (Calhoun), and Round Lake (Clay).

Table with 2 columns: Area and County. Rows include Little River Recreation Area (Decatur), Allen Green Refuge (Des Moines), Kettleson Area (Dickinson), Ingham Lake (Emmet), Forney Lake (Fremont), Riverton Area (Fremont), Dunbar Slough (Greene), Bays Branch (Guthrie), Iowa River Corridor Wildlife Area (Iowa), Green Island Area (Jackson), Hawkeye Wildlife Area (Johnson), Muskrat Slough (Jones), Colyn Area (Lucas), Red Rock Area (Marion, Polk, Warren), Badger Lake (Monona), Tievill/Decatur Bend (Monona), Five Island Lake (Palo Alto), Big Creek-Saylorville Complex (Polk), Chichaqua Area (Polk), Cottonwood Area (Polk), I-35 Area (Polk), Smith Area (Pottawattamie), Lake View Area (Sac), Princeton Area (Scott), Prairie Rose Lake (Shelby), Otter Creek Marsh (Tama), Green Valley Lake (Union), Three Mile Lake (Union), Lake Sugema (Van Buren), Rice Lake Area (Winnebago), Snyder Lake (Woodbury), Elk Creek Marsh (Worth), and Lake Cornelia (Wright).

ARC 8746A

NATURAL RESOURCE COMMISSION[571]

Notice of Intended Action

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)“b.”

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code subsection 455A.5(6), the Natural Resource Commission hereby gives Notice of Intended Action to amend Chapter 91, “Waterfowl and Coot Hunting Seasons,” Iowa Administrative Code.

These rules give the regulations for hunting waterfowl and coot and include season dates, bag limits, possession limits, shooting hours, and areas open to hunting. These amendments update season dates and hunting zones for the 1999 hunting season.

Any interested person may make written suggestions or comments on the proposed amendments on or before April 23, 1999. Such written materials should be directed to the Wildlife Bureau Chief, Department of Natural Resources, Wallace State Office Building, Des Moines, Iowa 50319-0034; fax (515)281-6794. Persons who wish to convey their views orally should contact the Bureau at (515)281-6156 or

## NATURAL RESOURCE COMMISSION[571](cont'd)

at the Bureau offices on the fourth floor of the Wallace State Office Building.

There will be a public hearing on April 17, 1999, at 10 a.m. at the State Forest Nursery, 2404 S. Duff, Ames, Iowa, at which time persons may present their views either orally or in writing. At the hearing, persons will be asked to give their names and addresses for the record and to confine their remarks to the subject of the amendments.

Any persons who intend to attend a public hearing and have special requirements such as hearing or mobility impairments should contact the Department of Natural Resources and advise of specific needs.

These amendments are intended to implement Iowa Code sections 481A.38, 481A.39 and 481A.48.

The following amendments are proposed.

ITEM 1. Amend rule 571—91.1(481A), introductory paragraph, as follows:

**571—91.1(481A) Ducks (split season).** Open season for hunting ducks shall be September ~~19 18~~ to September ~~23 22~~, ~~1998 1999~~; October ~~10 16~~ to December ~~3 9~~, ~~1998 1999~~, in that portion of the state lying north of a line beginning on the Nebraska-Iowa border at State Highway 175, southeast to State Highway 37, east to U.S. Highway 59, south to I-80 and along I-80 east to the Iowa-Illinois border; and September ~~19 18~~ to September ~~23 22~~, ~~1998 1999~~; October ~~17 16~~ to December ~~10 9~~, ~~1998 1999~~, in that portion of the state lying south of a line beginning on the Nebraska-Iowa border at State Highway 175, southeast to State Highway 37, east to U.S. Highway 59, south to I-80 and along I-80 east to the Iowa-Illinois border. Shooting hours are one-half hour before sunrise to sunset each day.

ITEM 2. Amend rule 571—91.3(481A), introductory paragraph, as follows:

**571—91.3(481A) Geese.** The north goose hunting zone is that part of Iowa north of a line beginning on the Nebraska-Iowa border at State Highway 175, east to State Highway 37, southeast to U.S. Highway 59, south to I-80 and along I-80 to the Iowa-Illinois border. The south goose hunting zone is the remainder of the state. The open season for hunting Canada geese only is September ~~12 11~~ and ~~13 12~~, ~~1998 1999~~, west of State Highway 63 in the north goose hunting zone only, except on the Big Marsh Wildlife Area where the season will remain closed. The open season for hunting Canada geese, white-fronted geese and brant is October ~~3 2~~ to December ~~11 10~~, ~~1998 1999~~, in the north goose hunting zone and October ~~3 2~~ to October ~~11 10~~ and October ~~17 16~~ to December ~~16 15~~, ~~1998 1999~~, in the south goose hunting zone. The open season for hunting snow geese is October ~~3 2~~ to December ~~29 27~~, ~~1998 1999~~, statewide, and will reopen statewide from February ~~20 19~~ to March 10, ~~1999 2000~~. Shooting hours are one-half hour before sunrise to sunset each day.

ITEM 3. Amend subrule 91.4(2), paragraphs "g," "h," and "o," as follows:

g. Area seven. Portions of Guthrie and Dallas Counties bounded as follows: Beginning at the junction of State Highways 4 and 44 in Panora; thence north along State Highway 4 (including the right-of-way) to County Road F25; thence east along County Road F25 (including the right-of-way) to ~~Dallas County Road P46 York Avenue~~; thence south along ~~P46 York Avenue 1 mile~~ (including the right-of-way) to ~~State Highway 44 170th Street~~; thence east one-half mile (including the right-of-way) to A Avenue in Dallas County; thence south on A Avenue 5 miles (including the right-of-way) to State Highway 44; thence west along State Highway 44 (including the right-of-way) to the point of beginning.

h. Area eight. A portion of Adams County bounded as follows: Beginning at the intersection of State Highway 148 and Adams County Road N53 in Corning; thence east and north along Adams County Road N53 approximately ~~12 9.5~~ miles to Adams County Road ~~H20 H24~~ (including the right-of-way); thence ~~westerly along Adams County Road H20 (including the right-of-way) to State Highway 148~~; thence ~~south along State Highway 148 (including the right-of-way) about one-half mile~~; thence west along Adams County Road ~~H20 H24 (including the right-of-way)~~ about ~~four~~ *eight* miles; thence south along ~~unnumbered county roads Elm Avenue~~ about ~~eight~~ *six* miles to Adams County Road H34; thence east along Adams County Road H34 (including the right-of-way) to State Highway 148; thence north along Highway 148 about three-fourths mile to the point of beginning.

o. Area fifteen. Portions of Butler County bounded as follows: Beginning at the junction of Highway 3 and County Road T16, thence south 8 miles on County Road T16 to its intersection with County Road C55, thence east 9 miles on County Road C55 to its intersection with Highway 14, thence north 8 miles on Highway 14 to its intersection with Highway 3, thence west 9 miles on Highway 3 to the point of beginning; but, excluding those lands within this bounded area east of Jay Avenue managed by the department of natural resources as the Big Marsh Management Area.

ITEM 4. Amend rule 571—91.6(481A) as follows:

**571—91.6(481A) Youth waterfowl hunt.** A special youth waterfowl hunt will be held statewide on ~~September 26, 1998~~ *October 9, 1999*. Youth hunters must be 15 years old or younger. Each youth hunter must be accompanied by an adult 18 years old or older. The youth hunter does not need to have a hunting license or stamps. The adult must have a valid hunting license and habitat stamp if normally required to have them to hunt and a state waterfowl stamp. Only the youth hunter may shoot ducks, coots and Canada geese. The adult may hunt for any other game birds for which the season is open. The daily bag limits are the same as for the regular waterfowl season, as defined in subrule 91.1(1), except the season for snow geese will not be open. The possession limit is the same as the daily bag limit. All other hunting regulations in effect for the regular waterfowl season apply to the youth hunt.

These rules are intended to implement Iowa Code sections 481A.38, 481A.39, and 481A.48.

ARC 8743A

## NATURAL RESOURCE COMMISSION[571]

### Notice of Intended Action

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)"b."

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code section 455A.5, the Natural Resource Commission hereby gives Notice of Intended Action to amend Chapter 99, "Wild Turkey Fall Hunting," Iowa Administrative Code.

These rules give the seasons for hunting wild turkey during the fall and include season dates, bag limits, possession limits, shooting hours, areas open to hunting, licensing pro-

## NATURAL RESOURCE COMMISSION[571](cont'd)

cedures, means and methods of take and transportation tag requirements. These amendments change the quota of turkey licenses to be issued to residents in Zone 4 and add a new zone, Zone 8.

Any interested person may make written suggestions or comments on the proposed amendments on or before April 23, 1999. Such written materials should be directed to the Wildlife Bureau Chief, Department of Natural Resources, Wallace State Office Building, Des Moines, Iowa 50319-0034; fax (515)281-6794. Persons who wish to convey their views orally should contact the Division at (515)281-6156 or at the Division offices on the fourth floor of the Wallace State Office Building.

There will be a public hearing on April 17, 1999, at 10 a.m. at the State Forest Nursery, 2404 S. Duff, Ames, Iowa, at which time persons may present their views either orally or in writing. At the hearing, persons will be asked to give their names and addresses for the record and to confine their remarks to the subject of the amendments.

Any persons who intend to attend a public hearing and have special requirements such as hearing or mobility impairments should contact the Department of Natural Resources and advise of specific needs.

These amendments are intended to implement Iowa Code sections 481A.38, 481A.39, 481A.48 and 483A.7.

The following amendments are proposed.

ITEM 1. Amend subrule 99.2(1), paragraph "f," and adopt a new paragraph "h" as follows:

f. Zone 6. Zone 6 is that portion of Iowa bounded on the south by Interstate Highway 80 and on the west by U.S. Highway 218 ~~from the Minnesota border to U.S. Highway 14 at Charles City, U.S. Highway 14 to U.S. Highway 20, Highway 20 east to U.S. Highway 63 and U.S. Highway 63 to Interstate Highway 80 63.~~

h. Zone 8. Zone 8 is that portion of Iowa bounded on the south by U.S. Highway 20, on the east by U.S. Highway 63, and on the west by U.S. Highway 69.

ITEM 2. Amend rule 571—99.5(481A) as follows:

**571—99.5(481A) License quotas.** A limited number of wild turkey hunting licenses will be issued to residents in the zones as follows:

1. Zone 1.	50
2. Zone 2.	50
3. Zone 3.	50
4. Zone 4.	2,000 2,500
5. Zone 5.	300
6. Zone 6.	3,000
7. Zone 7.	200
8. Zone 8.	75

**ARC 8749A**

## NATURAL RESOURCE COMMISSION[571]

### Notice of Intended Action

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)"b."

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code subsection 455A.5(6), the Natural Resource Commission hereby gives

Notice of Intended Action to amend Chapter 106, "Deer Hunting," Iowa Administrative Code.

These rules give the regulations for hunting deer during the fall and include season dates, bag limits, possession limits, shooting hours, areas open to hunting, licensing procedures, means and methods of taking and transportation tag requirements.

Subrules 106.5(2) and 106.6(5) are unchanged from 1998. However, changes to these subrules may be necessary once biological data including winter aerial surveys, deer-vehicle accident information, and the 1998 harvest data are evaluated. These data sets are not available at this time. In addition, some counties in east-central and northern Iowa may need more restrictions on doe harvest. These issues will be discussed at the public hearing and reviewed for the final rule.

Any interested person may make written suggestions or comments on the proposed amendments on or before April 23, 1999. Such written materials should be directed to the Wildlife Bureau Chief, Department of Natural Resources, Wallace State Office Building, Des Moines, Iowa 50319-0034; fax (515)281-6794. Persons who wish to convey their views orally should contact the Bureau at (515)281-6156 or at the Bureau offices on the fourth floor of the Wallace State Office Building.

There will be a public hearing on April 17, 1999, at 10 a.m. at the State Forest Nursery, 2404 S. Duff, Ames, Iowa, at which time persons may present their views either orally or in writing. At the hearing, persons will be asked to give their names and addresses for the record and to confine their remarks to the subject of the amendments.

Any persons who intend to attend a public hearing and have special requirements such as hearing or mobility impairments should contact the Department of Natural Resources and advise of specific needs.

These amendments are intended to implement Iowa Code sections 481A.38, 481A.39 and 481A.48.

The following amendments are proposed.

ITEM 1. Amend subrule 106.2(4) as follows:

**106.2(4) Special late season.** Antlerless deer may be taken by shotgun, muzzleloading rifle, handgun or bow as permitted in 571—106.7(481A) from January 11, 1999, through January 17, 1999. All participants must meet the hunter orange requirements in Iowa Code section 481A.122. All other regulations for taking deer with a firearm shall apply.

ITEM 2. Amend subrule 106.8(2) as follows:

**106.8(2) Regular gun, late muzzleloader season and antlerless licenses.** All applications for paid regular gun, late muzzleloader season, special late season and antlerless bow licenses shall be made on forms provided by the department of natural resources and returned to the department of natural resources office in Des Moines, Iowa. Applications for all statewide licenses and the first antlerless license must be accompanied by \$25 \$25.50 for each license. Applications for all antlerless licenses after the first antlerless license must be accompanied by \$10 for each license. Only individual applications will be accepted. Any incomplete or improperly completed application, any application not meeting the above conditions, or any application received after the application period will not be considered a valid application.

a. Statewide licenses. Applications will be received and accepted from the second Monday in July through the last Friday in August or if the application form bears a valid and legible U.S. Postal Service postmark prior to that date.

b. Antlerless licenses. Paid antlerless licenses will be issued by quota established for each county in the special ant-

NATURAL RESOURCE COMMISSION[571](cont'd)

lerless zone. Applications will be received and accepted from the second Monday in July through the last Friday in August or if the application form bears a valid and legible U.S. Postal Service postmark prior to that date. Hunters may apply for one license for one of the following seasons: bow; second regular gun; or late muzzleloader. Hunters may apply for one additional license for the special late season. A drawing will be held for each county where the number of applications exceeds the quota. Applications will be accepted on a first-come, first-served basis after September 1 if any county quotas do not fill. Applications for the bow season or second regular gun season or late muzzleloader season will be accepted through the first Friday in November or until quotas fill. Applications for the special late season will be accepted through January 10, 1999, or until quotas fill. If licenses are still available after September 1, hunters may apply for one additional license for the bow season or second regular gun season or late muzzleloader season and one additional license for the special late season. The maximum number of antlerless licenses for an individual is four: two for the bow or second regular gun or late muzzleloader season and two for the special late season (if second licenses are available).

ITEM 3. Amend subrule 106.10(6) as follows:  
**106.10(6)** Application procedures. All applications for youth gun and severely disabled deer hunting licenses for the current season shall be made on forms provided by the department of natural resources and returned to the department of natural resources office in Des Moines, Iowa. No one shall submit more than one application. Applications for youth gun and severely disabled deer hunting licenses must be accompanied by \$25 \$25.50 for each license. Applications will be received and accepted only from the third Monday in June through the third Friday in July.

**ARC 8756A**

**PERSONNEL DEPARTMENT[581]**

**Notice of Intended Action**

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)"b."

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code sections 19A.9 and 97B.15, the Department of Personnel hereby gives Notice of Intended Action to amend Chapter 19, "General Administration," and Chapter 21, "Iowa Public Employees' Retirement System," to adopt a new Chapter 26, "Contested Cases," and to rescind Chapter 31, "Department Procedure for Rule Making," and adopt a new Chapter 31 with the same title, Iowa Administrative Code.

Items 1 and 2 reflect changes required by 1998 Iowa Acts, chapter 1202, relating to declaratory orders and petitions for intervention.

A new subrule 21.9(5) is adopted, providing that IPERS appeals that are heard by the department of inspections and appeals shall be conducted according to the contested case rules adopted by the department of inspections and appeals.

Item 4 reflects changes required by 1998 Iowa Acts, chapter 1202, relating to contested case proceedings.

Item 5 reflects changes required by 1998 Iowa Acts, chapter 1202, relating to the Department's rule-making procedures.

Any interested person may make written suggestions or comments on these proposed amendments on or before March 30, 1999. Written comments or suggestions should be addressed to the General Counsel of the Department of Personnel, Grimes Building, 400 East 14th Street, Des Moines, Iowa 50319. Comments may also be directed to the General Counsel at (515)281-5290.

There will be a public hearing on March 30, 1999, at 2 p.m. (local Iowa time) at the Department of Personnel, Grimes Building, 400 East 14th Street, Des Moines, Iowa 50319, in the Grimes North Conference Room at which time persons with suggestions or comments will be asked to give their names and addresses for the record and to confine their remarks to the subject matter of the amendments.

These amendments are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202. The following amendments are proposed.

ITEM 1. Rescind rule **581—19.2(19A)**.

ITEM 2. Renumber rules **581—19.3(19A)** to **581—19.5(19A)** as **581—19.14(19A)** to **581—19.16(19A)**, respectively, and adopt **new** rules **581—19.2(17A)** through **581—19.13(17A)** as follows:

**581—19.2(17A) Petition for declaratory order.** Any person may file a petition with the department for a declaratory order as to the applicability to specified circumstances of a statute, rule, or order within the primary jurisdiction of the department, at Department of Personnel, Grimes Building, 400 East 14th Street, Des Moines, Iowa 50319. A petition is deemed filed when it is received by that office. The department shall provide the petitioner with a file-stamped copy of the petition if the petitioner provides the agency an extra copy for this purpose. The petition must be typewritten or legibly handwritten in ink and must substantially conform to the following form:

**DEPARTMENT OF PERSONNEL**

Petition by (Name of  
Petitioner) for a Declaratory  
Order on (Cite provisions of  
law involved).



**PETITION FOR  
DECLARATORY  
ORDER**

The petition must provide the following information:

1. A clear and concise statement of all relevant facts on which the order is requested.
2. A citation and the relevant language of the specific statutes, rules, policies, decisions, or orders, whose applicability is questioned, and any other relevant law.
3. The questions petitioner wants answered, stated clearly and concisely.
4. The answers to the questions desired by the petitioner and a summary of the reasons urged by the petitioner in support of those answers.
5. The reasons for requesting the declaratory order and disclosure of the petitioner's interest in the outcome.
6. A statement indicating whether the petitioner is currently a party to another proceeding involving the questions at issue and whether, to the petitioner's knowledge, those questions have been decided by, are pending determination by, or are under investigation by, any governmental entity.

PERSONNEL DEPARTMENT[581](cont'd)

7. The names and addresses of other persons, or a description of any class of persons, known by petitioner to be affected by, or interested in, the questions presented in the petition.

The petition must be dated and signed by the petitioner or the petitioner's representative. It must also include the name, mailing address, and telephone number of the petitioner and petitioner's representative and a statement indicating the person to whom communications concerning the petition should be directed.

**581—19.3(17A) Notice of petition.** Within 15 days after receipt of a petition for a declaratory order, the department shall give notice of the petition to all persons not served by the petitioner pursuant to rule 19.7(17A) to whom notice is required by any provision of law. The department may also give notice to any other persons.

**581—19.4(17A) Intervention.**

**19.4(1)** Persons who qualify under any applicable provision of law as an intervenor and who file a petition for intervention within 20 days of the filing of a petition for declaratory order shall be allowed to intervene in a proceeding for a declaratory order.

**19.4(2)** Any person who files a petition for intervention at any time prior to the issuance of an order may be allowed to intervene in a proceeding for a declaratory order at the discretion of the department.

**19.4(3)** A petition for intervention shall be filed at Department of Personnel, Grimes Building, 400 East 14th Street, Des Moines, Iowa 50319. Such a petition is deemed filed when it is received by that office. The department will provide the petitioner with a file-stamped copy of the petition for intervention if the petitioner provides an extra copy for this purpose. A petition for intervention must be typewritten or legibly handwritten in ink and must substantially conform to the following form:

DEPARTMENT OF PERSONNEL

Petition by (Name of Original Petitioner) for a Declaratory Order on (Cite provisions of law cited in original petition).	}	PETITION FOR INTERVENTION
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The petition for intervention must provide the following information:

1. Facts supporting the intervenor's standing and qualifications for intervention.
2. The answers urged by the intervenor to the question or questions presented in the original petition for declaratory order, and a summary the reasons urged in support of those answers.
3. Reasons for requesting intervention and disclosure of the intervenor's interest in the outcome.
4. A statement indicating whether the intervenor is currently a party to any proceeding involving the questions at issue and whether, to the intervenor's knowledge, those questions have been decided by, are pending determination by, or are under investigation by, any governmental entity.
5. The names and addresses of any additional persons, or a description of any additional class of persons, known by the intervenor to be affected by, or interested in, the questions presented.
6. Whether the intervenor consents to be bound by the determination of the matters presented in the declaratory order proceeding.

The petition must be dated and signed by the intervenor or the intervenor's representative. It must also include the name, mailing address, and telephone number of the intervenor and intervenor's representative, and a statement indicating the person to whom communications should be directed.

**581—19.5(17A) Briefs.** The petitioner or any intervenor may file a brief in support of the position urged. The department may request a brief from the petitioner, any intervenor, or any other person concerning the questions raised.

**581—19.6(17A) Inquiries.** Inquiries concerning the status of a declaratory order proceeding may be made to the director of the department at Department of Personnel, Grimes Building, Des Moines, Iowa 50319.

**581—19.7(17A) Service and filing of petitions and other papers.**

**19.7(1)** When service required. Except where otherwise provided by law, every petition for declaratory order, petition for intervention, brief, or other paper filed in a proceeding for a declaratory order shall be served upon each of the parties of record to the proceeding, and on all other persons identified in the petition for declaratory order or petition for intervention as affected by or interested in the questions presented, simultaneously with their filing. The party filing a document is responsible for service on all parties and other affected or interested persons.

**19.7(2)** Filing—when required. All petitions for declaratory orders, petitions for intervention, briefs, or other papers in a proceeding for a declaratory order shall be filed with the Department of Personnel, Grimes Building, Des Moines, Iowa 50319. All petitions, briefs, or other papers that are required to be served upon a party shall be filed simultaneously with the department.

**19.7(3)** Method of service. Petitions for declaratory orders, petitions for intervention, and every paper relating to such petitions shall be served upon the department and each known party simultaneously with their filing. The party filing a document is responsible for service on all parties.

Service upon a party represented by an attorney shall be made upon the attorney unless otherwise ordered. Service is made by delivery or by mailing a copy to the person's last-known address. Service by mail is complete upon mailing, except where otherwise specifically provided by statute, rule, or order.

**19.7(4)** Filing—when made. Except where otherwise provided by law, a document is deemed filed at the time it is delivered to the Director, Department of Personnel, Grimes Building, East 14th Street, Des Moines, Iowa 50319, delivered to an established courier service for immediate delivery to that office, or mailed by first-class mail or state interoffice mail to that office, so long as there is proof of mailing.

**19.7(5)** Proof of mailing. Proof of mailing includes either: a legible United States Postal Service postmark on the envelope, a certificate of service, a notarized affidavit, or a certification in substantially the following form:

I certify under penalty of perjury and pursuant to the laws of Iowa that, on (date of mailing), I mailed copies of (describe document) addressed to the (agency office and address) and to the names and addresses of the parties listed below by depositing the same in (a United States post office mailbox with correct postage properly affixed or state interoffice mail).

\_\_\_\_\_ (Date) \_\_\_\_\_ (Signature)

**581—19.8(17A) Informal meeting.** The department may schedule a brief and informal meeting between the original

## PERSONNEL DEPARTMENT[581](cont'd)

petitioner, all intervenors, and the department, a member of the department, or a member of the staff of the department, to discuss the questions raised. The department may solicit comments from any person on the questions raised. Also, comments on the questions raised may be submitted to the department by any person.

**581—19.9(17A) Action on petition.**

**19.9(1)** Within the time allowed by 1998 Iowa Acts, chapter 1202, section 13(5), after receipt of a petition for a declaratory order, the director or designee shall take action on the petition as required by 1998 Iowa Acts, chapter 1202, section 13(5).

**19.9(2)** The date of issuance of an order or of a refusal to issue an order shall be the date of mailing of a decision or order, or date of delivery if service is by other means, unless another date is specified in the order.

**581—19.10(17A) Refusal to issue order.**

**19.10(1)** The department shall not issue a declaratory order where prohibited by 1998 Iowa Acts, chapter 1202, section 13(1) and may refuse to issue a declaratory order on some or all questions raised for the following reasons:

a. The petition does not substantially comply with the required form.

b. The petition does not contain facts sufficient to demonstrate that the petitioner will be aggrieved or adversely affected by the failure of the department to issue an order.

c. The department does not have jurisdiction over the questions presented in the petition.

d. The questions presented by the petition are also presented in a current rule making, contested case, or other agency or judicial proceeding, that may definitively resolve them.

e. The questions presented by the petition would more properly be resolved in a different type of proceeding or by another body with jurisdiction over the matter.

f. The facts or questions presented in the petition are unclear, overbroad, insufficient, or otherwise inappropriate as a basis upon which to issue an order.

g. There is no need to issue an order because the questions raised in the petition have been settled due to a change in circumstances.

h. The petition is not based upon facts calculated to aid in the planning of future conduct but is, instead, based solely upon prior conduct in an effort to establish the effect of that conduct or to challenge an agency decision already made.

i. The petition requests a declaratory order that would necessarily determine the legal rights, duties, or responsibilities of other persons who have not joined in the petition, intervened separately, or filed a similar petition and whose position on the questions presented may fairly be presumed to be adverse to that of petitioner.

j. The petitioner requests the department to determine whether any of the conditions under Iowa Code section 17A.19 as amended by 1998 Iowa Acts, chapter 1202, section 24(10), have been met.

k. The department will not issue declaratory orders on the following:

(1) The present value of IPERS retirement monthly benefits;

(2) Actuarial assumptions used or proposed to be used by the department;

(3) The impact of proposed legislation;

(4) Issues which require the disclosure of confidential information; and

(5) Items listed in 581—26.1(17A).

**19.10(2)** A refusal to issue a declaratory order must indicate the specific grounds for the refusal and constitutes final agency action on the petition.

**19.10(3)** Refusal to issue a declaratory order pursuant to this provision does not preclude the filing of a new petition that seeks to eliminate the grounds for the refusal to issue an order.

**581—19.11(17A) Contents of declaratory order—effective date.** In addition to the order itself, a declaratory order must contain the date of its issuance, the name of petitioner and all intervenors, the specific statutes, rules, policies, decisions, or orders involved, the particular facts upon which it is based, and the reasons for its conclusion.

A declaratory order is effective on the date of issuance.

**581—19.12(17A) Copies of orders.** A copy of all orders issued in response to a petition for a declaratory order shall be mailed promptly to the original petitioner and all intervenors.

**581—19.13(17A) Effect of a declaratory order.** A declaratory order has the same status and binding effect as a final order issued in a contested case proceeding. It is binding on the department, the petitioner, and any intervenors who consent to be bound and is applicable only in circumstances where the relevant facts and the law involved are indistinguishable from those on which the order was based. As to all other persons, a declaratory order serves only as precedent and is not binding on the department. The issuance of a declaratory order constitutes final agency action on the petition.

These rules are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202.

ITEM 3. Adopt new subrule 21.9(5) as follows:

**21.9(5)** Contested case procedure. Appeals of decisions by IPERS that are heard by the department of inspections and appeals shall be conducted pursuant to the rules governing contested case hearings adopted by the department of inspections and appeals under 481—Chapter 10.

ITEM 4. Adopt the following new chapter:

CHAPTER 26  
CONTESTED CASES

**581—26.1(17A) Scope and applicability.** This chapter applies to contested case proceedings conducted by the department. Excepted from this chapter are matters covered by rules 581—11.2(19A) and 581—12.1(19A), 581—subrule 12.2(6), and rules 581—20.6(19B) and 581—21.9(97B); matters covered by the grievance procedure in any collective bargaining agreement with state employees; matters within the exclusive jurisdiction of the industrial commissioner; and matters related to the department's vendors who administer group benefits if the vendor has an established complaint or appeal procedure.

**581—26.2(17A) Definitions.** Except where otherwise specifically defined by law:

"Contested case" means a proceeding defined by Iowa Code section 17A.2(5) and includes any matter defined as a no factual dispute contested case under 1998 Iowa Acts, chapter 1202, section 14.

"Issuance" means the date of mailing of a decision or order or date of delivery if service is by other means unless another date is specified in the order.

"Party" means each person or agency named or admitted as a party or properly seeking and entitled as of right to be admitted as a party.

## PERSONNEL DEPARTMENT[581](cont'd)

"Presiding officer" means the department director, department director's designee, or in the case of an appeal pursuant to rule 581—3.5(19A) the classification appeal committee appointed by the director.

"Proposed decision" means the presiding officer's recommended findings of fact, conclusions of law, decision, and order in a contested case in which the department did not preside.

**581—26.3(17A) Time requirements.**

**26.3(1)** Time shall be computed as provided in Iowa Code subsection 4.1(34).

**26.3(2)** For good cause, the presiding officer may extend or shorten the time to take any action, except as precluded by statute or by rule that specifies a jurisdictional filing deadline. Except for good cause stated in the record, before extending or shortening the time to take any action, the presiding officer shall afford all parties an opportunity to be heard or to file written arguments.

**581—26.4(17A) Requests for contested case proceeding.**

Any person claiming an entitlement to a contested case proceeding shall file a written request for such a proceeding within the time specified by the particular rules or statutes governing the subject matter or, in the absence of such law, the time specified in the agency action in question.

The request for a contested case proceeding should state the name and address of the requester, identify the specific agency action which is disputed, and where the requester is represented by a lawyer identify the provisions of law or precedent requiring or authorizing the holding of a contested case proceeding in the particular circumstances involved, and include a short and plain statement of the issues of material fact in dispute.

**581—26.5(17A) Notice of hearing.**

**26.5(1)** Delivery. Delivery of the notice of hearing constitutes the commencement of the contested case proceeding. Delivery may be executed by:

- a. Personal service as provided in the Iowa Rules of Civil Procedure; or
- b. Certified mail, return receipt requested; or
- c. First-class mail; or
- d. Publication, as provided in the Iowa Rules of Civil Procedure.

**26.5(2)** Contents. The notice of hearing shall contain the following information:

- a. A statement of the time, place, and nature of the hearing;
- b. A statement of the legal authority and jurisdiction under which the hearing is to be held;
- c. A reference to the particular sections of the statutes and rules involved;
- d. A short and plain statement of the matters asserted. If the agency or other party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved. Thereafter, upon application, a more definite and detailed statement shall be furnished;
- e. Identification of all parties including the name, address and telephone number of the person who will act as advocate for the agency or the state and of parties' counsel where known;
- f. Reference to the procedural rules governing conduct of the contested case proceeding;
- g. Identification of the presiding officer, if known. If not known, a description of who will serve as presiding officer; and

h. Notification of the time period in which a party may request, pursuant to 1998 Iowa Acts, chapter 1202, section 15(1), and rule 26.6(17A) that the presiding officer be an administrative law judge.

**581—26.6(17A) Presiding officer.**

**26.6(1)** Any party who wishes to request that the presiding officer assigned to render a proposed decision be an administrative law judge employed by the department of inspections and appeals must file a written request to the director within 14 days after service of a notice of hearing which identifies or describes the presiding officer as the director, or director's designee if the designee is also a member of the department.

**26.6(2)** The director, or the director's designee, may deny the request only upon a finding that one or more of the following apply:

a. Neither the agency nor any officer of the agency under whose authority the contested case is to take place is a named party to the proceeding or a real party in interest to that proceeding.

b. There is a compelling need to expedite issuance of a final decision in order to protect the public health, safety, or welfare.

c. An administrative law judge with the qualifications identified in 26.6(4) is unavailable to hear the case within a reasonable time.

d. The case involves significant policy issues of first impression that are inextricably intertwined with the factual issues presented.

e. The demeanor of the witnesses is likely to be dispositive in resolving the disputed factual issues.

f. Funds are unavailable to pay the costs of an administrative law judge and an interagency appeal.

g. The request was not timely filed.

h. The request is not consistent with a specified statute.

**26.6(3)** The director, or the director's designee, shall issue a written ruling specifying the grounds for its decision within 20 days after a request for an administrative law judge is filed. If the ruling is contingent upon the availability of an administrative law judge with the qualifications identified in 26.6(4), the parties shall be notified at least 10 days prior to hearing if a qualified administrative law judge will not be available.

**26.6(4)** An administrative law judge assigned to act as presiding officer during classification appeal hearings under 581—3.5(19A) shall have the following technical expertise unless waived by the department:

- a. A license to practice law in the state of Iowa;
- b. Three years' experience as an administrative law judge;
- c. Three years' experience involving the state's classification system, or similar classification system of a large public employer, including examining positions for making determinations of the correct classification.

**26.6(5)** Except as provided otherwise by another provision of law, all rulings by an administrative law judge acting as presiding officer are subject to appeal to the agency. A party must seek any available intra-agency appeal in order to exhaust adequate administrative remedies.

**26.6(6)** Unless otherwise provided by law, the director, or the director's designee, when reviewing a proposed decision upon intra-agency appeal, shall have the powers of and shall comply with the provisions of this chapter which apply to presiding officers.

## PERSONNEL DEPARTMENT[581](cont'd)

**581—26.7(17A) Waiver of procedures.** Unless otherwise precluded by law, the parties in a contested case proceeding may waive any provision of this chapter. However, the department in its discretion may refuse to give effect to such a waiver when it deems the waiver to be inconsistent with the public interest.

**581—26.8(17A) Telephone proceedings.** The presiding officer may resolve preliminary procedural motions by telephone conference in which all parties have an opportunity to participate. Other telephone proceedings may be held with the consent of all parties. The presiding officer will determine the location of the parties and witnesses for telephone hearings. The convenience of the witnesses or parties, as well as the nature of the case, will be considered when location is chosen.

**581—26.9(17A) Disqualification.**

**26.9(1)** A presiding officer or other person shall withdraw from participation in the making of any proposed or final decision in a contested case if that person:

- a. Has a personal bias or prejudice concerning a party or a representative of a party;
- b. Has personally investigated, prosecuted, or advocated in connection with that case, the specific controversy underlying that case, another pending factually related contested case, or a pending factually related controversy that may culminate in a contested case involving the same parties;
- c. Is subject to the authority, direction or discretion of any person who has personally investigated, prosecuted, or advocated in connection with that contested case, the specific controversy underlying that contested case, or a pending factually related contested case or controversy involving the same parties;
- d. Has acted as counsel to any person who is a private party to that proceeding within the past two years;
- e. Has a personal financial interest in the outcome of the case or any other significant personal interest that could be substantially affected by the outcome of the case;
- f. Has a spouse or relative within the third degree of relationship that: (1) is a party to the case, or an officer, director or trustee of a party; (2) is a lawyer in the case; (3) is known to have an interest that could be substantially affected by the outcome of the case; or (4) is likely to be a material witness in the case; or
- g. Has any other legally sufficient cause to withdraw from participation in the decision making in that case.

**26.9(2)** The term "personally investigated" means taking affirmative steps to interview witnesses directly or to obtain documents or other information directly. The term "personally investigated" does not include general direction and supervision of assigned investigators, unsolicited receipt of information which is relayed to assigned investigators, review of another person's investigative work product in the course of determining whether there is probable cause to initiate a proceeding, or exposure to factual information while performing other agency functions, including fact gathering for purposes other than investigation of the matter which culminates in a contested case. Factual information relevant to the merits of a contested case received by a person who later serves as presiding officer in that case shall be disclosed if required by Iowa Code section 17A.17(3) and subrules 26.9(3) and 26.23(9).

**26.9(3)** In a situation where a presiding officer or other person knows of information which might reasonably be deemed to be a basis for disqualification and decides voluntary withdrawal is unnecessary, that person shall submit the relevant information for the record by affidavit and shall pro-

vide for the record a statement of the reasons for the determination that withdrawal is unnecessary.

**26.9(4)** If a party asserts disqualification on any appropriate ground, including those listed in subrule 26.9(1), the party shall file a motion supported by an affidavit pursuant to 1998 Iowa Acts, chapter 1202, section 19(7). The motion must be filed as soon as practicable after the reason alleged in the motion becomes known to the party. If, during the course of the hearing, a party first becomes aware of evidence of bias or other grounds for disqualification, the party may move for disqualification but must establish the grounds by the introduction of evidence into the record.

If the presiding officer determines that disqualification is appropriate, the presiding officer or other person shall withdraw. If the presiding officer determines that withdrawal is not required, the presiding officer shall enter an order to that effect. A party asserting disqualification may seek an interlocutory appeal under rule 26.25(17A) and seek a stay under rule 26.29(17A).

**581—26.10(17A) Consolidation—severance.**

**26.10(1)** Consolidation. The presiding officer may consolidate any or all matters at issue in two or more contested case proceedings where: (a) the matters at issue involve common parties or common questions of fact or law; (b) consolidation would expedite and simplify consideration of the issues involved; and (c) consolidation would not adversely affect the rights of any of the parties to those proceedings.

**26.10(2)** Severance. The presiding officer may, for good cause shown, order any contested case proceedings or portions thereof severed.

**581—26.11(17A) Pleadings.**

**26.11(1)** Pleadings may be required by rule, by the notice of hearing, or by order of the presiding officer.

**26.11(2)** Petition.

a. Any petition required in a contested case proceeding shall be filed within 20 days of delivery of the notice of hearing or subsequent order of the presiding officer, unless otherwise ordered.

b. A petition shall state in separately numbered paragraphs the following:

- (1) The persons or entities on whose behalf the petition is filed;
- (2) The particular provisions of statutes and rules involved;
- (3) The relief demanded and the facts and law relied upon for such relief; and
- (4) The name, address and telephone number of the petitioner and the petitioner's attorney, if any.

**26.11(3)** Answer. An answer shall be filed within 20 days of service of the petition unless otherwise ordered. A party may move to dismiss or apply for a more definite and detailed statement when appropriate.

An answer shall show on whose behalf it is filed and specifically admit, deny, or otherwise answer all material allegations of the pleading to which it responds. It shall state any facts deemed to show an affirmative defense and contain as many additional defenses as the pleader may claim.

An answer shall state the name, address and telephone number of the person filing the answer, the person or entity on whose behalf it is filed, and the attorney representing that person, if any.

Any allegation in the petition not denied in the answer is considered admitted. The presiding officer may refuse to consider any defense not raised in the answer which could have been raised on the basis of facts known when the answer was filed if any party would be prejudiced.

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**26.11(4) Amendment.** Any notice of hearing, petition, or other charging document may be amended before a responsive pleading has been filed. Amendments to pleadings after a responsive pleading has been filed and to an answer may be allowed with the consent of the other parties or in the discretion of the presiding officer who may impose terms or grant a continuance.

**581—26.12(17A) Service and filing of pleadings and other papers.**

**26.12(1)** When service required. Except where otherwise provided by law, every pleading, motion, document, or other paper filed in a contested case proceeding and every paper relating to discovery in such a proceeding shall be served upon each of the parties of record to the proceeding, including the person designated as advocate or prosecutor for the state or the agency, simultaneously with their filing. Except for the original notice of hearing and an application for rehearing as provided in Iowa Code section 17A.16(2), the party filing a document is responsible for service on all parties.

**26.12(2) Service—how made.** Service upon a party represented by an attorney shall be made upon the attorney unless otherwise ordered. Service is made by delivery or by mailing a copy to the person's last-known address. Service by mail is complete upon mailing, except where otherwise specifically provided by statute, rule, or order.

**26.12(3) Filing—when required.** After the notice of hearing, all pleadings, motions, documents or other papers in a contested case proceeding shall be filed with Director, Department of Personnel, 400 East 14th Street, Des Moines, Iowa 50319. All pleadings, motions, documents or other papers that are required to be served upon a party shall be filed simultaneously with the department.

**26.12(4) Filing—when made.** Except where otherwise provided by law, a document is deemed filed at the time it is delivered to the Director, Department of Personnel, 400 East 14th Street, Des Moines, Iowa 50319, delivered to an established courier service for immediate delivery to that office, or mailed by first-class mail or state interoffice mail to that office, so long as there is proof of mailing.

**26.12(5) Proof of mailing.** Proof of mailing includes either: a legible United States Postal Service postmark on the envelope, a certificate of service, a notarized affidavit, or a certification in substantially the following form:

I certify under penalty of perjury and pursuant to the laws of Iowa that, on (date of mailing), I mailed copies of (describe document) addressed to the (agency office and address) and to the names and addresses of the parties listed below by depositing the same in (a United States post office mailbox with correct postage properly affixed or state interoffice mail).

\_\_\_\_\_ (Date) \_\_\_\_\_ (Signature)

**581—26.13(17A) Discovery.**

**26.13(1)** Discovery procedures applicable in civil actions are applicable in contested cases. Unless lengthened or shortened by these rules or by order of the presiding officer, time periods for compliance with discovery shall be as provided in the Iowa Rules of Civil Procedure.

**26.13(2)** Any motion relating to discovery shall allege that the moving party has previously made a good-faith attempt to resolve the discovery issues involved with the opposing party. Motions in regard to discovery shall be ruled upon by the presiding officer. Opposing parties shall be afforded the opportunity to respond within ten days of the filing of the motion unless the time is shortened as provided in

subrule 26.13(1). The presiding officer may rule on the basis of the written motion and any response, or may order argument on the motion.

**26.13(3)** Evidence obtained in discovery may be used in the contested case proceeding if that evidence would otherwise be admissible in that proceeding.

**581—26.14(17A) Subpoenas.****26.14(1) Issuance.**

a. An agency subpoena shall be issued to a party on request. Such a request must be in writing. In the absence of good cause for permitting later action, a request for a subpoena must be received at least five days before the scheduled hearing. The request shall include the name, address, and telephone number of the requesting party.

b. Except to the extent otherwise provided by law, parties are responsible for service of their own subpoenas and payment of witness fees and mileage expenses.

**26.14(2)** Motion to quash or modify. The presiding officer may quash or modify a subpoena for any lawful reason upon motion in accordance with the Iowa Rules of Civil Procedure. A motion to quash or modify a subpoena shall be set for argument promptly.

**581—26.15(17A) Motions.**

**26.15(1)** No technical form for motions is required. However, prehearing motions must be in writing, state the grounds for relief, and state the relief sought.

**26.15(2)** Any party may file a written response to a motion within ten days after the motion is served, unless the time period is extended or shortened by rules of the agency or the presiding officer. The presiding officer may consider a failure to respond within the required time period in ruling on a motion.

**26.15(3)** The presiding officer may schedule oral argument on any motion.

**26.15(4)** Motions pertaining to the hearing, except motions for summary judgment, must be filed and served at least ten days, or other time period designated by the department or presiding officer, prior to the date of hearing unless there is good cause for permitting later action or the time for such action is lengthened or shortened by rule of the department or an order of the presiding officer.

**26.15(5)** Motions for summary judgment. Motions for summary judgment shall comply with the requirements of Iowa Rule of Civil Procedure 237 and shall be subject to disposition according to the requirements of that rule to the extent such requirements are not inconsistent with the provisions of this rule or any other provision of law governing the procedure in contested cases. Motions for summary judgment must be filed and served at least 20 days prior to the scheduled hearing date, or other time period determined by the presiding officer. Any party resisting the motion shall file and serve a resistance within 10 days, unless otherwise ordered by the presiding officer, from the date a copy of the motion was served. The time fixed for hearing or normal submission shall be not less than 20 days after the filing of the motion, unless a shorter time is ordered by the presiding officer. A summary judgment order rendered on all issues in a contested case is subject to rehearing pursuant to 26.28(17A) and appeal pursuant to 26.27(17A).

**581—26.16(17A) Prehearing conference.**

**26.16(1)** Any party may request a prehearing conference. A written request for prehearing conference or an order for prehearing conference on the presiding officer's own motion shall be filed not less than seven days prior to the hearing

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date. A prehearing conference shall be scheduled not less than three business days prior to the hearing date.

Written notice of the prehearing conference shall be given by the presiding officer to all parties. For good cause the presiding officer may permit variances from this rule.

**26.16(2)** Each party shall bring to the prehearing conference:

a. A final list of the witnesses who the party anticipates will testify at hearing. Witnesses not listed may be excluded from testifying unless there was good cause for the failure to include their names; and

b. A final list of exhibits which the party anticipates will be introduced at hearing. Exhibits other than rebuttal exhibits that are not listed may be excluded from admission into evidence unless there was good cause for the failure to include them.

c. Witness or exhibit lists may be amended subsequent to the prehearing conference within the time limits established by the presiding officer at the prehearing conference. Any such amendments must be served on all parties.

**26.16(3)** In addition to the requirements of subrule 26.16(2), the parties at a prehearing conference may:

- a. Enter into stipulations of law or fact;
- b. Enter into stipulations on the admissibility of exhibits;
- c. Identify matters which the parties intend to request be officially noticed;
- d. Enter into stipulations for waiver of any provision of law; and
- e. Consider any additional matters which will expedite the hearing.

**26.16(4)** Prehearing conferences shall be conducted by telephone unless otherwise ordered. Parties shall exchange and receive witness and exhibit lists in advance of a telephone prehearing conference.

**581—26.17(17A) Continuances.** Unless otherwise provided, applications for continuances shall be made to the presiding officer.

**26.17(1)** A written application for a continuance shall:

- a. Be made at the earliest possible time and no less than seven days before the hearing except in case of unanticipated emergencies;
- b. State the specific reasons for the request; and
- c. Be signed by the requesting party or the party's representative.

An oral application for a continuance may be made if the presiding officer waives the requirement for a written motion. However, a party making such an oral application for a continuance must confirm that request by written application within five days after the oral request unless that requirement is waived by the presiding officer. No application for continuance shall be made or granted without notice to all parties except in an emergency where notice is not feasible. The department or presiding officer may waive notice of such requests for a particular case or an entire class of cases.

**26.17(2)** In determining whether to grant a continuance, the presiding officer may consider:

- a. Prior continuances;
- b. The interests of all parties;
- c. The likelihood of informal settlement;
- d. The existence of an emergency;
- e. Any objection;
- f. Any applicable time requirements;
- g. The existence of a conflict in the schedules of counsel, parties, or witnesses;
- h. The timeliness of the request; and

i. Other relevant factors.

The presiding officer may require documentation of any grounds for continuance.

**581—26.18(17A) Withdrawals.** A party requesting a contested case proceeding may withdraw that request prior to the hearing only in accordance with department rules. A party requesting withdrawal of an appeal shall do so in writing and submit the request to the director or presiding officer, whichever is applicable. Unless otherwise provided, a withdrawal shall be with prejudice.

**581—26.19(17A) Intervention.**

**26.19(1) Motion.** A motion for leave to intervene in a contested case proceeding shall state the grounds for the proposed intervention, the position and interest of the proposed intervenor, and the possible impact of intervention on the proceeding. A proposed answer or petition in intervention shall be attached to the motion. Any party may file a response within 14 days of service of the motion to intervene unless the time period is extended or shortened by the presiding officer.

**26.19(2) When filed.** Motion for leave to intervene shall be filed as early in the proceeding as possible to avoid adverse impact on existing parties or the conduct of the proceeding. Unless otherwise ordered, a motion for leave to intervene shall be filed before the prehearing conference, if any, or at least 20 days before the date scheduled for hearing. Any later motion must contain a statement of good cause for the failure to file in a timely manner. The presiding officer may deny the motion for leave to intervene if not filed timely. Unless inequitable or unjust, an intervenor shall be bound by any agreement, arrangement, or other matter previously raised in the case. Requests by untimely intervenors for continuances which would delay the proceeding will ordinarily be denied.

**26.19(3) Grounds for intervention.** The movant shall demonstrate that: (a) intervention would not unduly prolong the proceedings or otherwise prejudice the rights of existing parties; (b) the movant is likely to be aggrieved or adversely affected by a final order in the proceeding; and (c) the interests of the movant are not adequately represented by existing parties.

**26.19(4) Effect of intervention.** If appropriate, the presiding officer may order consolidation of the petitions and briefs of different parties whose interests are aligned with each other and limit the number of representatives allowed to participate actively in the proceedings. A person granted leave to intervene is a party to the proceeding. The order granting intervention may restrict the issues that may be raised by the intervenor or otherwise condition the intervenor's participation in the proceeding.

**581—26.20(17A) Hearing procedures.**

**26.20(1)** The presiding officer presides at the hearing, and may rule on motions, require briefs, issue a proposed decision, and issue such orders and rulings as will ensure the orderly conduct of the proceedings.

**26.20(2)** All objections shall be timely made and stated on the record.

**26.20(3)** Parties have the right to participate or to be represented in all hearings or prehearing conferences related to their case. Partnerships, corporations, or associations may be represented by any member, officer, director, or duly authorized agent. Any party may be represented by an attorney or another person authorized by law. The cost of representation is the responsibility of the party.

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**26.20(4)** Subject to terms and conditions prescribed by the presiding officer, parties have the right to introduce evidence on issues of material fact, cross-examine witnesses present at the hearing as necessary for a full and true disclosure of the facts, present evidence in rebuttal, and submit briefs and engage in oral argument.

**26.20(5)** The presiding officer shall maintain the decorum of the hearing and may refuse to admit or may expel anyone whose conduct is disorderly.

**26.20(6)** Witnesses may be sequestered during the hearing.

**26.20(7)** The presiding officer shall conduct the hearing in the following manner:

a. The presiding officer shall give an opening statement briefly describing the nature of the proceedings;

b. The parties shall be given an opportunity to present opening statements;

c. Parties shall present their cases in the sequence determined by the presiding officer;

d. Each witness shall be sworn or affirmed by the presiding officer or the court reporter, and be subject to examination and cross-examination. The presiding officer may limit questioning in a manner consistent with law;

e. When all parties and witnesses have been heard, parties may be given the opportunity to present final arguments.

**581—26.21(17A) Evidence.**

**26.21(1)** The presiding officer shall rule on admissibility of evidence and may, where appropriate, take official notice of facts in accordance with all applicable requirements of law.

**26.21(2)** Stipulation of facts is encouraged. The presiding officer may make a decision based on stipulated facts.

**26.21(3)** Evidence in the proceeding shall be confined to the issues as to which the parties received notice prior to the hearing unless the parties waive their right to such notice or the presiding officer determines that good cause justifies expansion of the issues. If the presiding officer decides to admit evidence on issues outside the scope of the notice over the objection of a party who did not have actual notice of those issues, that party, upon timely request, shall receive a continuance sufficient to amend pleadings and to prepare on the additional issue.

**26.21(4)** The party seeking admission of an exhibit must provide opposing parties with an opportunity to examine the exhibit prior to the ruling on its admissibility. Copies of documents should normally be provided to opposing parties. All exhibits admitted into evidence shall be appropriately marked and be made part of the record.

**26.21(5)** Any party may object to specific evidence or may request limits on the scope of any examination or cross-examination. Such an objection shall be accompanied by a brief statement of the grounds upon which it is based. The objection, the ruling on the objection, and the reasons for the ruling shall be noted in the record. The presiding officer may rule on the objection at the time it is made or may reserve a ruling until the written decision.

**26.21(6)** Whenever evidence is ruled inadmissible, the party offering that evidence may submit an offer of proof on the record. The party making the offer of proof for excluded oral testimony shall briefly summarize the testimony or, with permission of the presiding officer, present the testimony. If the excluded evidence consists of a document or exhibit, it shall be marked as part of an offer of proof and inserted in the record.

**581—26.22(17A) Default.**

**26.22(1)** If a party fails to appear or participate in a contested case proceeding after proper service of notice, the presiding officer may, if no adjournment is granted, enter a default decision or proceed with the hearing and render a decision in the absence of the party.

**26.22(2)** Where appropriate and not contrary to law, any party may move for default against a party who has requested the contested case proceeding and has failed to file a required pleading or has failed to appear after proper service.

**26.22(3)** Default decisions or decisions rendered on the merits after a party has failed to appear or participate in a contested case proceeding become final agency action unless, within 15 days after the date of notification or mailing of the decision, a motion to vacate is filed and served on all parties or an appeal of a decision on the merits is timely initiated within the time provided by rule 26.27(17A). A motion to vacate must state all facts relied upon by the moving party which establish that good cause existed for that party's failure to appear or participate at the contested case proceeding. Each fact so stated must be substantiated by at least one sworn affidavit of a person with personal knowledge of each such fact, which affidavit(s) must be attached to the motion.

**26.22(4)** The time for further appeal of a decision for which a timely motion to vacate has been filed is stayed pending a decision on the motion to vacate.

**26.22(5)** Properly substantiated and timely filed motions to vacate shall be granted only for good cause shown. The burden of proof as to good cause is on the moving party. Adverse parties shall have ten days to respond to a motion to vacate. Adverse parties shall be allowed to conduct discovery as to the issue of good cause and to present evidence on the issue prior to a decision on the motion, if a request to do so is included in that party's response.

**26.22(6)** "Good cause" for purposes of this rule shall have the same meaning as "good cause" for setting aside a default judgment under Iowa Rule of Civil Procedure 236.

**26.22(7)** A decision denying a motion to vacate is subject to further appeal within the time limit allowed for further appeal of a decision on the merits in the contested case proceeding. A decision granting a motion to vacate is subject to interlocutory appeal by the adverse party pursuant to rule 26.25(17A).

**26.22(8)** If a motion to vacate is granted and no timely interlocutory appeal has been taken, the presiding officer shall issue another notice of hearing and the contested case shall proceed accordingly.

**26.22(9)** A default decision may award any relief consistent with the request for relief made in the petition and embraced in its issues but, unless the defaulting party has appeared, it cannot exceed the relief demanded.

**26.22(10)** A default decision may provide either that the default decision is to be stayed pending a timely motion to vacate or that the default decision is to take effect immediately, subject to a request for stay under rule 26.29(17A).

**581—26.23(17A) Ex parte communication.**

**26.23(1)** Prohibited communications. Unless required for the disposition of ex parte matters specifically authorized by statute, following issuance of the notice of hearing, there shall be no communication, directly or indirectly, between the presiding officer and any party or representative of any party or any other person with a direct or indirect interest in such case in connection with any issue of fact or law in the case except upon notice and opportunity for all parties to participate. This does not prohibit persons jointly assigned such tasks from communicating with each other. Nothing in this provision is intended to preclude the presiding officer from

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communicating with members of the agency or seeking the advice or help of persons other than those with a personal interest in, or those engaged in personally investigating as defined in subrule 26.9(2), prosecuting, or advocating in, either the case under consideration or a pending factually related case involving the same parties as long as those persons do not directly or indirectly communicate to the presiding officer any ex parte communications they have received of a type that the presiding officer would be prohibited from receiving or that furnish, augment, diminish, or modify the evidence in the record.

**26.23(2)** Prohibitions on ex parte communications commence with the issuance of the notice of hearing in a contested case and continue for as long as the case is pending.

**26.23(3)** Written, oral or other forms of communication are "ex parte" if made without notice and opportunity for all parties to participate.

**26.23(4)** To avoid prohibited ex parte communications, notice must be given in a manner reasonably calculated to give all parties a fair opportunity to participate. Notice of written communications shall be provided in compliance with rule 26.12(17A) and may be supplemented by telephone, facsimile, electronic mail or other means of notification. Where permitted, oral communications may be initiated through conference telephone call including all parties or their representatives.

**26.23(5)** Persons who jointly act as presiding officer or are a committee assigned to conduct a contested case may communicate with each other without notice or opportunity for parties to participate.

**26.23(6)** The director, director's designee, or other persons may be present in deliberations or otherwise advise the presiding officer without notice or opportunity for parties to participate as long as they are not disqualified from participating in the making of a proposed or final decision under any provision of law and they comply with subrule 26.23(1).

**26.23(7)** Communications with the presiding officer involving uncontested scheduling or procedural matters do not require notice or opportunity for parties to participate. Parties should notify other parties prior to initiating such contact with the presiding officer when feasible, and shall notify other parties when seeking to continue hearings or other deadlines pursuant to rule 26.17(17A).

**26.23(8)** Disclosure of prohibited communications. A presiding officer who receives a prohibited ex parte communication while a contested case is pending must initially determine if the effect of the communication is so prejudicial that the presiding officer should be disqualified. If the presiding officer determines that disqualification is warranted, a copy of any prohibited written communication, all written responses to the communication, a written summary stating the substance of any prohibited oral or other communication not available in written form for disclosure, all responses made, and the identity of each person from whom the presiding officer received a prohibited ex parte communication shall be submitted for inclusion in the record and disclosed to all parties having an interest in the contested case. If the presiding officer determines that disqualification is not warranted, such documents shall be submitted for inclusion in the record and served on all parties. Any party desiring to rebut the prohibited communication must be allowed the opportunity to do so upon written request filed within ten days after notice of the communication.

**26.23(9)** Promptly after being assigned to serve as presiding officer at any stage in a contested case proceeding, a presiding officer shall disclose to all parties material factual in-

formation received through ex parte communication prior to such assignment unless the factual information has already been or shortly will be disclosed pursuant to Iowa Code section 17A.13(2) or through discovery. Factual information contained in an investigative report or similar document need not be separately disclosed by the presiding officer as long as such documents have been or will shortly be provided to the parties.

**26.23(10)** The presiding officer may render a proposed or final decision imposing appropriate sanctions for violations of this rule including default, a decision against the offending party, censure, or suspension or revocation of the privilege to practice before the agency. Violation of ex parte communication prohibitions by department personnel shall be reported to director or department general counsel for possible sanctions including censure, suspension, dismissal, or other disciplinary action.

**581—26.24(17A) Recording costs.** Upon request, the department shall provide a copy of the whole or any portion of the record at cost. The cost of preparing a copy of the record or of transcribing the hearing record shall be paid by the requesting party.

Parties who request that a hearing be recorded by certified reporters rather than by electronic means shall bear the cost of that recordation, unless otherwise provided by law.

**581—26.25(17A) Interlocutory appeals.** Upon written request of a party or on its own motion, the director or the director's designee may review an interlocutory order of the presiding officer. In determining whether to do so, the director shall weigh the extent to which the granting the interlocutory appeal would expedite final resolution of the case and the extent to which review of that interlocutory order by the agency at the time it reviews the proposed decision of the presiding officer would provide an adequate remedy. Any request for interlocutory review must be filed within ten days of issuance of the challenged order, but no later than the time for compliance with the order or the date of hearing, whichever is first.

**581—26.26(17A) Final decision.**

**26.26(1)** When the department presides over the reception of evidence at the hearing, its decision is a final decision.

**26.26(2)** When the department does not preside at the reception of evidence, the presiding officer shall make a proposed decision. The proposed decision becomes the final decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the department within the time provided in rule 26.27(17A).

**581—26.27(17A) Appeals and review.**

**26.27(1)** Appeal by party. Any adversely affected party may appeal a proposed decision to the director within 14 days after issuance of the proposed decision.

**26.27(2)** Review. The director may initiate review of a proposed decision on the director's own motion at any time within 21 days following the issuance of such a decision.

**26.27(3)** Notice of appeal. An appeal of a proposed decision is initiated by filing a timely notice of appeal with the department. The notice of appeal must be signed by the appealing party or a representative of that party and contain a certificate of service. The notice shall specify:

- a. The parties initiating the appeal;
- b. The proposed decision or order appealed from;
- c. The specific findings or conclusions to which exception is taken and any other exceptions to the decision or order;

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- d. The relief sought;
- e. The grounds for relief.

**26.27(4)** Requests to present additional evidence. A party may request the taking of additional evidence only by establishing that the evidence is material, that good cause existed for the failure to present the evidence at the hearing, and that the party has not waived the right to present the evidence. A written request to present additional evidence must be filed with the notice of appeal or, by a nonappealing party, within 14 days of service of the notice of appeal. The director may remand a case to the presiding officer for further hearing. The director, or a designee of the director, may preside at the taking of additional evidence.

**26.27(5)** Scheduling. The department shall issue a schedule for consideration of the appeal.

**26.27(6)** Briefs and arguments. Unless otherwise ordered, within 20 days of the notice of appeal or order for review, each appealing party may file exceptions and briefs. Within 14 days thereafter any party may file a responsive brief. Briefs shall cite any applicable legal authority and specify relevant portions of the record in that proceeding. Written requests to present oral argument shall be filed with the briefs. The director or director's designee may resolve the appeal on the briefs or provide an opportunity for oral argument. The director or director's designee may shorten or extend the briefing period as appropriate.

**581—26.28(17A) Applications for rehearing.**

**26.28(1)** By whom filed. Any party to a contested case proceeding may file an application for rehearing from a final order.

**26.28(2)** Content of application. The application for rehearing shall state on whose behalf it is filed, the specific grounds for rehearing, and the relief sought. In addition, the application shall state whether the applicant desires reconsideration of all or part of the agency decision on the existing record and whether, on the basis of the grounds enumerated in subrule 26.27(4), the applicant requests an opportunity to submit additional evidence.

**26.28(3)** Time of filing. The application shall be filed with the department within 20 days after issuance of the final decision.

**26.28(4)** Notice to other parties. A copy of the application shall be timely mailed by the applicant to all parties of record not joining therein. If the application does not contain a certificate of service, the department shall serve copies on all parties.

**26.28(5)** Disposition. Any application for a rehearing shall be deemed denied unless the department grants the application within 20 days after its filing.

**581—26.29(17A) Stays of agency actions.**

**26.29(1)** When available.

a. Any party to a contested case proceeding may petition the department for a stay of an order issued in that proceeding or for other temporary remedies, pending review by the agency. The petition shall be filed with the notice of appeal and shall state the reasons justifying a stay or other temporary remedy. The director, or director's designee, may rule on the stay or authorize the presiding officer to do so.

b. Any party to a contested case proceeding may petition the department for a stay or other temporary remedies pending judicial review of all or part of that proceeding. The petition shall state the reasons justifying a stay or other temporary remedy.

**26.29(2)** When granted. In determining whether to grant a stay, the director, director's designee, or presiding officer

shall consider the factors listed in 1998 Iowa Acts, chapter 1202, section 23(5c).

**26.29(3)** Vacation. A stay may be vacated by the issuing authority upon application of the department's representative or any other party.

**581—26.30(17A) No factual dispute contested cases.** If the parties agree that no dispute of material fact exists as to a matter that would be a contested case if such a dispute of fact existed, the parties may present all relevant admissible evidence either by stipulation or otherwise as agreed by the parties, without necessity for the production of evidence at an evidentiary hearing. If such agreement is reached, a jointly submitted schedule detailing the method and timetable for submission of the record, briefs and oral argument should be submitted to the presiding officer for approval as soon as practicable. If the parties cannot agree, any party may file and serve a motion for summary judgment pursuant to the rules governing such motions.

**581—26.31(17A) Emergency adjudicative proceedings.**

**26.31(1)** Necessary emergency action. To the extent necessary to prevent or avoid immediate danger to the public health, safety, or welfare and, consistent with the Constitution and other provisions of law, the agency may issue a written order in compliance with Iowa Code section 17A.18 to suspend a license in whole or in part, order the cessation of any continuing activity, order affirmative action, or take other action within the jurisdiction of the agency by emergency adjudicative order. Before issuing an emergency adjudicative order the agency shall consider factors including, but not limited to, the following:

a. Whether there has been a sufficient factual investigation to ensure that the agency is proceeding on the basis of reliable information;

b. Whether the specific circumstances which pose immediate danger to the public health, safety or welfare have been identified and determined to be continuing;

c. Whether the person required to comply with the emergency adjudicative order may continue to engage in other activities without posing immediate danger to the public health, safety or welfare;

d. Whether imposition of monitoring requirements or other interim safeguards would be sufficient to protect the public health, safety or welfare; and

e. Whether the specific action contemplated by the agency is necessary to avoid the immediate danger.

**26.31(2)** Issuance of order.

a. An emergency adjudicative order shall contain findings of fact, conclusions of law, and policy reasons to justify the determination of an immediate danger in the agency's decision to take immediate action.

b. The written emergency adjudicative order shall be immediately delivered to persons who are required to comply with the order by utilizing one or more of the following procedures:

1. Personal delivery;

2. Certified mail, return receipt requested, to the last address on file with the agency;

3. Certified mail to the last address on file with the agency;

4. First-class mail to the last address on file with the agency; or

5. Fax. Fax may be used as the sole method of delivery if the person required to comply with the order has filed a written request that department orders be sent by fax and has provided a fax number for that purpose.

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c. To the degree practicable, the department shall select the procedure for providing written notice that best ensures prompt, reliable delivery.

**26.31(3)** Oral notice. Unless the written emergency adjudicative order is provided by personal delivery on the same day that the order issues, the department shall make reasonable immediate efforts to contact by telephone the persons who are required to comply with the order.

**26.31(4)** Completion of proceedings. After the issuance of an emergency adjudicative order, the department shall proceed as quickly as feasible to complete any proceedings that would be required if the matter did not involve an immediate danger.

Issuance of a written emergency adjudicative order shall include notification of the date on which department proceedings are scheduled for completion. After issuance of an emergency adjudicative order, continuance of further department proceedings to a later date will be granted only in compelling circumstances upon application in writing.

These rules are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202.

ITEM 5. Rescind **581—Chapter 31** and adopt the following **new** chapter:

## CHAPTER 31

## DEPARTMENT PROCEDURE FOR RULE MAKING

**581—31.1(17A) Applicability.** Except to the extent otherwise expressly provided by statute, all rules adopted by the department are subject to the provisions of Iowa Code chapter 17A, the Iowa administrative procedure Act, and the provisions of this chapter. Except as otherwise provided by statute or rule, all communications to the department regarding the adoption, amendment or repeal of a rule must be addressed as follows:

**31.1(1)** For all matters except those relating to the Iowa public employees' retirement system: General Counsel, Iowa Department of Personnel, Grimes Building, 400 East 14th Street, Des Moines, Iowa 50319.

**31.1(2)** For matters relating to the Iowa public employees' retirement system: General Counsel, Iowa Public Employees' Retirement System, 600 East Court Avenue, Des Moines, Iowa 50309.

**581—31.2(17A) Advice on possible rules before notice of proposed rule adoption.** In addition to seeking information by other methods, the department may, before publication of a Notice of Intended Action under Iowa Code section 17A.4(1)"a," solicit comments from the public by any reasonable means on a subject matter of possible rule making by the department. Notwithstanding the foregoing, except as otherwise provided by law, the department may use its own experience, specialized knowledge, and judgment in the adoption of a rule.

**581—31.3(17A) Public participation.**

**31.3(1)** Written comments. For at least 20 days after publication of a Notice of Intended Action, persons may submit argument, data, and views, in writing, on the subject matter of the Notice of Intended Action. Such written submissions should identify each proposed rule to which they relate and should be submitted to the person designated in the Notice of Intended Action at the address designated in the Notice of Intended Action.

**31.3(2)** Oral proceedings. The department may, at any time, schedule an oral proceeding on a Notice of Intended Action. The department shall schedule an oral proceeding if,

within 20 days after the published Notice of Intended Action, a written request for an opportunity to make oral presentations is submitted to the department by the administrative rules review committee, a governmental subdivision, an agency, an association having not less than 25 members, or at least 25 persons. That request must also contain the following additional information:

a. A request by one or more individual persons must be signed by each of them and include the address and telephone number of each of them.

b. A request by an association must be signed by an officer or designee of the association and must contain a statement that the association has at least 25 members and the address and telephone number of the person signing that request.

c. A request by an agency or governmental subdivision must be signed by an official having authority to act on behalf of the entity and must contain the address and telephone number of the person signing that request.

**31.3(3) Conduct of oral proceedings.**

a. Applicability. This subrule applies only to those oral rule-making proceedings in which an opportunity to make oral presentations is authorized or required by Iowa Code section 17A.4(1)"b" as amended by 1998 Iowa Acts, chapter 1202, section 8, or subrule 31.3(2) of this chapter.

b. Scheduling and notice. An oral proceeding on a Notice of Intended Action may be held in one or more locations and shall not be held earlier than 20 days after notice of its location and time is published in the Iowa Administrative Bulletin. That notice shall also identify the applicable Notice of Intended Action by ARC number and citation to the Iowa Administrative Bulletin.

c. Presiding officer. The department, a member of the department, or another person designated by the department who will be familiar with the substance of the rules proposed in the Notice of Intended Action, shall preside at the oral proceeding. If the department does not preside, the presiding officer shall prepare a memorandum for consideration by the department summarizing the contents of the presentations made at the oral proceeding unless the department determines that such a memorandum is unnecessary because the department will personally listen to or read the entire transcript of the oral proceeding.

d. Conduct of proceeding. At an oral proceeding on a Notice of Intended Action, persons may make oral statements and make documentary and physical submissions, which may include data, views, comments or arguments concerning the subject matter of the rules proposed in the Notice of Intended Action. Persons wishing to make oral presentations at such a proceeding are encouraged to notify the department at least one business day prior to the proceeding and indicate the general subject of their presentations. At the proceeding, those who participate shall indicate their names and addresses, identify any persons or organizations they may represent, and provide any other information relating to their participation deemed appropriate by the presiding officer. Oral proceedings shall be open to the public and shall be recorded by stenographic or electronic means.

(1) At the beginning of an oral proceeding, the presiding officer shall give a brief synopsis of the subject matter of the rules proposed in the Notice of Intended Action, a statement of the statutory authority for each proposed rule, and the reasons for the department's decision to propose each rule. The presiding officer may place time limitations on individual oral presentations when necessary to ensure the orderly and expeditious conduct of an oral proceeding. To encourage joint oral presentations and to avoid repetition, additional

## PERSONNEL DEPARTMENT[581](cont'd)

time may be provided for persons whose presentations represent the views of other individuals as well as their own views.

(2) Persons making oral presentations are encouraged to avoid restating matters which have already been submitted in writing.

(3) To facilitate the exchange of information, the presiding officer may, where time permits, open the floor to questions or general discussion.

(4) The presiding officer shall have the authority to take any reasonable action necessary for the orderly conduct of a meeting.

(5) Physical and documentary submissions presented by participants in an oral proceeding shall be submitted to the presiding officer. Such submissions become the property of the department.

(6) An oral proceeding may be continued by the presiding officer to a later time without notice other than by announcement at the hearing.

(7) Participants in an oral proceeding shall not be required to take an oath or to submit to cross-examination. However, the presiding officer in an oral proceeding may question participants and permit the questioning of participants by other participants about any matter relating to that rule-making proceeding, including any prior written submissions made by those participants in that proceeding; but no participant shall be required to answer any question.

(8) The presiding officer in an oral proceeding may permit rebuttal statements and request the filing of written statements subsequent to the adjournment of the oral presentations.

**31.3(4)** Additional information. In addition to receiving written comments and oral presentations according to the provisions of this rule, the department may obtain information concerning its proposed rules through any other lawful means deemed appropriate under the circumstances.

**31.3(5)** Accessibility. The department shall schedule oral proceedings in rooms accessible to and functional for persons with physical disabilities. Persons who have special requirements should contact the person designated in the Notice of Intended Action at the telephone number or address provided in the Notice of Intended Action in advance to arrange access or other needed services.

**581—31.4(17A,25B) Fiscal impact statement.**

**31.4(1)** A proposed rule that mandates additional combined expenditures exceeding \$100,000 by all affected political subdivisions, or agencies and entities which contract with political subdivisions to provide services shall be accompanied by a fiscal impact statement outlining the costs associated with the rule. A fiscal impact statement shall satisfy the requirements of Iowa Code section 25B.6.

**31.4(2)** If the department determines at the time it adopts a rule that the fiscal impact statement upon which the rule is based contains errors, the department shall, at the same time, issue a corrected fiscal impact statement and publish the corrected fiscal impact statement in the Iowa Administrative Bulletin.

**581—31.5(17A) Variance between adopted rule and published notice of proposed rule adoption.**

**31.5(1)** The department shall not adopt a rule that differs from the rule proposed in a Notice of Intended Action on which the rule is based unless:

a. The differences are within the scope of the subject matter announced in the Notice of Intended Action and are in character with the issues raised in that notice; and

b. The differences are a logical outgrowth of the contents of that Notice of Intended Action and the comments submitted in response thereto; and

c. The Notice of Intended Action provided fair warning that the outcome of that rule-making proceeding could be the rule in question.

**31.5(2)** In determining whether a Notice of Intended Action provided fair warning that the outcome of that rule-making proceeding could be the rule in question, the department shall consider the following factors:

a. The extent to which persons who will be affected should have understood that the rule making on which it is based could affect their interests;

b. The extent to which the subject matter or the issues determined by the adopted rule are different from the subject matter or issues contained in the Notice of Intended Action; and

c. The extent to which the effects of the adopted rule differ from the effects of the proposed rule contained in the Notice of Intended Action.

**31.5(3)** The department shall commence a rule-making proceeding within 60 days of its receipt of a petition for rule making seeking the amendment or repeal of an adopted rule that differs from the proposed rule contained in the Notice of Intended Action upon which the adopted rule is based, unless the department finds that the differences are so insubstantial as to make such a rule-making proceeding wholly unnecessary. A copy of any such finding and the petition to which it responds shall be sent to petitioner, the administrative rules coordinator, and the administrative rules review committee, within three days of its issuance.

**581—31.6(17A) Exemptions from public rule-making procedures.**

**31.6(1)** Omission of notice and comment. To the extent the department for good cause finds that public notice and participation are unnecessary, impracticable, or contrary to the public interest in the process of adopting a particular rule or set of rules, the department may adopt that rule or set of rules without publishing advance Notice of Intended Action in the Iowa Administrative Bulletin and without providing for written or oral public submissions prior to adoption. The department shall incorporate the required finding and a brief statement of its supporting reasons in each rule adopted in reliance upon this subrule.

**31.6(2)** Categories exempt. The following narrowly tailored categories of rules are exempt from the usual public notice and participation requirements because those requirements are unnecessary, impracticable, or contrary to the public interest with respect to each category:

a. Rules that implement nondiscretionary federal law;

b. Rules that implement nondiscretionary state law;

c. Rules implementing contribution rates set by the Iowa public employees' retirement system's actuary;

d. Minor changes such as grammar, punctuation, spelling and other scrivener's errors that are otherwise nonsubstantive and serve only to make a correction; and

e. Any other categories added to this list by rule-making where such an exemption is justified.

**31.6(3)** Public proceedings on rules adopted without them. The department may, at any time, commence a standard rule-making proceeding for the adoption of a rule that is identical or similar to a rule adopted in reliance upon subrule 31.6(1). Upon written petition by a governmental subdivision, the administrative rules review committee, an agency, the administrative rules coordinator, an association having not less than 25 members, or at least 25 persons, the depart-

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ment shall commence a standard rule-making proceeding for any rule specified in the petition that was adopted in reliance upon subrule 31.6(1). Such a petition must be filed within one year of the publication of the specified rule in the Iowa Administrative Bulletin as an adopted rule. A rule-making proceeding on that rule must be commenced within 60 days of the receipt of such a petition. After a standard rule-making proceeding commenced pursuant to this subrule, the department may either readopt a rule it adopted without benefit of all usual procedures on the basis of subrule 31.6(1), or may take any other lawful action, including the amendment or repeal of the rule in question, with whatever further proceedings are appropriate.

**581—31.7(17A) Concise statement of reasons.**

**31.7(1) General.** When requested by a person, either prior to the adoption of a rule or within 30 days after its publication in the Iowa Administrative Bulletin as an adopted rule, the department shall issue a concise statement of reasons for the rule. Requests for such a statement must be in writing and be delivered to the person designated in the Notice of Intended Action at the address designated in the Notice of Intended Action. The request should indicate whether the statement is sought for all or only a specified part of the rule. Requests will be considered made on the date received.

**31.7(2) Contents.** The concise statement of reasons shall contain:

- a. The reasons for adopting the particular rule;
- b. An indication of any change between the text of the proposed rule contained in the published Notice of Intended Action and the text of the rule as finally adopted, with the reasons for any such change; and
- c. The principal reasons urged in the rule-making proceeding for and against the rule, and the department's reasons for overruling the arguments made against the rule.

**31.7(3) Time of issuance.** After a proper request, the department shall issue a concise statement of reasons by the later of the time the rule is adopted or 35 days after receipt of the request.

**581—31.8(17A) Contents, style, and form of rules.**

**31.8(1) Contents.** Each rule making by the department shall contain the text of each rule and, in addition:

- a. The date the department adopted the rule;
- b. A brief explanation of the principal reasons for the rule-making action if such reasons are required by 1998 Iowa Acts, chapter 1202, section 8, or the department in its discretion decides to include such reasons;
- c. A reference to all rules repealed, amended, or suspended by the rule;
- d. A reference to the specific statutory or other authority authorizing adoption of the rule;
- e. Any findings required by any provision of law as a prerequisite to adoption or effectiveness of the rule;
- f. Effective July 1, 1999, if the department has not included the subject matter of the proposed rule in a separate rule listing categories of rules for which no waiver provision will be included, a brief explanation of the principal reasons for the failure to provide for waivers to the rule if no waiver provision is included and a brief explanation of any waivers or special exceptions provided in the rule if such reasons are required by 1998 Iowa Acts, chapter 1202, section 8, or the department in its discretion decides to include such reasons; and
- g. The effective date of the rule.

**31.8(2) Incorporation by reference.** The department may incorporate by reference in a proposed or adopted rule, and

without causing publication of the incorporated material in full, all or any part of a code, standard, rule, or other matter if the department finds that the incorporation of its text in the department proposed or adopted rule would be unduly cumbersome, expensive, or otherwise inexpedient. The reference in the department proposed or adopted rule shall fully and precisely identify the incorporated material by location, title, citation, date, and edition, if any, and may state that the proposed or adopted rule includes any later amendments or editions of the proposed material that are binding on the department by state or federal law or regulation. The department may only incorporate such material by reference in a proposed or adopted rule if it is readily available to the public at the department's principal place of business, or at the state law library. If the department adopts standards by reference to another publication that is not available to the public at the department's principal place of business and is not currently on file with the state law library, the department shall provide a copy of the publication containing the standards to the administrative rules coordinator for deposit in the state law library. The department shall retain permanently a copy of any materials not available from the state law library that are incorporated by reference in a rule. Copies of incorporated material not available from the state law library may be obtained at cost from the department. The department shall also provide upon request information about how and where copies of the incorporated matter may be obtained directly from the issuer of the incorporated material.

**31.8(3) References to materials not published in full.** When the administrative code editor decides to omit the full text of a proposed or adopted rule because publication of the full text would be unduly cumbersome, expensive, or otherwise inexpedient, the department shall prepare and submit to the administrative code editor for inclusion in the Iowa Administrative Bulletin and Iowa Administrative Code a summary statement describing the specific subject matter of the omitted material. This summary statement shall include the title and a brief description sufficient to inform the public of the specific nature and subject matter of the proposed or adopted rules, and of significant issues involved in these rules. The summary statement shall also describe how a copy of the full text of the proposed or adopted rule, including any unpublished matter and any matter incorporated by reference, may be obtained from the department. The department will provide a copy of that full text at actual cost upon request and shall ensure that copies of the full text are available for review at the state law library and may make the standards available electronically.

At the request of the administrative code editor, the department shall provide a proposed statement explaining why publication of the full text would be unduly cumbersome, expensive, or otherwise inexpedient.

**31.8(4) Style and form.** In preparing its rules, the department shall follow the uniform numbering system, form, and style prescribed by the administrative rules coordinator.

**581—31.9(17A) Department rule-making record.**

**31.9(1) Requirement.** The department shall maintain for each separate rule making an index listing and summarizing the rules being proposed, adopted, amended or repealed. In addition, the department shall maintain a rule-making record as described in subrule 31.9(2) for each separate rule making that it proposes, adopts, or terminates under the provisions of Iowa Code chapter 17A and this chapter. These indices and rule-making records, including materials incorporated by reference, must be available for public inspection.

## PERSONNEL DEPARTMENT[581](cont'd)

**31.9(2)** Contents of rule-making record. The department shall maintain a file containing the indices from each separate rule making that it proposes, adopts, or terminates under the provisions of Iowa Code chapter 17A and this chapter. This file shall also include information showing the date of publication in the Iowa Administrative Bulletin and ARC number where each applicable rule making was published.

Each separate rule-making record shall contain:

a. Copies of all publications in the Iowa Administrative Bulletin with respect to a rule making and any file-stamped copies of department submissions to the administrative rules coordinator concerning the rule making;

b. All written petitions for declaratory orders, all requests for rule makings, all submissions by a governmental subdivision, the administrative rules review committee, an agency, the administrative rules coordinator, an association having not less than 25 members, or at least 25 persons, and all other written materials of a factual nature as distinguished from opinion that are relevant to the merits of the rule and that were created or compiled by the department and considered in connection with the formulation, proposal, or adoption of a rule or the proceeding upon which a rule is based, except to the extent the department is authorized by law to keep them confidential; provided, however, that when any such materials are deleted because they are authorized by law to be kept confidential, the department shall identify in the record the particular materials deleted and state the reasons for that deletion;

c. Any official transcript of oral presentations made in rule-making proceedings or, if not transcribed, the stenographic record or electronic recording of those presentations, and any memorandum prepared by a presiding officer summarizing the contents of those presentations;

d. A copy of any regulatory analysis or fiscal impact statement prepared for rule-making proceedings;

e. A copy of the rule and any concise statement of reasons prepared for the rule;

f. All petitions for amendment, repeal or suspension of the rule;

g. A copy of any objection to the issuance of that rule without public notice and participation filed pursuant to Iowa Code section 17A.4(2) by the administrative rules review committee, the governor, or the attorney general;

h. A copy of any objection to a rule filed by the administrative rules review committee, the governor, or the attorney general pursuant to Iowa Code section 17A.4(4), and any department response to such objections;

i. A copy of any significant criticism of the rule, including a summary of any petitions for waiver of a rule; and

j. A copy of any executive order concerning the rule.

**31.9(3)** Effect of record. Except as otherwise required by a provision of law, the department rule-making record required by this rule need not constitute the exclusive basis for department action on a rule.

**31.9(4)** Maintenance of record. The department shall maintain the rule-making record for a period of not less than five years from the latest date the rules to which it pertains became effective, or the date of the Notice of Intended Action, whichever is later.

#### **581—31.10(17A) Effectiveness of rules prior to publication.**

**31.10(1)** Grounds. The department may make a rule effective after its filing at any stated time prior to 35 days after its indexing and publication in the Iowa Administrative Bulletin if it finds that a statute so provides, the rule confers a benefit or removes a restriction on some segment of the pub-

lic, or that the effective date of the rule is necessary to avoid imminent peril to the public health, safety, or welfare. The department shall incorporate the required finding and a brief statement of its supporting reasons in each rule adopted in reliance upon this subrule.

**31.10(2)** Special notice. When the department makes a rule effective prior to its indexing and publication in reliance upon the provisions of Iowa Code section 17A.5(2)“b”(3), the department shall employ all reasonable efforts to make its contents known to the persons who may be affected by that rule prior to the rule’s indexing and publication. The term “all reasonable efforts” requires the department to employ the most effective and prompt means of notice rationally calculated to inform potentially affected parties of the effectiveness of the rule that is justified and practical under the circumstances considering the various alternatives available for this purpose, the comparative costs to the department of utilizing each of those alternatives, and the harm suffered by affected persons from any lack of notice concerning the contents of the rule prior to its indexing and publication. The means that may be used for providing notice of such rules prior to their indexing and publication include, but are not limited to, any one or more of the following means: radio, newspaper, television, signs, mail, telephone, personal notice or electronic means.

A rule made effective prior to its indexing and publication in reliance upon the provisions of Iowa Code section 17A.5(2)“b”(3) shall include in that rule a statement describing the reasonable efforts that will be used to comply with the requirements of this subrule 31.10(2).

#### **581—31.11(17A) Review by department of rules.**

**31.11(1)** Any interested person, association, agency, or political subdivision may submit a written request to the administrative rules coordinator requesting the department to conduct a formal review of a specified rule. Upon approval of that request by the administrative rules coordinator, the department shall conduct a formal review of a specified rule to determine whether a new rule should be adopted or the rule should be amended or repealed. The department may refuse to conduct a review if it has conducted such a review of the specified rule within five years prior to the filing of the written request.

**31.11(2)** In conducting the formal review, the department shall prepare within a reasonable time a written report summarizing its findings, its supporting reasons, and any proposed course of action. The report must include a concise statement of the department’s findings regarding the rule’s effectiveness in achieving its objectives, including a summary of any available supporting data. The report shall also concisely describe significant written criticisms of the rule received during the previous five years, including a summary of any petitions for waiver of the rule received by the department or granted by the department. The report shall describe alternative solutions to resolve the criticisms of the rule, the reasons any were rejected, and any changes made in the rule in response to the criticisms as well as the reasons for the changes. A copy of the department’s report shall be sent to the administrative rules review committee and the administrative rules coordinator. The report must also be available for public inspection.

These rules are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202.

## ARC 8777A

PHARMACY EXAMINERS  
BOARD[657]

## Notice of Intended Action

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)"b."

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code sections 17A.3, 147.76, 272C.3, 272C.4, and 272C.10, the Board of Pharmacy Examiners hereby gives Notice of Intended Action to amend Chapter 1, "Purpose and Organization," Chapter 4, "Pharmacist-Intern Registration and Minimum Standards for Evaluating Practical Experience," Chapter 17, "Wholesale Drug Licenses," and Chapter 19, "Nonresident Pharmacy Licenses," and to adopt Chapter 36, "Discipline," Iowa Administrative Code.

The amendments were approved at the February 2, 1999, regular meeting of the Board of Pharmacy Examiners.

The new Chapter 36 rules establish procedures and requirements specific to Board disciplinary actions against pharmacist, pharmacy, and drug wholesaler licenses, against pharmacy technician and pharmacist-intern registrations, and against precursor substances permits. The rules include procedures and requirements for investigation of complaints and allegations of violation of rules or laws; for the establishment of peer review committees; for administrative hearings, informal settlements, and informal conferences; and for reinstatement of previously disciplined licenses, registrations, and permits. The rules identify the Board's authority to take disciplinary action, identify grounds for disciplinary action, and identify disciplinary sanctions which may be imposed as a result of the Board's finding that alleged violations are fact.

The amendments in Chapters 1, 4, 17, and 19 change references within those chapters due to the adoption of new Chapter 36 rules.

Any interested person may present written comments, data, views, and arguments on the proposed amendments not later than 4:30 p.m. on March 30, 1999. Such written materials should be sent to Lloyd K. Jessen, Executive Secretary/Director, Board of Pharmacy Examiners, Executive Hills West, 1209 East Court Avenue, Des Moines, Iowa 50319.

These amendments are intended to implement Iowa Code sections 17A.10 to 17A.23 as amended by 1998 Iowa Acts, chapter 1202, 124.301, 124.304, 124B.12, 126.16 to 126.18, 155A.6, 155A.12, 155A.13, 155A.13A, 155A.15 to 155A.18, 155A.25, 205.11, 272C.3 to 272C.6, 272C.9, and 272C.10.

The following amendments are proposed.

ITEM 1. Amend 657—1.2(17A,124,124A,124B,126,147,155A,205) as follows:

**657—1.2(17A,124,124A,124B,126,147,155A,205) Disciplinary action.**

**1.2(1)** License denial, revocation or suspension. Pursuant to 657—~~Chapter 9 Chapters 35 and 36~~, the board may deny, restrict, revoke or suspend a license to practice pharmacy for grounds stated in Iowa Code sections 147.55 and 155A.12. Pursuant to 657—~~Chapter 9 Chapters 35 and 36~~, the board may also deny, revoke or suspend a license to oper-

ate a pharmacy for grounds stated in Iowa Code ~~section sections~~ 155A.13A or 155A.15, as appropriate. Pursuant to 657—~~Chapters 35 and 36~~, the board may deny, revoke or suspend a license to operate a wholesale drug distribution facility doing business in Iowa for grounds stated in Iowa Code section 155A.17.

**1.2(2)** Controlled substance registration denial, revocation or suspension. Pursuant to 657—~~Chapter 9 Chapters 35 and 36~~, the board may deny, restrict, revoke or suspend registration for grounds stated in Iowa Code sections 124.303 and 124.304.

**1.2(3)** Permit denial, revocation or suspension. Pursuant to 657—~~Chapter 9 Chapters 35 and 36~~, the board may refuse, suspend, or revoke a permit to handle precursor substances for grounds stated in Iowa Code section 124B.12.

**1.2(4)** Pharmacy technician registration denial, revocation or suspension. Pursuant to 657—~~Chapter 9 Chapters 35 and 36~~, the board may deny, suspend, or revoke a pharmacy technician registration for grounds stated in Iowa Code section 155A.6.

**1.2(5)** Pharmacist-intern registration denial, revocation or suspension. Pursuant to 657—~~Chapter 9 Chapters 35 and 36~~, the board may deny, suspend, or revoke a pharmacist-intern registration for grounds stated in Iowa Code section 155A.6.

ITEM 2. Amend 657—4.1(155A), definition of "Pharmacist preceptor," as follows:

"Pharmacist preceptor" or "preceptor" means a pharmacist licensed to practice pharmacy in Iowa. Preceptors shall meet the conditions and requirements of rule 4.9(155A). No pharmacist shall serve as a preceptor if their license to practice pharmacy has been the subject of an order of the board imposing any penalty set out in 657—Chapter 9 36 during the time the pharmacist is serving as preceptor or within the three-year period immediately preceding application for approval as a preceptor. Provided, however, a pharmacist who has been the subject of such an order may petition the board in writing for approval to act as preceptor.

ITEM 3. Amend 657—17.16(155A) as follows:

**657—17.16(155A) Discipline.** Pursuant to 657—~~Chapter 9 Chapters 35 and 36~~, the board may deny, suspend, or revoke a wholesale drug license for any violation of Iowa Code chapters 155A, 126, 124, 124A, 124B, and 205, or a rule of the board promulgated thereunder.

ITEM 4. Amend 657—19.3(155A) as follows:

**657—19.3(155A) Discipline.** Pursuant to 657—~~Chapter 9 Chapters 35 and 36~~, the board may deny, suspend, or revoke a nonresident pharmacy license for any violation of Iowa Code section 155A.13A; section 155A.15, subsection 2, paragraph "a," "b," "d," "e," "f," "g," "h," or "i"; Iowa Code chapter 124, 124A, 124B, 126, or 205; or a rule of the board promulgated thereunder unless the Iowa Code or Iowa Administrative Code conflicts with law, administrative rule, or regulation of the home state. The more stringent of the two shall apply when there is a conflict of law regarding services to Iowa residents.

ITEM 5. Adopt the following new chapter:

CHAPTER 36  
DISCIPLINE

**657—36.1(147,155A,272C) Authority and grounds for discipline.**

**36.1(1)** The board has the authority to impose discipline for any violations of Iowa Code chapters 124, 124A, 124B,

## PHARMACY EXAMINERS BOARD[657](cont'd)

126, 147, 155A, 205, and 272C or the rules promulgated thereunder.

**36.1(2)** The board has the authority to impose the following disciplinary sanctions:

- a. Revocation of a registration or of a license to operate a pharmacy or to practice pharmacy.
- b. Suspension of a registration or of a license to operate a pharmacy or to practice pharmacy until further order of the board or for a specified period.
- c. Nonrenewal of a registration or of a license to operate a pharmacy or to practice pharmacy.
- d. Prohibit permanently, until further order of the board, or for a specified period, the engaging in specified procedures, methods or acts.
- e. Probation.
- f. Require additional education or training.
- g. Require a reexamination.
- h. Order a physical or mental examination.
- i. Impose civil penalties not to exceed \$25,000.
- j. Issue citation and warning.
- k. Such other sanctions allowed by law as may be appropriate.
  1. Suspend for a specified period of time the licensee's privilege to participate in the medical assistance program operated by the state.
  - m. Deny, suspend, or revoke a wholesale drug license.
  - n. Refuse, suspend, or revoke a precursor substance permit.

**36.1(3)** The following factors may be considered by the board in determining the nature and severity of the disciplinary sanction to be imposed:

- a. The relative seriousness of the violation as it relates to assuring the citizens of this state a high standard of professional care.
- b. The facts of the particular violation.
- c. Any extenuating circumstances or other countervailing considerations.
- d. Number of prior violations or complaints.
- e. Seriousness of prior violations or complaints.
- f. Whether remedial action has been taken.
- g. Such other factors as may reflect upon the competency, ethical standards, and professional conduct of the licensee, registrant, or permittee.

**36.1(4)** The board may impose any of the disciplinary sanctions set out in subrule 36.1(2), including civil penalties in an amount not to exceed \$25,000, when the board determines that the licensee, registrant, or permittee is guilty of the following acts or offenses:

- a. Fraud in procuring a license. Fraud in procuring a license includes but is not limited to an intentional perversion of the truth in making application for a license to practice pharmacy, to operate a pharmacy doing business in this state, or to operate as a wholesale drug distributor doing business in this state or in making an application for a registration to practice as a pharmacist-intern or a pharmacy technician, and includes false representations of a material fact, whether by word or conduct, by false or misleading allegations, or by concealment of that which should have been disclosed when making such application, or attempting to file or filing with the board any false or forged diploma, certificate, affidavit, identification, or qualification in making such application for a license or registration in this state.
- b. Professional incompetency. Professional incompetency includes but is not limited to:

(1) A substantial lack of knowledge or ability to discharge professional obligations within the scope of the pharmacist's practice.

(2) A substantial deviation by a pharmacist from the standards of learning or skill ordinarily possessed and applied by other pharmacists in the state of Iowa acting in the same or similar circumstances.

(3) A failure by a pharmacist to exercise in a substantial respect that degree of care which is ordinarily exercised by the average pharmacist in the state of Iowa acting under the same or similar circumstances.

(4) A willful or repeated departure from, or the failure to conform to, the minimal standard or acceptable and prevailing practice of pharmacy in the state of Iowa.

c. Knowingly making misleading, deceptive, untrue or fraudulent representations in the practice of pharmacy or engaging in unethical conduct or practice harmful to the public. Proof of actual injury need not be established.

d. Habitual intoxication or addiction to the use of drugs. Habitual intoxication or addiction to the use of drugs includes, but is not limited to:

(1) The inability of a licensee or registrant to practice with reasonable skill and safety by reason of the excessive use of alcohol on a continuing basis.

(2) The excessive use of drugs which may impair a licensee's or registrant's ability to practice with reasonable skill or safety.

e. Conviction of a felony. A copy of the record of conviction or a plea of guilty shall be conclusive evidence.

f. Fraud in representations as to skill or ability. Fraud in representations as to skill or ability includes, but is not limited to, a pharmacist having made deceptive or untrue representations as to competency to perform professional services which the pharmacist is not qualified to perform by virtue of training or experience.

g. Use of untrue or improbable statements in advertisements.

h. Distribution of intoxicating liquors or drugs for other than lawful purposes. The distribution of drugs for other than lawful purposes includes, but is not limited to, the disposition of drugs in violation of Iowa Code chapters 155A, 124, and 126.

i. Willful or repeated violations of the provisions of Iowa Code chapter 147 or Iowa Code chapter 272C. Willful or repeated violations of these Acts include, but are not limited to, a pharmacist's, pharmacist-intern's, or pharmacy technician's intentionally or repeatedly violating a lawful rule or regulation promulgated by the board of pharmacy examiners or the state department of public health or violating a lawful order of the board in a disciplinary hearing or violating the provisions of Title IV (Public Health) of the Code of Iowa.

j. Violating a statute or law of this state, another state, or the United States, without regard to its designation as either a felony or misdemeanor, which statute or law relates to the practice of pharmacy or the distribution of controlled substances, prescription drugs, or nonprescription drugs.

k. Failure to report a license or registration revocation, suspension, or other disciplinary action taken by another state, territory or country.

l. Knowingly aiding, assisting, procuring, or advising another person to unlawfully practice pharmacy or to unlawfully perform the functions of a pharmacy technician.

m. Inability of a licensee or registrant to practice with reasonable skill and safety by reason of mental or physical impairment or chemical abuse.

## PHARMACY EXAMINERS BOARD[657](cont'd)

n. Being adjudged mentally incompetent by a court of competent jurisdiction. Such adjudication shall automatically suspend a license or registration for the duration of the license or registration unless the board otherwise orders.

o. Submission of a false report of continuing education or failure to submit annual reports of continuing education.

p. Failure to notify the board within 30 days after occurrence of any judgment or settlement of a malpractice court claim or action.

q. Failure to file the reports required by subrule 36.2(4) concerning acts or omissions committed by another licensee or registrant.

r. Willful or repeated malpractice.

s. Willful or gross negligence.

t. Obtaining any fee by fraud or misrepresentation.

u. Violating any of the grounds for revocation or suspension of a license or registration listed in Iowa Code sections 147.55, 155A.12, and 155A.15.

v. Practicing pharmacy without an active and current Iowa pharmacist license, operating a pharmacy without a current pharmacy license, operating a prescription drug wholesale facility without a current wholesale drug license, practicing as a pharmacist-intern without a current pharmacist-intern registration, or assisting a pharmacist with technical functions associated with the practice of pharmacy without a current pharmacy technician registration except as provided in 657—subrule 22.4(3).

w. Attempting to circumvent the patient counseling requirements, or discouraging patients from receiving patient counseling concerning their prescription drug orders.

x. Noncompliance with a support order or with a written agreement for payment of support as evidenced by a certificate of noncompliance issued pursuant to Iowa Code chapter 252J.

y. Student loan default or noncompliance with the terms of an agreement for payment of a student loan obligation as evidenced by a certificate of noncompliance issued pursuant to Iowa Code chapter 261.

z. Engaging in any conduct that subverts or attempts to subvert a board investigation.

aa. Employing or continuing to employ as a practicing pharmacist any person whose Iowa pharmacist license is not current and active, or employing or continuing to employ a person to assist a pharmacist with technical functions associated with the practice of pharmacy who is not currently registered as a pharmacy technician except as provided in 657—subrule 22.4(3).

ab. Retaliatory action. Retaliating against a pharmacist, pharmacist-intern, or a pharmacy technician for reporting to the board as required by board rules or by federal or state law, making allegations of illegal or unethical activities, making other required reports to the board, or cooperating with a board investigation or survey under this chapter.

#### 657—36.2(155A,272C) Investigations.

**36.2(1) General.** The board shall, upon receipt of a written or verbal complaint, or may upon its own motion pursuant to other evidence received by the board, review and investigate alleged acts or omissions which the board reasonably believes constitute cause under applicable law or administrative rules for licensee, registrant, or permittee discipline.

**36.2(2) Reporting of judgments or settlements.** Each licensee or registrant shall report to the board every adverse judgment in a malpractice action to which the pharmacist, pharmacist-intern, or pharmacy technician is a party, and every settlement of a claim alleging malpractice. The report,

together with a copy of the judgment or settlement, must be filed within 30 days from the date of the judgment or settlement.

**36.2(3) Investigation of reports of judgments and settlements.** Reports received by the board from the commissioner of insurance, insurance carriers, and licensees or registrants involving adverse judgments in a professional malpractice action, and settlement of claims alleging malpractice, which involve acts or omissions which constitute negligence, careless acts, or omissions in the practice of pharmacy, shall be reviewed and investigated by the board.

**36.2(4) Reporting of acts or omissions.** Each licensee or registrant, having firsthand knowledge of acts or omissions set forth in subrule 36.1(4), shall report to the board those acts or omissions when committed by another person licensed to practice pharmacy or registered to practice as a pharmacist-intern or as a pharmacy technician. The report shall include the name and address of the licensee or registrant and the date, time, and place of the incident.

**36.2(5) Failure to report.** Upon obtaining information that a licensee or registrant failed to file a report as required by subrule 36.2(4) within 30 days from the date the licensee or registrant initially acquired the information, the board may initiate a disciplinary proceeding against the licensee or registrant who failed to make the required report.

**36.2(6) Confidentiality of investigative files.** Complaint files, investigation files, and all other investigation reports and investigative information in the possession of the board or its employees or agents which relate to licensee, permittee, or registrant discipline shall be privileged and confidential and shall not be subject to discovery, subpoena, or other means of legal compulsion for their release to any person other than the licensee, permittee, or registrant, and the board, its employees, and agents involved in licensee, permittee, or registrant discipline, nor be admissible evidence in any judicial or administrative proceeding other than the proceeding involving licensee, permittee, or registrant discipline. The licensee, permittee, or registrant is not entitled to investigative reports and documentary information until a disciplinary proceeding has been commenced. However, a final written decision, finding of fact, and order of the board in a disciplinary proceeding shall be public record.

**36.2(7) Investigation of allegations.** In order to determine if probable cause exists for a disciplinary hearing, the board, the executive secretary/director, or someone designated by the executive secretary/director, shall cause an investigation to be made into the allegations of the complaint. In this regard, the person complained of may be furnished information concerning the complaint and given the opportunity to informally present a position or defense respecting the allegations of the complaint prior to the commencement of a contested case. This position or defense may be submitted in writing but a personal conference with the investigator(s) may be had as a matter of right upon request.

**36.2(8) Investigatory subpoena powers.** In connection with the reporting of acts and omissions as required in 36.2(4), the board is authorized by law to subpoena books, papers, records, and any other real evidence, whether or not privileged or confidential under law, to help determine whether a contested case proceeding (hearing) should be commenced.

**36.2(9) Investigative report.** Upon completion of the investigation, the investigator(s) shall prepare a report for the board's consideration, which report may contain the position or defense of the respondent, discuss jurisdiction, and set forth any legal arguments and authorities that appear appli-

## PHARMACY EXAMINERS BOARD[657](cont'd)

cable to the case. The report may be concluded with a recommendation as to whether probable cause exists for further proceedings.

**36.2(10) Board consideration.** The board shall review and rule on all investigative reports. Participation in the review and consideration of the investigative report(s) does not bar any board member from participating in any subsequent disciplinary proceeding.

**36.2(11) Ruling on the initial inquiry.**

a. Rejection. If a determination is made by the board to reject the case, the complaint may be returned to the complainant along with a statement specifying the reason for rejection. A letter of explanation concerning the decision of the board may be sent to the subject of the investigation.

b. Requirement of further inquiry. If determination is made by the board to order further inquiry, the complaint and recommendations by the investigator(s) shall be returned to the investigator(s) along with a statement specifying the information deemed necessary.

c. Acceptance of the case. If determination is made by the board to initiate formal disciplinary action, the board shall direct the executive secretary/director to prepare a statement of changes and notice of hearing.

**657—36.3(147,272C) Peer review committees.**

**36.3(1)** The board may establish and register peer review committees in an emergency or under special circumstances.

**36.3(2)** The board shall determine which complaints or other matters shall be referred to the peer review committee for investigation, review, and report to the board.

**36.3(3)** The board may provide investigatory and related services to a peer review committee upon request.

**36.3(4)** A peer review committee may determine the method to be used in making its investigation, or that it is unable to investigate the report upon a complaint and return the complaint, together with an explanation, to the board.

**36.3(5)** A peer review committee shall observe the requirements of confidentiality imposed by Iowa Code section 272C.6.

**36.3(6)** Members of a peer review committee shall not be liable for acts, omissions, or decisions made in connection with service on the peer review committee. However, such immunity from civil liability shall not apply if such act is done with malice.

**36.3(7)** A peer review committee shall submit to the board for approval the procedures to be used for review, investigation, and handling of all complaints.

**657—36.4(17A,124,124B,126,147,155A,272C) Disciplinary proceedings.** The proceeding for revocation or suspension of a pharmacy license, a wholesale drug license, a pharmacy technician registration, a pharmacist-intern registration, or a license to practice pharmacy, or to discipline a person licensed to practice pharmacy, or the denial of a license, registration, or permit, or the suspension or revocation of a permit to handle precursor substances, or the refusal to issue or renew a license, registration, or permit, shall be substantially in accord with the procedures set forth in 657—Chapters 35 and 36 of these rules, which are an addition to the procedures stated in Iowa Code sections 147.58 et seq. and 155A.16.

**657—36.5(17A,124,124B,126,147,155A,272C) Notice of disciplinary hearing.**

**36.5(1)** The executive secretary/director shall prepare the notice of hearing upon direction to do so by members of the board upon a probable cause determination.

**36.5(2) Contents.** The notice of hearing shall contain the information set forth in 657—subrule 35.5(2).

**36.5(3) Delivery.** Delivery of the notice shall constitute the commencement of the contested case proceeding, and delivery may be executed by one of the methods provided for in 657—subrule 35.5(1).

**36.5(4) Notice of a hearing involving denial of license, permit, or registration renewal shall be served no later than 30 days before the expiration of the license, permit, or registration.**

**36.5(5) Notice of a hearing involving revocation or suspension of a license, permit, or registration shall be served no less than 30 days before the time set for the hearing.**

**657—36.6(17A,124B,147,155A,272C) Informal settlement.****36.6(1) Parties.**

a. A contested case may be resolved by informal settlement. Negotiation of an informal settlement may be initiated by the board or the respondent.

b. The board chairperson shall designate the executive secretary/director or one or more board members with authority to negotiate on behalf of the board.

**36.6(2) Waiver of notice and opportunity to be heard.** The decision to enter into informal settlement negotiations is voluntary on the part of the respondent. By entering into informal settlement negotiations, the respondent waives the right to seek disqualification of a board member pursuant to Iowa Code section 17A.17 and 657—35.9(17A) based on that board member's participation in the settlement negotiations. Upon initiation of negotiation, the assistant attorney general is authorized to discuss informal settlement with the board's designee. Consent to negotiation by the respondent also constitutes a waiver of notice and opportunity to be heard pursuant to Iowa Code section 17A.17 during informal settlement negotiation.

**36.6(3) Board approval.** All informal settlements are subject to approval of a majority of the full board. If the board fails to approve an informal settlement, it shall be of no force or effect to either party.

**36.6(4) Participation of designee.** A board member who is designated to act in negotiation of an informal settlement may review investigative material in the course of conducting the negotiation. The designated board member is not disqualified from participating in the adjudication of the contested case by virtue of reviewing the investigative material or having participated in negotiation discussions.

**657—36.7(272C) Appearance.** The respondent shall have the right to appear before the board in person or by attorney at the respondent's expense.

**657—36.8(17A,147,155A,124B,272C) Order of proceedings.** Before testimony is presented, the record shall show the identity of any board members present, the presiding hearing officer, the primary parties and their representatives, and the fact that all testimony is being recorded.

Hearings before the board generally follow the order established by these rules.

1. The presiding officer shall read the specification of charges and the answer thereto, or other responsive pleading, filed by the respondent prior to the hearing.

2. The assistant attorney general representing the public interest before the board may make an opening statement.

3. The respondent or respondents shall each be offered the opportunity to make an opening statement. A respondent may elect to reserve an opening statement until just prior to the presentation of evidence by the respondent.

## PHARMACY EXAMINERS BOARD[657](cont'd)

4. The presentation of evidence on behalf of the public.
5. The presentation of evidence on behalf of the respondent(s).
6. Rebuttal evidence on behalf of the public.
7. Rebuttal evidence on behalf of the respondent(s).
8. Closing arguments, first on behalf of the public, then on behalf of the respondent, and then on behalf of the public.

**657—36.9(272C) Confidentiality.** At no time prior to the release of the final decision by the board shall any portion or the whole thereof be made public or be distributed to any persons other than the parties.

**657—36.10(17A,272C) Notification of decision.** All parties to a proceeding hereunder shall be promptly furnished with a copy of any final decision or order either in person or by first-class mail, or by phone if necessary to ensure that the parties learn of the decision or order first.

**657—36.11(272C) Board decision.** The board's decision and order to discipline a licensee, registrant, or permittee or to revoke or suspend a license to practice pharmacy, a wholesale drug license, a license to operate a pharmacy, a registration to practice as a pharmacist-intern or as a pharmacy technician, or to suspend or revoke a permit to handle precursor substances, shall remain in force and effect until the appeal is finally determined and disposed of upon its merit unless the board grants a stay of its decision as provided for in rule 657—35.28(17A).

**657—36.12(17A,272C) Publication of decisions.** Final decisions of the board relating to disciplinary proceedings may be transmitted to the appropriate professional association and a newspaper of general circulation to be selected by the board.

**657—36.13(17A,124B,147,155A,272C) Reinstatement.** Any person whose license to practice pharmacy or to operate a pharmacy or whose wholesale drug license or permit to handle precursor substances or whose pharmacy technician registration or pharmacist-intern registration has been revoked or suspended must meet the following eligibility requirements:

1. Must have satisfied all the terms of the order of revocation or suspension or court proceedings as they apply to that revocation or suspension. If the order of revocation or suspension did not establish terms and conditions upon which reinstatement might occur, or if the license, registration, or permit was voluntarily surrendered, an initial application for reinstatement may not be made until one year has elapsed from the date of the board's order or the date of voluntary surrender.

2. A person whose license to practice pharmacy was revoked or voluntarily surrendered must successfully pass the North American Pharmacist Licensure Examination (NAPLEX) or an equivalent examination as determined by NABP and the Multistate Pharmacy Jurisprudence Examination (MPJE), Iowa Edition.

3. All proceedings for reinstatement shall be initiated by the respondent who shall file with the board an application for reinstatement of the license, registration, or permit. Such application shall be docketed in the original case in which the license, registration, or permit was revoked, suspended, or relinquished. All proceedings upon petition for reinstatement, including all matters preliminary and ancillary thereto, shall be subject to the same rules of procedure as other cases before the board. The board and the respondent may informally settle the issue of reinstatement. The respondent may choose to have an informal reinstatement conference before

the board, as provided in rule 657—36.14(17A,124B,147,155A,272C).

4. An application for reinstatement shall allege facts which, if established, will be sufficient to enable the board to determine that the basis for the revocation or suspension no longer exists and that it will be in the public interest for the license, registration, or permit to be reinstated. The burden of proof to establish such facts shall be on the respondent.

5. An order for reinstatement shall be based upon a decision which incorporates findings of facts and conclusions of law and must be based upon the affirmative vote of a quorum of the board. This order shall be available to the public as provided in 657—Chapter 14.

**657—36.14(17A,124B,147,155A,272C) Informal reinstatement conference.**

**36.14(1) Request.** Upon informed and written consent by the respondent, an informal reinstatement conference before the board may be held.

**36.14(2) Confidentiality.** The conference shall be open to the public except as provided in Iowa Code chapter 21 and Iowa Code section 272C.6. Material submitted to the board regarding a licensee, registrant, or permittee subject to suspension or revocation received prior to the filing of an application for reinstatement shall be deemed to be investigatory in nature and therefore confidential. After an application for reinstatement is filed by the respondent, no material regarding the respondent shall be presented to board members until either a formal hearing is held or a request for an informal settlement conference is made and approved. After a request for an informal settlement conference is made and approved, all material submitted by the respondent to the board for its consideration shall be deemed public records and is not confidential unless the respondent requests that the conference be closed. Upon filing a request for an informal reinstatement conference, the respondent consents to the provision of relevant materials to board members prior to the time of the informal reinstatement conference.

**36.14(3) Disposition.** After conducting an informal reinstatement conference, the board may issue a proposed order for reinstatement, may issue a proposed order denying reinstatement, or may order a formal hearing on the application.

**36.14(4) Appeal—formal hearing.** Upon appeal of a proposed order or upon the board's order for formal hearing, application for reinstatement shall be set for formal hearing subject to the same rules of procedure as other cases before the board. By consenting to the informal settlement conference, respondent waives any objection to any board member participating in a formal hearing by virtue of the board member's participation at the informal settlement conference. All materials submitted and statements made by the respondent at the informal settlement conference shall be admissible at a subsequent formal hearing.

**657—36.15(17A,124B,147,155A,272C) Voluntary surrender of a license, permit, or registration.** A license to practice pharmacy, a license to operate a pharmacy, a wholesale drug license, a permit to handle precursor substances, a pharmacy technician registration, or a pharmacist-intern registration which has been voluntarily surrendered shall be considered a revocation of license, permit, or registration with respect to a request for reinstatement which will be handled under the terms established by rule 657—36.13(17A,124B,147,155A,272C).

**657—36.16(17A,124B,147,155A,272C) License, permit, or registration denial.** Any request for a hearing before the board concerning the denial of a license, permit, or registra-

## PHARMACY EXAMINERS BOARD[657](cont'd)

tion shall be submitted by the applicant in writing to the board by certified mail, return receipt requested, within 30 days of a mailing of a notice of denial of license, permit, or registration.

**657—36.17(272C) Disciplinary hearings — fees and costs.**

**36.17(1) Definitions.** As used in this chapter in relation to a formal disciplinary action filed by the board against a licensee or registrant:

“Deposition” means the testimony of a person pursuant to subpoena or at the request of the state of Iowa taken in a setting other than a hearing.

“Expenses” means costs incurred by persons appearing pursuant to subpoena or at the request of the state of Iowa for purposes of providing testimony on the part of the state of Iowa in a hearing or other official proceeding and shall include mileage reimbursement at the rate specified in Iowa Code section 70A.9 or, if commercial air or ground transportation is used, the actual cost of transportation to and from the proceeding. Also included are actual costs incurred for meals and necessary lodging.

“Medical examination fees” means actual costs incurred by the board in a physical, mental, chemical abuse, or other impairment-related examination or evaluation of a licensee or registrant when the examination or evaluation is conducted pursuant to an order of the board.

“Transcript” means a printed verbatim reproduction of everything said on the record during a hearing or other official proceeding.

“Witness fees” means compensation paid by the board to persons appearing pursuant to subpoena or at the request of the state of Iowa, for purposes of providing testimony on the part of the state of Iowa. For the purposes of this rule, compensation shall be the same as outlined in Iowa Code section 622.69 or 622.72 as the case may be.

**36.17(2)** The board may charge a fee not to exceed \$75 for conducting a disciplinary hearing which results in disciplinary action taken by the board against the licensee or registration. In addition to the fee, the board may recover from the licensee or registrant costs for the following procedures and personnel:

- a. Transcript.
- b. Witness fees and expenses.
- c. Depositions.
- d. Medical examination fees incurred relating to a person licensed or registered under Iowa Code chapters 147, 154A, 155, or 169.

**36.17(3)** Fees and costs assessed by the board pursuant to subrule 36.17(2) shall be calculated by the board's executive secretary/director and shall be entered as part of the board's final disciplinary order. The board's final disciplinary order shall specify the time period in which the fees and costs shall be paid by the licensee or registrant.

**36.17(4)** Fees and costs collected by the board pursuant to subrule 36.17(2) shall be allocated pursuant to rule 641—173.20(272C). The fees and costs shall be considered repayment receipts as defined in Iowa Code section 8.2.

**36.17(5)** Failure of a licensee or registrant to pay the fees and costs assessed herein in the time specified in the board's final disciplinary order shall constitute a violation of a lawful order of the board.

These rules are intended to implement Iowa Code sections 17A.10 to 17A.23 as amended by 1998 Iowa Acts, chapter 1202, 124.301, 124.304, 124B.12, 126.16 to 126.18, 155A.6, 155A.12, 155A.13, 155A.13A, 155A.15 to

155A.18, 155A.25, 205.11, 272C.3 to 272C.6, 272C.9, and 272C.10.

**ARC 8770A**

**PHARMACY EXAMINERS  
BOARD[657]**

**Amended Notice of Intended Action**

Pursuant to Iowa Code sections 17A.22, 124.301, 147.76, and 272C.3, Notice is hereby given that a public hearing will be held on Wednesday, March 31, 1999, at 1 p.m. in the Second Floor East Conference Room, Executive Hills West, 1209 East Court Avenue, Des Moines, Iowa, in order to receive oral or written comments on proposed new rule 657—1.3(17A,124,126,147,155A,205,272C), waiver or variances from rules, published in the Iowa Administrative Bulletin on October 21, 1998, as **ARC 8411A**.

**ARC 8766A**

**PHARMACY EXAMINERS  
BOARD[657]**

**Notice of Termination**

Pursuant to the authority of Iowa Code sections 124.301, 126.17, 147.76, and 155A.13, the Board of Pharmacy Examiners hereby terminates the rule making initiated by its Notice of Intended Action published in the Iowa Administrative Bulletin on July 29, 1998, as **ARC 8210A**, amending Chapter 6, “General Pharmacy Licenses,” Iowa Administrative Code.

The Notice proposed to amend rule 657—6.9(126) by prohibiting any pharmacist from accepting from a patient or patient's agent any controlled substance for return, exchange, or resale. The Notice also proposed changing a cross-reference within this rule.

The Board is terminating the rule making commenced in **ARC 8210A** and will renote the proposed changes with other related rules.

**ARC 8778A**

**PHARMACY EXAMINERS  
BOARD[657]**

**Notice of Intended Action**

*Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)“b.”*

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code sections 124.301, 126.17, 147.76, and 155A.13, the Board of Pharmacy Examiners hereby gives Notice of Intended Action to amend Chapter 6, “General Pharmacy Licenses,” Iowa Administrative Code.

## PHARMACY EXAMINERS BOARD[657](cont'd)

The amendment was approved at the February 2, 1999, regular meeting of the Board of Pharmacy Examiners.

The amendment prohibits the return to the pharmacy of any previously dispensed controlled substances prescription medications in conformance with such prohibition under federal law and changes a cross-reference to a subrule which is being moved from Chapter 8 to new Chapter 23.

Any interested person may present written comments, data, views, and arguments on the proposed amendment not later than 4:30 p.m. on March 30, 1999. Such written materials should be sent to Lloyd K. Jessen, Executive Secretary/Director, Board of Pharmacy Examiners, Executive Hills West, 1209 East Court Avenue, Des Moines, Iowa 50319.

This amendment is intended to implement Iowa Code sections 124.301, 126.10, and 155A.13.

The following amendment is proposed.

Amend rule 657—6.9(126) as follows:

**657—6.9(126) Return of drugs and appliances.** For the protection of the public health and safety, prescription drugs shall not be returned, exchanged, or resold unless, in the professional judgment of the pharmacist, the integrity of the prescription drug has not in any way been compromised. *Under no circumstances shall a pharmacist accept from a patient or patient's agent any controlled substances for return, exchange, or resale.* Prescription drugs, *excluding controlled substances*, may, however, be returned and reused as authorized in 657—subrule 8.9(6) 23.12(5). No items of personal contact nature which have been removed from the original package or container after sale shall be accepted for return, exchanged, or resold by any pharmacist.

## ARC 8779A

PHARMACY EXAMINERS  
BOARD[657]

## Notice of Intended Action

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)“b.”

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code sections 124.301, 147.76, and 155A.13, the Board of Pharmacy Examiners hereby gives Notice of Intended Action to amend Chapter 7, “Hospital Pharmacy Licenses,” Iowa Administrative Code.

The amendment was approved at the February 2, 1999, regular meeting of the Board of Pharmacy Examiners.

The amendment adds requirements for dispensing of prescription medications in a hospital setting using a unit dose dispensing system. Including this rule with other rules for practices specific to hospital pharmacies will make it easier for pharmacists to locate and maintain compliance with the requirements of the rule.

Any interested person may present written comments, data, views, and arguments on the proposed amendment not later than 4:30 p.m. on March 30, 1999. Such written materials should be sent to Lloyd K. Jessen, Executive Secretary/Director, Board of Pharmacy Examiners, Executive Hills West, 1209 East Court Avenue, Des Moines, Iowa 50319.

This amendment is intended to implement Iowa Code sections 124.301, 126.10, 155A.13, and 155A.28.

The following amendment is proposed.

Adopt the following **new** rule 657—7.11(126,155A):

**657—7.11(126,155A) Unit dose dispensing systems.**

**7.11(1) Definitions.** For the purposes of this rule, the following definitions shall apply:

“Single unit package” is a package which contains one discrete pharmaceutical dosage form.

“Unit dose dispensing systems” are those drug distribution systems determined by the board to be pharmacy-based and which involve single unit, unit dose, or unit of issue packaging in a manner which helps reduce or remove traditional drug stocks from patient care areas and enables the selection and distribution of drugs to be pharmacy-based and controlled.

“Unit dose package” is a package which contains that particular dose of a drug ordered for the patient for one administration time. A unit dose package is not always a single unit package.

“Unit of issue package” is a package which provides multiple units/doses attached to each other but separated in a card or specifically designed container.

**7.11(2) Packaging requirements.** Packaging for all non-sterile drugs stored and dispensed in single unit, unit dose, or unit of issue packages shall:

a. Preserve and protect the identity and integrity of the drug from the point of packaging to the point of patient administration.

b. When packaged by the manufacturer or distributor, be in accordance with federal Food and Drug Administration (FDA) requirements.

c. When in single unit and unit dose packages prepackaged by the pharmacy for use beyond 24 hours, be in accordance with 657—subrule 8.3(1).

d. When in containers used for packaging, be clean and free of extraneous matter when the dosage unit(s) is placed into the package.

**7.11(3) Labeling requirements.**

a. Labeling for single unit or unit dose packaging shall comply with the following:

(1) Doses packaged by the manufacturer or distributor shall be properly labeled according to federal Food and Drug Administration (FDA) requirements.

(2) Doses packaged by the pharmacy shall be properly labeled according to 657—subrule 8.3(2) if used beyond a 24-hour period.

b. Labeling for unit of issue packages shall contain the following information:

(1) Name, strength, and expiration date of drug when the packages are utilized for floor stock in an institutional setting.

(2) Name and room or bed number of patient, name of prescribing practitioner, name and strength of drug, directions for use, and name and address of the dispensing pharmacy, when the packages are utilized for patients in an institutional setting. Room or bed number, the name of prescribing practitioner, and the name and address of the dispensing pharmacy are not required if this information appears on a medication administration record used by the institution.

(3) Unit of issue packages dispensed to patients on an outpatient basis or in a noninstitutional setting shall be considered prescription containers and shall be labeled in accordance with 657—subrule 8.14(1).

c. If a pharmacist selects a generically equivalent drug product for a brand name drug product prescribed by a practitioner, the label must identify the generic drug and may identify the brand name drug for which the selection is made.

## PHARMACY EXAMINERS BOARD[657](cont'd)

The dual identification allowed under this paragraph must take the form of the following statement on the label: "(generic name) Generic for (brand name product)".

**7.11(4)** General procedures. The following will apply when a unit dose dispensing system is employed:

a. The pharmacist shall be responsible for determining the classification for containers set by USP Standard 671 used by the pharmacy to repack nonsterile drugs into single unit, unit dose, or unit of issue packaging. This classification shall be used to determine maximal expiration dating for repackaging set forth in subrule 7.11(5).

b. Established written policies and procedures shall be available in the pharmacy for inspection by the board or its agents which:

(1) Specify the categories of drugs or drug dosage forms which will or will not be dispensed under the particular unit dispensing system employed.

(2) Specify the pharmacy's recall policy for drugs returned upon a particular manufacturer's or FDA recall.

c. Those drugs not dispensed under a unit dose dispensing system shall be dispensed in accordance with the packaging requirements of the federal Food and Drug Administration (FDA) and labeling requirements of 657—subrule 8.14(1).

**7.11(5)** Expiration dating. Expiration dating for nonsterile drugs repackaged by the pharmacy into single unit, unit dose, or unit of issue packages shall meet the following conditions:

a. Not exceed 90 days from the date of repackaging except as provided in paragraph 7.11(5)"c."

b. Not exceed the manufacturer's original expiration date.

c. May exceed 90 days from the date of repackaging provided that each of the following conditions are met:

(1) The container is classified according to USP Standard 671 as being Class A or Class B for oral solid dosage forms or is a tight container for liquid dosage forms.

(2) The container is light-resistant when the manufacturer has labeled the product "sensitive to light."

(3) The expiration date is not greater than 12 months.

d. Drugs or dosage forms having known stability problems are assigned an expiration date of less than 90 days or are not repackaged as determined by policies developed by the pharmacy.

**7.11(6)** Return of drugs. Drugs dispensed in single unit, unit dose, or unit of issue packaging in compliance with subrules 7.11(1) to 7.11(5) may be returned to the pharmacy stock and reissued provided that:

a. The expiration dating information is retrievable and identifiable.

b. Drugs returned from unit of issue packaging are kept separate according to manufacturer's lot number and the pharmacy's repackaged expiration date unless the pharmacy's recall policy states that all lots of a drug will be returned upon recall. In this instance, drugs returned to stock shall be kept separate according to the pharmacy's repackaged expiration date as determined in subrule 7.11(5).

c. The drugs were stored under proper storage conditions.

d. The drugs are returned to the pharmacy in the original packaging as when dispensed.

e. The pharmacy includes in their written policies and procedures the manner in which they will record or identify controlled substances returned.

This rule is intended to implement Iowa Code sections 124.301, 126.10, 155A.13, and 155A.28.

**ARC 8767A****PHARMACY EXAMINERS BOARD[657]****Notice of Termination**

Pursuant to the authority of Iowa Code sections 147.76, 155A.13, and 272C.4, the Board of Pharmacy Examiners hereby terminates the rule making initiated by its Notice of Intended Action published in the Iowa Administrative Bulletin on July 29, 1998, as **ARC 8211A**, amending Chapter 8, "Minimum Standards for the Practice of Pharmacy," Chapter 9, "Discipline," and Chapter 15, "Correctional Facility Pharmacy Licenses," Iowa Administrative Code.

The Notice proposed to amend Chapters 8 and 15 by rescinding rules and changing references to rules which the Board proposed, under separate Notice, to move to a new chapter. The Notice also proposed defining pharmaceutical care and providing for disciplinary action for advertising pharmaceutical care without meeting the requirements of the definition.

The Board is terminating the rule making commenced in **ARC 8211A** and will renounce some portions of the original Notice. Following review of comments regarding the proposed definition of pharmaceutical care and related grounds for disciplinary action, the Board has decided to discontinue any activity aimed at defining pharmaceutical care at this time.

**ARC 8780A****PHARMACY EXAMINERS BOARD[657]****Notice of Intended Action**

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)"b."

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code sections 124.301, 147.76 and 155A.13, the Board of Pharmacy Examiners hereby gives Notice of Intended Action to amend Chapter 8, "Minimum Standards for the Practice of Pharmacy," and Chapter 15, "Correctional Facility Pharmacy Licenses," and to adopt Chapter 23, "Long-Term Care Pharmacies," Iowa Administrative Code.

The amendments were approved at the February 2, 1999, regular meeting of the Board of Pharmacy Examiners.

New Chapter 23 includes definitions applicable to the specific type of pharmacy practice, the requirements and responsibilities of the pharmacy providing medication services to patients residing in long-term care facilities, and circumstances and situations which are unique to pharmacies and pharmacists engaged in this type of practice. The amendments also remove from Chapter 8 the procedures and requirements of a unit dose dispensing system and propose placing that rule in Chapter 23. Other proposed amendments change references due to reorganization of rules and delete a provision which is no longer valid.

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Any interested person may present written comments, data, views, and arguments on the proposed amendments not later than 4:30 p.m. on March 30, 1999. Such written materials should be sent to Lloyd K. Jessen, Executive Secretary/Director, Board of Pharmacy Examiners, Executive Hills West, 1209 East Court Avenue, Des Moines, Iowa 50319.

These amendments are intended to implement Iowa Code sections 124.301, 124.306, 124.308, 126.10, 155A.2, 155A.13, 155A.13A, 155A.15, 155A.21, 155A.27, 155A.28, 155A.33, 155A.35, and 155A.36.

The following amendments are proposed.

ITEM 1. Rescind and reserve rule 657—8.9(155A,126).

ITEM 2. Amend subrule 8.13(4) as follows:

8.13(4) Expiration dating (beyond-use dating). Expiration dating for nonsterile drugs repackaged by the pharmacy into patient med paks shall meet the following conditions: not exceed 90 days from the date of repackaging except as provided in board 657—subrule 8.9(5), paragraph “c.” 23.12(4), paragraph “c.”

ITEM 3. Rescind subrule 8.13(5), paragraph “e.”

ITEM 4. Amend subrule 8.14(2) as follows:

8.14(2) The requirements of subrule 8.14(1) do not apply to unit dose dispensing systems, rule 8.9(155A,126) 657—23.12(124,126,155A); sterile products, rule 8.30(126, 155A); and patient med paks, rule 8.13(155A,126).

ITEM 5. Amend subrule 8.32(6) as follows:

8.32(6) Labeling—interior. All drugs contained in the emergency/first dose drug supply shall be labeled in accordance with subrule 8.3(2) or 8.9(3) 657—subrule 23.12(3), as appropriate.

ITEM 6. Amend subrule 15.8(1) as follows:

15.8(1) Drugs dispensed in a unit dose dispensing system for subsequent administration by nurses or other qualified individuals shall be packaged and labeled in compliance with the provisions of rule 657—8.9(124,155A) 657—23.12(124,126,155A).

ITEM 7. Adopt the following new chapter:

CHAPTER 23  
LONG-TERM CARE PHARMACIES

657—23.1(155A) **Definitions.** For purposes of this chapter, the following definitions shall apply:

“Consultant pharmacist” in a long-term care facility means a pharmacist licensed to engage in the practice of pharmacy in this state who is responsible for developing, coordinating, and supervising pharmaceutical services in a long-term care facility on a regularly scheduled basis. A consultant pharmacist:

1. Reviews the distribution and storage of medications and assists facilities in establishing the policies and procedures for the distribution and storage of medications and makes appropriate recommendations to the facility and the provider pharmacist;

2. Monitors the therapeutic response and utilization of all medications prescribed for the resident. The following shall be used as minimum guidelines supplementing the pharmacist’s professional expertise:

- Regulations and interpretive guidelines of the Health Care Financing Administration, if applicable;
- Rules of the Iowa department of inspections and appeals; and
- Other state rules and regulations;

3. Serves as a resource for pharmacy-related education services within the facility;

4. Participates in quality management of resident care in the facility;

5. Communicates with the provider pharmacist regarding areas of mutual concern and resolution thereof.

“Long-term care facility” or “facility” means:

1. A facility licensed by the Iowa department of inspections and appeals under Iowa Code chapter 135C or Iowa Code chapter 135H;

2. A hospital-based long-term care unit certified under 42 CFR, Part 483, Subpart B; or

3. A freestanding inpatient hospice certified under 42 CFR, Part 418.

“Long-term care pharmacy” or “provider pharmacy” means a hospital pharmacy, a general pharmacy, a limited use pharmacy, or a nonresident pharmacy in which medications, chemicals, or poisons are prepared, compounded, dispensed, vended, distributed, or sold on a regular and recurring basis to or for the use of residents of a long-term care facility and from which related pharmacy services are delivered.

“Medication order,” as used in these rules, means a written order from a practitioner or an oral order from a practitioner or the practitioner’s authorized agent for administration of a drug or device. For purposes of this chapter, “medication order” includes a prescription.

“Patient med pak” means a customized patient medication package prepared in accordance with rule 657—8.13(155A,126) for a specific resident which comprises a series of immediate containers containing two or more prescribed solid oral dosage forms, each container being labeled with the time or the appropriate period for the patient to take its contents. Use of patient med paks is permitted only when the prescriber’s orders specifically indicate that the resident is capable of self-administering the medications contained therein.

“Provider pharmacist” means a pharmacist licensed to engage in the practice of pharmacy, who is employed by or contracted to a long-term care pharmacy or a provider pharmacy and who is responsible for supervising the accurate dispensing and proper delivery of medications to a long-term care facility located within this state. These services shall include, at a minimum, proper medication labeling, storage, transport, record keeping, and prospective drug utilization review in compliance with all federal, state, and local laws and regulations.

“Single unit package” means a package which contains one discrete pharmaceutical dosage form.

“Unit dose dispensing system” means those medication distribution systems determined by the board to be pharmacy based and which involve single unit, unit dose, or unit of issue packaging in a manner which helps reduce or remove traditional medication stocks from resident care areas and enables the selection and distribution of medications to be pharmacy based and controlled.

“Unit dose package” means a package which contains that particular dose of a medication ordered for the patient for one administration time. A unit dose package is not always a single unit package.

“Unit of issue package” means a package which provides multiple units or doses attached to each other but separated in a card or specifically designed container.

657—23.2(124,155A) **Applicability of rules.** Nothing in these rules shall be deemed to constitute a waiver or abrogation of any of the provisions of board rules or other applicable

## PHARMACY EXAMINERS BOARD[657](cont'd)

provisions of state and federal laws and rules, nor should these rules be construed as authorizing or permitting any person not licensed as a pharmacist to engage in the practice of pharmacy.

**657—23.3(124,155A) Freedom of choice.** Pursuant to 657—subrule 8.5(6), no pharmacist shall participate in any agreement or plan which infringes on any resident's right to freedom of choice as to the provider of pharmacy services. A resident in a long-term care facility shall have a choice of long-term care pharmacy so long as the pharmacy's medication delivery system provides for the timely delivery of medications compatible with the established system currently used by the facility for administering medications.

**657—23.4(124,155A) Pharmacy responsibilities.** The long-term care pharmacy shall be responsible for:

1. Providing medications pursuant to a medication order for an individual resident, properly labeled for that resident, as addressed in rule 657—23.12(124,126,155A) or 657—23.13(124,155A).

2. Providing medications for the long-term care resident, dispensed in a form consistent with the medication distribution system described in the facility's policies and procedures.

3. Affixing labels to each container of medication for residents in long-term care facilities, in compliance with rule 657—23.12(124,126,155A) or 657—23.13(124,155A).

4. Maintaining records of all transactions of the long-term care pharmacy as may be required by law and maintaining accurate control over and accountability for all medications and prescription devices.

5. Developing a medication recall procedure that protects the health and safety of the resident including immediate discontinuation of any recalled medication and subsequent notification of the prescriber and director of nursing of the facility.

6. Providing a 24-hour emergency service procedure either directly or by contract with another pharmacy.

7. Reviewing patient profiles to ensure the appropriateness of therapy for that resident and the compatibility of the medication and dosage for that patient when processing new medication orders.

8. Providing sufficient and accurate information to facility staff regarding the appropriate administration and use of all dispensed medications.

9. Communicating with the consultant pharmacist and the facility regarding concerns and resolution thereof.

**657—23.5(124,155A) Emergency medications.** A supply of emergency medications may be provided by one long-term care pharmacy to the facility pursuant to rule 657—8.32(124,155A).

**23.5(1) Emergency medication order—pharmacist review.** When an emergency medication is provided pursuant to rule 657—8.32(124,155A), the medication order shall be reviewed by the patient's dispensing pharmacist prior to the administration of a second dose.

**23.5(2) Facilities in which licensed personnel administer medications.** In addition to an emergency box or stat medication box, a long-term care facility staffed by one or more persons licensed to administer medications may maintain a stock of intravenous fluids, irrigation fluids, heparin flush kits, medicinal gases, sterile water and saline, and prescription devices. Such stock shall be limited to a listing to be determined by the provider pharmacist in consultation with the consultant pharmacist and the medical director and director of nursing of the facility.

**657—23.6(124,155A) Minimum requirements of a long-term care pharmacy.** Each pharmacy serving a long-term care facility shall have adequate space, equipment, and supplies for the professional and administrative functions of the pharmacy.

**23.6(1) Prescription department equipment.** The pharmacy shall have, as a minimum, the following:

a. Measuring devices such as syringes or graduates capable of measuring 1 ml to 250 ml;

b. Suitable refrigeration unit. The temperature of the refrigerator shall be maintained within a range compatible with the proper storage of medications requiring refrigeration;

c. Other equipment as necessary for the particular practice of pharmacy.

**23.6(2) Clean and orderly.** The pharmacy shall be arranged in an orderly fashion and kept clean. All required equipment shall be in good operating condition and maintained in a sanitary manner.

**23.6(3) Reference library.** References may be printed or computer accessed. The pharmacy shall maintain a reference library which includes, as a minimum, one reference from each of the following:

a. Current Iowa pharmacy laws, rules, and regulations.

b. A patient information reference, updated at least annually, such as:

(1) United States Pharmacopeia Dispensing Information, Volume II (Advice to the Patient);

(2) Facts and Comparisons Patient Drug Facts; or

(3) Leaflets which provide patient information in compliance with rule 657—8.20(155A).

c. A current reference on medication interactions, such as:

(1) Phillip D. Hansten's Drug Interactions; or

(2) Facts and Comparisons Drug Interactions.

d. A general information reference, updated at least annually, such as:

(1) Facts and Comparisons with current supplements;

(2) United States Pharmacopeia Dispensing Information, Volume I (Drug Information for the Healthcare Provider); or

(3) American Hospital Formulary Service with current supplements.

e. A current drug equivalency reference, including supplements, such as:

(1) Approved Drugs Products With Therapeutic Equivalence Evaluations (FDA Orange Book);

(2) ABC - Approved Bioequivalency Codes; or

(3) USP DI, Volume III.

f. Basic antidote information or the telephone number of a poison control center.

g. Additional references as may be necessary for the pharmacist to adequately meet the needs of the patients served.

**23.6(4) Sink.** The pharmacy shall have a sink with hot and cold running water within the prescription department, available to all pharmacy personnel, and maintained in a sanitary condition.

**23.6(5) Lighting and ventilation.** The pharmacy shall be properly lighted and ventilated.

**23.6(6) Temperature.** The temperature of the pharmacy shall be maintained within a range compatible with the proper storage of medications.

**657—23.7(124,155A) Policies and procedures.** Policies and procedures shall be formulated to cover the provider pharmacy's packaging and dispensing responsibilities to the residents of the long-term care facility. The policies and pro-

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cedures shall be maintained at the provider pharmacy and shall be available to the facility and the consultant pharmacist. Policies and procedures shall include, at a minimum:

1. Methods used to dispense and deliver medications to the facility in a timely fashion;
2. Proper notification to the facility when a medication is not readily available;
3. Proper labeling requirements to meet the needs of the facility which are consistent with state and federal laws and regulations;
4. Appropriate medication destruction or return of unused medication, or both, which is consistent with state and federal laws and regulations.

**657—23.8(124,155A) Training and utilization of pharmacy technicians.** Long-term care pharmacies utilizing pharmacy technicians shall develop, implement, and periodically review written policies and procedures for the training and utilization of pharmacy technicians. Pharmacy policies shall specify the frequency of review. Technician training shall be documented and maintained by the pharmacy for the duration of employment. Policies and procedures and documentation of technician training shall be available for inspection by the board or an agent of the board.

**23.8(1) Functions authorized.** Pursuant to the requirements of 657—Chapter 22, properly trained pharmacy technicians may transcribe a prescriber's medication orders to a patient profile, fill the medication orders, and perform other such duties related to a medication distribution system, including any of the functions identified in 657—22.14(155A), provided these duties are performed under the supervision of a pharmacist or as authorized in 657—6.6(155A).

**23.8(2) Pharmacist responsible.** The ultimate responsibility for the actions of a pharmacy technician working under a supervising pharmacist shall remain with the supervising pharmacist.

**657—23.9(124,155A) Medication orders.** Medications may be dispensed only upon orders of an authorized prescriber.

**23.9(1) Requirements.** New orders transmitted to the pharmacy for medications for residents of the facility shall, at a minimum, contain resident name, medication name and strength, directions for use, date of order, and name of prescriber. Orders for Schedule II controlled substances shall comply with the requirements of 657—23.17(124,155A).

**23.9(2) Abbreviations.** Orders employing abbreviations or chemical symbols shall be only those which are customarily used in the practice of medicine and pharmacy or those on a list of approved abbreviations developed by the appropriate committee or representative of the facility.

**23.9(3) Who may transmit medication orders.** Any person who is employed by a long-term care facility and who is authorized by the facility's policies and procedures may transmit to the long-term care pharmacy a medication order lawfully ordered by a practitioner authorized to prescribe medications and devices.

**657—23.10(124,155A) Stop orders.** The consultant pharmacist, in consultation with the provider pharmacist, the medical director, and the appropriate committee or representative of the facility, shall develop and implement an automatic stop order policy.

**657—23.11(124,155A) Medications dispensed to residents in a care facility—general requirements.**

**23.11(1) Labeling.** All prescription containers, other than those dispensed pursuant to rule 657—23.12(124,126,155A) or 657—23.13(124,155A), shall be properly labeled in accordance with 657—subrule 8.14(1).

a. If a label change is required to reflect a change in directions, the pharmacy shall be responsible for affixing the correct label to the container. Long-term care facility personnel shall not be authorized to affix such a label to the medication container.

b. Direction change labels that notify long-term care facility personnel that a change in directions for the medication has taken place may be used and affixed to the container by facility personnel so as not to deface the original label.

**23.11(2) Medication order required.** Dispensing of all medications to the facility shall be pursuant to a medication order for an individual resident.

**23.11(3) Prescription containers.** All prescription containers, including, but not limited to single unit, unit dose, and unit of issue containers utilized for distribution within a long-term care facility, shall meet minimum requirements as established by the United States Pharmacopoeia. Where applicable, light-resistant packaging shall be used.

**23.11(4) Floor stock.** Prescription drugs, as defined by Iowa Code section 155A.3(30), shall not be floor stocked in a long-term care facility except as provided in this subrule or in subrule 23.5(2). Bulk supplies of nonprescription medications may be maintained as provided in subrule 23.13(5). Any pharmacy which utilizes a floor stock distribution system pursuant to this subrule shall develop and implement procedures to accurately establish proof of use of prescription medications and shall maintain a perpetual inventory, whether by electronic or manual means, of all prescription medications so dispensed. A floor stock distribution system for prescription drugs may be permitted in either of the following circumstances:

a. A licensed pharmacy under the direct supervision and control of a pharmacist is established in the facility or

b. The facility and the hospital wherein the licensed pharmacy is located are both licensed under Iowa Code chapter 135B with a single hospital license.

**23.11(5) Emergency medications.** An emergency/first dose drug supply may be maintained in a long-term care facility as provided in 657—23.5(124,155A). No consultant pharmacist or provider pharmacist shall utilize a floor stock distribution system for prescription medications except as provided in subrule 23.11(4) or subrule 23.5(2). Bulk supplies of nonprescription medications may be maintained as provided in subrule 23.13(5).

**657—23.12(124,126,155A) Unit dose dispensing systems.** All medications dispensed to individual residents, other than those dispensed pursuant to 657—subrule 8.14(1), shall be dispensed in compliance with the requirements of this rule or 657—23.13(124,155A).

**23.12(1) Packaging requirements.** Packaging for all non-sterile drugs stored and dispensed in single unit, unit dose, or unit of issue packages shall:

a. Preserve and protect the identity and integrity of the drug from the point of packaging to the point of patient administration.

b. When packaged by the manufacturer or distributor, be in accordance with federal Food and Drug Administration (FDA) requirements.

c. When in single unit and unit dose packages prepackaged by the pharmacy for use beyond 24 hours, be in accordance with 657—subrule 8.3(1).

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d. When in containers used for packaging, be clean and free of extraneous matter when the dosage unit(s) is placed into the package.

**23.12(2) Labeling requirements.**

a. Labeling for single unit or unit dose packaging shall comply with the following:

(1) Doses packaged by the manufacturer or distributor shall be properly labeled according to federal Food and Drug Administration (FDA) requirements.

(2) Doses packaged by the pharmacy shall be properly labeled according to 657—subrule 8.3(2) if used beyond a 24-hour period.

b. Labeling for unit of issue packages shall contain the following information:

(1) Name, strength, and expiration date of drug when the packages are utilized for floor stock in an institutional setting.

(2) Name and room or bed number of patient, the name of prescribing practitioner, the name and strength of drug, directions for use, and name and address of the dispensing pharmacy, when the packages are utilized for patients in an institutional setting. Room or bed number, the name of prescribing practitioner, and the name and address of the dispensing pharmacy are not required if this information appears on a medication administration record used by the institution.

(3) Unit of issue packages dispensed to patients on an outpatient basis or in a noninstitutional setting shall be considered prescription containers and shall be labeled in accordance with 657—subrule 8.14(1).

c. If a pharmacist selects a generically equivalent drug product for a brand name drug product prescribed by a practitioner, the label must identify the generic drug and may identify the brand name drug for which the selection is made. The dual identification allowed under this paragraph must take the form of the following statement on the label: "(generic name) Generic for (brand name product)".

**23.12(3) General procedures.** The following will apply when a unit dose dispensing system is employed:

a. The pharmacist shall be responsible for determining the classification for containers set by USP Standard 671 used by the pharmacy to repackage nonsterile drugs into single unit, unit dose, or unit of issue packaging. This classification shall be used to determine maximal expiration dating for repackaging set forth in subrule 23.12(4).

b. Established written policies and procedures shall be available in the pharmacy for inspection by the board or its agents which:

(1) Specify the categories of drugs or drug dosage forms which will or will not be dispensed under the particular unit dispensing system employed.

(2) Specify the pharmacy's recall policy for drugs returned upon a particular manufacturer's or FDA recall.

c. Those drugs not dispensed under a unit dose dispensing system shall be dispensed in accordance with the packaging requirements of the federal Food and Drug Administration (FDA) and labeling requirements of 657—subrule 8.14(1).

**23.12(4) Expiration dating.** Expiration dating for nonsterile drugs repackaged by the pharmacy into single unit, unit dose, or unit of issue packages shall meet the following conditions:

a. Not exceed 90 days from the date of repackaging except as provided in paragraph 23.12(4)"c."

b. Not exceed the manufacturer's original expiration date.

c. May exceed 90 days from the date of repackaging provided that each of the following conditions is met:

(1) The container is classified according to USP Standard 671 as being Class A or Class B for oral solid dosage forms or is a tight container for liquid dosage forms.

(2) The container is light-resistant when the manufacturer has labeled the product "sensitive to light."

(3) The expiration date is not greater than 12 months.

d. Drugs or dosage forms having known stability problems are assigned an expiration date of less than 90 days or are not repackaged as determined by policies developed by the pharmacy.

**23.12(5) Return of drugs.** Drugs, excluding controlled substances, dispensed in single unit, unit dose, or unit of issue packaging in compliance with 657—subrules 23.12(1) to 23.12(4) may be returned to the pharmacy stock and reissued provided that:

a. The expiration dating information is retrievable and identifiable.

b. Drugs returned from unit of issue packaging are kept separate according to manufacturer's lot number and the pharmacy's repackaged expiration date unless the pharmacy's recall policy states that all lots of a drug will be returned upon recall. In this instance, drugs returned to stock shall be kept separate according to the pharmacy's repackaged expiration date as determined in 657—subrule 23.12(4).

c. The drugs were stored under proper storage conditions.

d. The drugs are returned to the pharmacy in the original packaging as when dispensed.

e. The pharmacy includes in written policies and procedures the manner in which returned medications will be recorded or identified.

**657—23.13(124,155A) Labeling medications under special circumstances.**

**23.13(1) Insulin, ophthalmics, and otic preparations.** These medications shall be dispensed with a label affixed to the immediate container showing at least the resident's name and location.

**23.13(2) Biologicals and other injectables.** Biologicals and other injectables prescribed and dispensed for an individual resident shall meet the labeling requirements of subrule 23.11(1). Labeling of biologicals and other injectables supplied to a facility for a health immunization or ongoing screening program, such as influenza vaccine, tuberculin skin test, or hepatitis B, and intended for use in the facility, shall include the following information and such label shall be affixed so as not to obscure the manufacturer's label:

- a. Identification of pharmacy;
- b. Name of facility;
- c. Name of biological or medication;
- d. Route of administration when necessary for clarification;
- e. Strength of biological or medication;
- f. Auxiliary labels as needed;
- g. Expiration date;
- h. Date dispensed;
- i. Lot number.

**23.13(3) Legend solutions—irrigation and infusion.** Legend irrigation solutions and infusion solutions supplied by a licensed pharmacy may be stored in the locked medication area of a long-term care facility provided that:

a. The facility uses the solution only within the confines of the facility and under the orders of an authorized prescriber;

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b. Upon use, the container is identified by resident name;

c. The container is dated and initialed upon opening;

d. The solution is stored appropriately after opening according to facility policy.

**23.13(4)** Medications added to parenteral, enteral, or irrigation solutions. Whenever any medications are added to such solutions, whether within or outside the direct and personal supervision of a licensed pharmacist, such admixture shall be labeled with a distinctive supplementary label indicating the patient's name; the drug name, dosage, and strength per unit/volume of the medication added; the date and time of addition or dilution; the expiration date, administration time, and infusion rate when applicable; and the identity of the person so adding. If the medication is intended for addition, dilution, or reconstitution in the facility by a licensed nurse outside the direct and personal supervision of the pharmacist, specific directions for such dilution, reconstitution, or addition shall accompany the medication.

**23.13(5)** Floor stocked, nonprescription medication containers. All such nonprescription medications intended for use within the facility shall be in appropriate containers and adequately labeled as to identify, at a minimum, brand name or generic name and manufacturer, strength, lot number, and expiration date. An internal code which centrally references manufacturer and lot number may be utilized.

**23.13(6)** Leave meds. Labeling of prescription medications for residents on leave from the facility for a period in excess of 24 hours shall comply with 657—subrule 8.14(1). The pharmacy shall be responsible for packaging and labeling leave meds in compliance with this subrule.

**23.13(7)** Discharge meds. Medications authorized for a resident being discharged from the facility shall be labeled in compliance with 657—subrule 8.14(1) before the resident removes those medications from the facility premises. The pharmacy shall be responsible for packaging and labeling discharge meds in compliance with this subrule.

**657—23.14(124,155A)** Return and reuse of medications and devices. Pharmacists and pharmacies shall not accept from residents or their agents for reuse or resale any drugs, prescribed medications, chemicals, poisons or medical devices unless, in the professional judgment of the pharmacist, the integrity of the prescription drug has not in any way been compromised. Under no circumstances shall a pharmacist accept from a patient or patient's agent any controlled substances for return, exchange, or resale. Prescription drugs, excluding controlled substances, dispensed in unit dose, unit of issue, or single unit packaging pursuant to 657—23.12(124,126,155A) may, however, be returned and reused as authorized in subrule 23.12(5). No items of personal contact nature which have been removed from the original package or container after sale shall be accepted for return, exchanged, or resold by any pharmacist.

**657—23.15(124,155A)** Destruction of outdated and improperly labeled medications. The consultant pharmacist, in consultation with the provider pharmacist, shall develop and implement policies and procedures to ensure that all discontinued, outdated, deteriorated, or improperly labeled medications or containers with worn, illegible or missing labels are destroyed or disposed of so as to render them unusable. Such medications shall be destroyed by means that will ensure protection against unauthorized possession or use.

**657—23.16(124,155A)** Accountability of controlled substances.

**23.16(1)** Proof of use. Documentation of use of Schedule II controlled substances shall be upon proof-of-use forms. A committee or representative of the facility may also require that Schedule III, IV, or V controlled substances or any other medications be accounted for on proof-of-use forms. Proof-of-use forms shall specify at a minimum:

a. Name of medication;

b. Dose;

c. Name of ordering prescriber;

d. Name of resident;

e. Date and time of administration to resident;

f. Signature and title of individual administering;

g. Documentation of destruction, return to the pharmacy, or other disposition of all unused portions of single doses including two signature verifications, at least one of which is a licensed healthcare professional.

**23.16(2)** Container requirement. Any medication required to be counted and accounted for with proof-of-use forms shall be dispensed in a container that allows verification of individual doses. Containers for solid oral doses must allow visual identification of individual doses and individual accountability.

**657—23.17(124,155A)** Schedule II orders. This rule shall not apply to Schedule II controlled substances orders in facilities which utilize a floor stock distribution system as provided in subrule 23.11(4). Schedule II controlled substances in all other facilities shall be dispensed only upon receipt of an original written order signed by the prescribing individual practitioner or upon receipt of a facsimile transmission of an original written order signed by the prescribing individual practitioner pursuant to rule 657—21.9(124,155A). In emergency situations as defined in 657—subrule 10.13(5), Schedule II controlled substances may be dispensed in compliance with the requirements of rule 657—10.13(124) or rule 657—21.7(124,155A), as applicable. In all cases, any order for a Schedule II controlled substance shall specify the total quantity authorized by the prescriber.

**657—23.18(124,155A)** Dispensing Schedule II controlled substances. A pharmacy that dispenses Schedule II controlled substances shall advise facility personnel that federal and state laws and regulations governing such medications require that accurate records be kept of their administration or their ultimate disposition in compliance with rule 657—23.16(124,155A). The pharmacy shall further advise facilities that stored Schedule II substances shall be double locked in accordance with rules of the Iowa department of inspections and appeals. The requirement for double locking Schedule II controlled substances shall not apply to periods during which medications are being administered to residents; however, these substances shall be secured during such administration periods.

**657—23.19(124,155A)** Partial filling of Schedule II controlled substances. A medication order for a Schedule II controlled substance written for a resident in a long-term care facility (LTCF) may be filled in partial quantities to include individual dosage units. The pharmacist must record on the medication order that the patient is an "LTCF patient." A medication order that is partially filled and does not contain the notation "LTCF patient" shall be deemed to have been filled in violation of the controlled substances Act.

**23.19(1)** Partial filling record. For each partial filling, the dispensing pharmacist shall record on the back of the medication order (or on another appropriate record, uniformly maintained, and readily retrievable) the date of the partial filling, quantity dispensed, remaining quantity authorized to

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be dispensed, and the identification of the dispensing pharmacist.

**23.19(2)** Total dispensed. The total quantity of Schedule II controlled substances dispensed in all partial fillings must not exceed the total quantity prescribed.

**23.19(3)** Duration. Schedule II medication orders for residents in a long-term care facility shall be valid for a period not to exceed 60 days from the issue date unless sooner terminated by the discontinuance of medication.

**23.19(4)** Requirements of computerized system. Information pertaining to current Schedule II medication orders for residents in a long-term care facility may be maintained in a computerized system if this system has the capability to permit:

a. Output (display and printout) of the original prescription number, date of issue, identification of prescribing individual practitioner, identification of resident, address of the long-term care facility, identification of medication authorized (to include dosage form, strength and quantity), listing of the partial fillings that have been dispensed under each medication order, and the information required in this rule.

b. Immediate (real-time) updating of the medication order record each time a partial filling of the medication order is conducted.

c. Retrieval of partially filled Schedule II medication order information as required in 657—subrule 21.11(6).

**657—23.20(124,155A)** Destruction of controlled substances. Controlled substances dispensed to a resident in a long-term care facility and subsequently requiring destruction due to discontinuance of the medication, death of the resident, or other reasons necessitating destruction shall be destroyed by one of the following methods.

**23.20(1)** Destruction or other disposition of controlled substances in facility. In facilities staffed by one or more persons licensed to administer medications, controlled substances may be destroyed by a licensed healthcare professional (pharmacist, registered nurse, licensed practical nurse) in witness of one other responsible adult. The professional destroying or otherwise disposing the medication shall prepare and maintain a readily retrievable record of the destruction or other disposition which shall be clearly marked to indicate the destruction or other disposition of resident medications. The record shall include, at a minimum, the following:

- a. Resident name;
- b. The name, strength, and dosage form of the substance;
- c. The quantity destroyed or otherwise disposed;
- d. The date the substance is destroyed or disposed;
- e. The signature or uniquely identifying initials or other unique identification of the professional and the witness.

**23.20(2)** Destruction or other disposition of controlled substances in long-term care pharmacy. Controlled substances returned to the pharmacy for destruction or other disposition may be destroyed or otherwise disposed by a pharmacist in witness of one other person. The pharmacist shall prepare and maintain in the pharmacy a readily retrievable record of the destruction or other disposition which shall be clearly marked to indicate the destruction or other disposition of noninventory or resident medications. The record shall include, at a minimum, the following:

- a. Source of the controlled substance (resident name, identification of resident facility, and date of return from the facility);
- b. The name, strength, and dosage form of the substance;

c. The quantity returned and destroyed or otherwise disposed;

d. The date the substance is destroyed or otherwise disposed;

e. The signature or uniquely identifying initials or other unique identification of the pharmacist and the witness.

These rules are intended to implement Iowa Code sections 124.301, 124.306, 124.308, 126.10, 155A.2, 155A.13, 155A.13A, 155A.15, 155A.21, 155A.27, 155A.28, 155A.33, 155A.35, and 155A.36.

**ARC 8768A**

## PHARMACY EXAMINERS BOARD[657]

### Notice of Termination

Pursuant to the authority of Iowa Code sections 124.301, 147.76, 155A.6, 272C.4, and 272C.5, the Board of Pharmacy Examiners hereby terminates the rule making initiated by its Notice of Intended Action published in the Iowa Administrative Bulletin on October 21, 1998, as **ARC 8414A**, amending Chapter 9, "Discipline," Iowa Administrative Code.

The Notice proposed to amend Chapter 9 by adding references to registrants, permittees, pharmacy technicians, and pharmacist-interns to subrules regarding Board investigations; a person's responsibility to report judgments, settlements, acts, or omissions; and consequences of failing to report as required.

The Board is terminating the rule making commenced in **ARC 8414A** and will incorporate the proposed amendments into new rules proposed in response to Iowa Code chapter 17A revisions which will become effective July 1, 1999.

**ARC 8781A**

## PHARMACY EXAMINERS BOARD[657]

### Notice of Intended Action

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)"b."

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code sections 17A.22, 147.76, 124.301, 126.17, 205.13, 272C.5, and 272C.10, the Board of Pharmacy Examiners hereby gives Notice of Intended Action to rescind Chapter 9, "Discipline," Iowa Administrative Code, and adopt new Chapter 35, "Contested Cases," Iowa Administrative Code.

The rules were approved at the February 2, 1999, regular meeting of the Board of Pharmacy Examiners.

The amendment rescinds current Chapter 9 and adopts new rules applicable to all contested case proceedings, including disciplinary actions. The new rules establish procedures and requirements for all contested case proceedings to implement changes to the Iowa Administrative Procedures Act which changes are effective July 1, 1999. The new rules address hearing notices, pleadings, and other documents;

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identify the presiding officer for nondisciplinary hearings and the duties and responsibilities of the presiding officer; include procedures and requirements for the issuance of subpoenas in a contested case proceeding and in an investigation; and include procedures for prehearing conferences, for continuances, for contested case hearings, for emergency adjudication, and for appeal and review. The new rules also address ex parte communications, stipulations, evidence, default, and stays of Board actions.

Any interested person may present written comments, data, views, and arguments on the proposed amendment not later than 4:30 p.m. on March 30, 1999. Such written materials should be sent to Lloyd K. Jessen, Executive Secretary/Director, Board of Pharmacy Examiners, Executive Hills West, 1209 East Court Avenue, Des Moines, Iowa 50319.

These rules are intended to implement Iowa Code sections 17A.10 to 17A.23 as amended by 1998 Iowa Acts, chapter 1202, 124.304, 124B.12, 126.17, 147.96, 155A.6, 155A.12, 155A.13A, 155A.15 to 155A.18, 155A.26, 205.11, 272C.3 to 272C.6, 272C.9, and 272C.10.

The following amendment is proposed.

Rescind **657—Chapter 9**, Discipline, and adopt the following **new** chapter in lieu thereof:

CHAPTER 35  
CONTESTED CASES

**657—35.1(17A,124,124B,126,147,155A,205,272C) Scope and applicability.** This chapter applies to contested case proceedings, including licensee, registrant, or permittee discipline, conducted by the board of pharmacy examiners.

**657—35.2(17A,272C) Definitions.** Except where otherwise specifically defined by law:

“Contested case” means a proceeding defined by Iowa Code section 17A.2(5) and includes any matter defined as a no factual dispute contested case under 1998 Iowa Acts, chapter 1202, section 14.

“Issuance” means the date of mailing of a decision or order or date of delivery if service is by other means unless another date is specified in the order.

“Party” means each person or agency named or admitted as a party or properly seeking and entitled as of right to be admitted as a party.

“Presiding officer” means members of the board of pharmacy examiners, or the administrative law judge assigned to preside over the case pursuant to rule 657—35.6(17A,272C).

“Proposed decision” means the presiding officer’s recommended findings of fact, conclusions of law, decision, and order in a contested case in which the board of pharmacy examiners did not preside or, if the contested case involves licensee or registrant discipline, “proposed decision” means the decision of the panel of the board when the hearing is held before a panel of the board rather than the full board.

**657—35.3(17A) Time requirements.**

**35.3(1)** Time shall be computed as provided in Iowa Code subsection 4.1(34).

**35.3(2)** For good cause, the presiding officer may extend or shorten the time to take any action, except as precluded by statute or by rule. Except for good cause stated in the record, before extending or shortening the time to take any action, the presiding officer shall afford all parties an opportunity to be heard or to file written arguments.

**657—35.4(17A) Reserved.**

**657—35.5(17A,124B,126,147,155A,205,272C) Notice of hearing.**

**35.5(1) Delivery.** Delivery of the notice of hearing constitutes the commencement of the contested case proceeding. Delivery may be executed by:

- a. Personal service as provided in the Iowa Rules of Civil Procedure; or
- b. Certified mail, return receipt requested; or
- c. First-class mail; or
- d. Publication, as provided in the Iowa Rules of Civil Procedure.

**35.5(2) Contents.** The notice of hearing shall contain the following information:

- a. A statement of the time, place, and nature of the hearing;
- b. A statement of the legal authority and jurisdiction under which the hearing is to be held;
- c. A reference to the particular sections of the statutes and rules involved;
- d. A short and plain statement of the matters asserted. If the board or other party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved. Thereafter, upon application, a more definite and detailed statement shall be furnished;
- e. Identification of all parties including the name, address and telephone number of the person who will act as advocate for the board or the state and of parties’ counsel where known;
- f. Reference to the procedural rules governing conduct of the contested case proceeding;
- g. Reference to the procedural rules governing informal settlement;
- h. Identification of the presiding officer, if known. If not known, a description of who will serve as presiding officer (e.g., members of the board, administrative law judge from the department of inspections and appeals); and
- i. Notification of the time period in which a party may request, pursuant to 1998 Iowa Acts, chapter 1202, section 15(1), and rule 657—35.6(17A,272C), that the presiding officer be an administrative law judge.

**657—35.6(17A,272C) Presiding officer for nondisciplinary hearings.**

**35.6(1)** Any party who wishes to request that the presiding officer assigned to render a proposed decision be an administrative law judge employed by the department of inspections and appeals must file a written request within 20 days after service of a notice of hearing which identifies or describes the presiding officer as the members of the board of pharmacy examiners.

**35.6(2)** The executive secretary/director may deny the request only upon a finding that one or more of the following apply:

- a. Neither the board nor any member of the board of pharmacy examiners, under whose authority the contested case is to take place, is a named party to the proceeding or a real party in interest to that proceeding.
- b. There is a compelling need to expedite issuance of a final decision in order to protect the public health, safety, or welfare.
- c. The contested case involves the discipline of a licensee or registrant and therefore must be decided by the board as required by Iowa Code section 272C.6.

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d. The case involves significant policy issues of first impression that are inextricably intertwined with the factual issues presented.

e. The demeanor of the witnesses is likely to be dispositive in resolving the disputed factual issues.

f. Funds are unavailable to pay the costs of an administrative law judge and an interagency appeal.

g. The request was not timely filed.

h. The request is not consistent with a specified statute.

**35.6(3)** The executive secretary/director shall issue a written ruling specifying the grounds for the decision within 20 days after a request for an administrative law judge is filed.

**35.6(4)** Except as provided otherwise by another provision of law, all rulings by an administrative law judge acting as presiding officer are subject to appeal to the board. A party shall seek any available intra-agency appeal in order to exhaust adequate administrative remedies.

**35.6(5)** Unless otherwise provided by law, members of the board of pharmacy examiners, when reviewing a proposed decision upon intra-agency appeal, shall have the powers of and shall comply with the provisions of this chapter which apply to presiding officers.

**657—35.7(17A,124B,147,155A,272C) Waiver of procedures.** Unless otherwise precluded by law, the parties in a contested case proceeding may waive any provision of this chapter. However, the board in its discretion may refuse to give effect to such a waiver when it deems the waiver to be inconsistent with the public interest.

**657—35.8(17A,272C) Telephone proceedings.** The presiding officer may resolve preliminary procedural motions by telephone conference in which all parties have an opportunity to participate. Other telephone proceedings may be held with the consent of all parties. The presiding officer will determine the location of the parties and witnesses for telephone hearings. The convenience of the witnesses or parties, as well as the nature of the case, will be considered when location is chosen.

**657—35.9(17A) Disqualification.**

**35.9(1)** A presiding officer or other person shall withdraw from participation in the making of any proposed or final decision in a contested case if that person:

a. Has a personal bias or prejudice concerning a party or a representative of a party;

b. Has personally investigated, prosecuted or advocated in connection with that case, the specific controversy underlying that case, another pending factually related contested case, or a pending factually related controversy that may culminate in a contested case involving the same parties;

c. Is subject to the authority, direction or discretion of any person who has personally investigated, prosecuted or advocated in connection with that contested case, the specific controversy underlying that contested case, or a pending factually related contested case or controversy involving the same parties;

d. Has acted as counsel to any person who is a private party to that proceeding within the past two years;

e. Has a personal financial interest in the outcome of the case or any other significant personal interest that could be substantially affected by the outcome of the case;

f. Has a spouse or relative within the third degree of relationship that:

(1) Is a party to the case, or an officer, director or trustee of a party;

(2) Is a lawyer in the case;

(3) Is known to have an interest that could be substantially affected by the outcome of the case; or

(4) Is likely to be a material witness in the case; or

g. Has any other legally sufficient cause to withdraw from participation in the decision making in that case.

**35.9(2)** The term “personally investigated” means taking affirmative steps to interview witnesses directly or to obtain documents or other information directly. The term “personally investigated” does not include general direction and supervision of assigned investigators, unsolicited receipt of information which is relayed to assigned investigators, review of another person’s investigative work product in the course of determining whether there is probable cause to initiate a proceeding, or exposure to factual information while performing other board functions, including fact gathering for purposes other than investigation of the matter which culminates in a contested case. Factual information relevant to the merits of a contested case received by a person who later serves as presiding officer in that case shall be disclosed if required by Iowa Code section 17A.17(3) and subrules 35.9(3) and 35.22(9).

**35.9(3)** In a situation where a presiding officer or other person knows of information which might reasonably be deemed to be a basis for disqualification and decides voluntary withdrawal is unnecessary, that person shall submit the relevant information for the record by affidavit and shall provide for the record a statement of the reasons for the determination that withdrawal is unnecessary.

**35.9(4)** If a party asserts disqualification on any appropriate ground, including those listed in subrule 35.9(1), the party shall file a motion supported by an affidavit pursuant to 1998 Iowa Acts, chapter 1202, section 19(7). The motion shall be filed as soon as practicable after the reason alleged in the motion becomes known to the party. If, during the course of the hearing, a party first becomes aware of evidence of bias or other grounds for disqualification, the party may move for disqualification but must establish the grounds by the introduction of evidence into the record.

If the presiding officer determines that disqualification is appropriate, the presiding officer or other person shall withdraw. If the presiding officer determines that withdrawal is not required, the presiding officer shall enter an order to that effect. A party asserting disqualification may seek an interlocutory appeal under rule 657—35.24(17A) and seek a stay under rule 657—35.28(17A,272C).

**657—35.10(17A,272C) Consolidation—severance.**

**35.10(1)** Consolidation. The presiding officer may consolidate any or all matters at issue in two or more contested case proceedings where:

a. The matters at issue involve common parties or common questions of fact or law;

b. Consolidation would expedite and simplify consideration of the issues involved; and

c. Consolidation would not adversely affect the rights of any of the parties to those proceedings.

**35.10(2)** Severance. The presiding officer may, for good cause shown, order any contested case proceedings or portions thereof severed.

**657—35.11(17A,272C) Service and filing of pleadings and other papers.**

**35.11(1)** When service required. Except where otherwise provided by law, every pleading, motion, document, or other paper filed in a contested case proceeding and every paper relating to discovery in such a proceeding shall be served upon each of the parties of record to the proceeding, includ-

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ing the person designated as advocate or prosecutor for the state or the board, simultaneously with their filing. Except for the original notice of hearing and an application for rehearing as provided in Iowa Code section 17A.16(2), the party filing a document is responsible for service on all parties.

**35.11(2) Service—how made.** Service upon a party represented by an attorney shall be made upon the attorney unless otherwise ordered. Service is made by delivery or by mailing a copy to the person's last-known address. Service by mail is complete upon mailing, except where otherwise specifically provided by statute, rule, or order.

**35.11(3) Filing—when required.** After the notice of hearing, all pleadings, motions, documents or other papers in a contested case proceeding shall be filed with the Board of Pharmacy Examiners, Executive Hills West, 1209 East Court Avenue, Des Moines, Iowa 50319-0187. All pleadings, motions, documents or other papers that are required to be served upon a party shall be filed simultaneously with the board of pharmacy examiners.

**35.11(4) Filing—when made.** Except where otherwise provided by law, a document is deemed filed at the time it is delivered to the board of pharmacy examiners, delivered to an established courier service for immediate delivery to that office, or mailed by first-class mail or state interoffice mail to that office, so long as there is proof of mailing.

**35.11(5) Proof of mailing.** Proof of mailing includes one of the following:

a. A legible United States Postal Service postmark on the envelope;

b. A certificate of service;

c. A notarized affidavit; or

d. A certification in substantially the following form:

I certify under penalty of perjury and pursuant to the laws of Iowa that, on (date of mailing), I mailed copies of (describe document) addressed to the Board of Pharmacy Examiners, Executive Hills West, 1209 East Court Avenue, Des Moines, Iowa 50319-0187, and to the names and addresses of the parties listed below by depositing the same in (a United States post office mailbox with correct postage properly affixed or state interoffice mail).

\_\_\_\_\_  
Date

\_\_\_\_\_  
Signature

**657—35.12(17A,272C) Discovery.**

**35.12(1) Discovery procedures applicable in civil actions** are applicable in contested cases. Unless lengthened or shortened by these rules or by order of the presiding officer, time periods for compliance with discovery shall be as provided in the Iowa Rules of Civil Procedure.

**35.12(2) Any motion relating to discovery shall allege** that the moving party has previously made a good-faith attempt to resolve the discovery issues involved with the opposing party. Motions in regard to discovery shall be ruled upon by the presiding officer. Opposing parties shall be afforded the opportunity to respond within ten days of the filing of the motion unless the time is shortened as provided in subrule 35.12(1). The presiding officer may rule on the basis of the written motion and any response, or may order argument on the motion.

**35.12(3) Evidence obtained in discovery may be used in the contested case proceeding if that evidence would otherwise be admissible in that proceeding.**

**657—35.13(17A,272C) Subpoenas.**

**35.13(1) Issuance of investigatory subpoenas.**

a. The board's executive secretary/director or designee may, upon the written request of a board investigator or on the executive secretary/director's own initiative, subpoena books, papers, records, and other real evidence which the executive secretary/director determines are necessary for the board to decide whether to institute a contested case proceeding. In the case of a subpoena for mental health records, each of the following conditions shall be satisfied prior to the issuance of the subpoena:

(1) The nature of the complaint reasonably justifies the issuance of a subpoena;

(2) Adequate safeguards have been established to prevent unauthorized disclosure;

(3) An express statutory mandate, articulated public policy, or other recognizable public interest favors access; and

(4) The patient was notified and an attempt was made to secure an authorization from the patient for release of the records at issue.

b. A written request for a subpoena or the executive secretary/director's written memorandum in support of the issuance of a subpoena shall contain the following:

(1) The name and address of the person to whom the subpoena will be directed;

(2) A specific description of the books, papers, records or other real evidence requested;

(3) An explanation of why the documents sought to be subpoenaed are necessary for the board to determine whether it should institute a contested case proceeding; and

(4) In the case of a subpoena request for mental health records, confirmation that the conditions described in subrule 35.13(1), paragraph "a," have been satisfied.

c. Each subpoena shall contain:

(1) The name and address of the person to whom the subpoena is directed;

(2) A description of the books, papers, records or other real evidence requested;

(3) The date, time, and location for production or inspection and copying;

(4) The time within which a motion to quash or modify the subpoena must be filed;

(5) The signature, address and telephone number of the executive secretary/director or designee;

(6) The date of issuance;

(7) A return of service.

d. Any person who is aggrieved or adversely affected by compliance with the subpoena who desires to challenge the subpoena shall, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days, file with the board a motion to quash or modify the subpoena. The motion shall describe the legal reasons why the subpoena should be quashed or modified and may be accompanied by legal briefs or factual affidavits.

e. Upon receipt of a timely motion to quash or modify a subpoena, the board may request an administrative law judge to hold an argument and issue a decision, or the board may hold the argument and issue a decision. The administrative law judge or the board may quash or modify the subpoena, deny the motion, or issue an appropriate protective order.

f. A person aggrieved by a ruling of an administrative law judge who desires to challenge the ruling must appeal the ruling to the board in accordance with the procedure applicable to intra-agency appeals of proposed decisions set forth in rule 657—35.26(17A,124B,126,147,155A,205,272C), provided that all of the time frames are reduced by one-half.

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g. If the person contesting the subpoena is not the person under investigation, the board's decision is final for purposes of judicial review. If the person contesting the subpoena is the person under investigation, the board's decision is not final for purposes of judicial review until either the person is notified the investigation has been concluded with no formal action or there is a final decision in the contested case.

**35.13(2) Issuance of subpoenas in a contested case.**

a. Subpoenas issued in a contested case may compel the attendance of witnesses at depositions or hearing, and may compel the production of books, papers, records, and other real evidence. A command to produce evidence or to permit inspection may be joined with a command to appear at deposition or hearing, or may be issued separately. Subpoenas shall be issued by the executive secretary/director or designee upon written request. A request for a subpoena of patient records must confirm the conditions described in subrule 35.13(1), paragraph "a," prior to the issuance of the subpoena.

b. A request for a subpoena shall include the following information, as applicable, unless the subpoena is requested to compel testimony or documents for rebuttal or impeachment purposes:

(1) The name, address, and telephone number of the person requesting the subpoena;

(2) The name and address of the person to whom the subpoena shall be directed;

(3) The date, time, and location at which the person shall be commanded to attend and give testimony;

(4) Whether the testimony is requested in connection with a deposition or hearing;

(5) A description of the books, papers, records, or other real evidence requested;

(6) The date, time, and location for production or inspection and copying; and

(7) In the case of a subpoena request for mental health records, confirmation that the conditions described in subrule 35.13(1), paragraph "a," have been satisfied.

c. Each subpoena shall contain, as applicable:

(1) The caption of the case;

(2) The name, address, and telephone number of the person who requested the subpoena;

(3) The name and address of the person to whom the subpoena is directed;

(4) The date, time, and location at which the person is commanded to appear;

(5) Whether the testimony is commanded in connection with a deposition or hearing;

(6) A description of the books, papers, records or other real evidence the person is commanded to produce;

(7) The date, time, and location for production or inspection and copying;

(8) The time within which a motion to quash or modify the subpoena must be filed;

(9) The signature, address, and telephone number of the executive secretary/director or designee;

(10) The date of issuance;

(11) A return of service.

d. Unless a subpoena is requested to compel testimony or documents for rebuttal or impeachment purposes, the executive secretary/director or designee shall mail copies of all subpoenas to the parties to the contested case. The person who requested the subpoena is responsible for serving the subpoena upon the subject of the subpoena.

e. Any person who is aggrieved or adversely affected by compliance with the subpoena, or any party to the contested

case who desires to challenge the subpoena, shall, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days, file with the board a motion to quash or modify the subpoena. The motion shall describe the legal reasons why the subpoena should be quashed or modified, and may be accompanied by legal briefs or factual affidavits.

f. Upon receipt of a timely motion to quash or modify a subpoena, the board may request an administrative law judge to hold an argument and issue a decision, or the board may hold the argument and issue a decision. The administrative law judge or the board may quash or modify the subpoena, deny the motion, or issue an appropriate protective order.

g. A person aggrieved by a ruling of an administrative law judge who desires to challenge the ruling shall appeal the ruling to the board in accordance with the procedure applicable to intra-agency appeals of proposed decisions set forth in 657—35.26(17A,124B,126,147,155A,205,272C), provided that all of the time frames are reduced by one-half.

h. If the person contesting the subpoena is not the person under investigation, the board's decision is final for purposes of judicial review. If the person contesting the subpoena is the person under investigation, the board's decision is not final for purposes of judicial review until there is a final decision in the contested case.

**35.13(3) Refusal to obey subpoena.** In the event of a refusal to obey a subpoena, the board may petition the district court for its enforcement. Upon proper showing, the district court shall order the person to obey the subpoena and, if the person fails to obey the order of the court, the person may be found guilty of contempt of court.

**657—35.14(17A,272C) Motions.**

**35.14(1)** No technical form for motions is required. However, prehearing motions must be in writing, state the grounds for relief, and state the relief sought.

**35.14(2)** Any party may file a written response to a motion within ten days after the motion is served, unless the time period is extended or shortened by rules of the board or the presiding officer. The presiding officer may consider a failure to respond within the required time period in ruling on a motion.

**35.14(3)** The presiding officer may schedule oral argument on any motion.

**35.14(4)** Motions pertaining to the hearing, except motions for summary judgment, must be filed and served at least ten days prior to the date of hearing unless there is good cause for permitting later action or the time for such action is lengthened or shortened by rule of the board or an order of the presiding officer.

**657—35.15(17A,272C) Prehearing conference.**

**35.15(1)** Any party may request a prehearing conference. A written request for prehearing conference or an order for prehearing conference on the presiding officer's own motion shall be filed not less than seven days prior to the hearing date. A prehearing conference shall be scheduled not less than three business days prior to the hearing date.

Written notice of the prehearing conference shall be given by the executive secretary/director to all parties. For good cause the presiding officer may permit variances from this rule.

**35.15(2)** Each party shall bring to the prehearing conference:

a. A final list of the witnesses who the party anticipates will testify at hearing. Witnesses not listed may be excluded

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from testifying unless there was good cause for the failure to include their names; and

b. A final list of exhibits which the party anticipates will be introduced at hearing. Exhibits other than rebuttal exhibits that are not listed may be excluded from admission into evidence unless there was good cause for the failure to include them.

c. Witness or exhibit lists may be amended subsequent to the prehearing conference within the time limits established by the presiding officer at the prehearing conference. Any such amendments must be served on all parties.

**35.15(3)** In addition to the requirements of subrule 35.15(2), the parties at a prehearing conference may:

- a. Enter into stipulations of law or fact;
- b. Enter into stipulations on the admissibility of exhibits;
- c. Identify matters which the parties intend to request be officially noticed;
- d. Enter into stipulations for waiver of any provision of law; and
- e. Consider any additional matters which will expedite the hearing.

**35.15(4)** Prehearing conferences shall be conducted by telephone unless otherwise ordered. Parties shall exchange and receive witness and exhibit lists in advance of a telephone prehearing conference.

**657—35.16(17A,272C) Continuances.** Unless otherwise provided, applications for continuances shall be made to the presiding officer or, in the case of a license or registrant disciplinary hearing, to the executive secretary/director.

- 35.16(1)** A written application for a continuance shall:
- a. Be made at the earliest possible time and no less than seven days before the hearing except in case of unanticipated emergencies;
  - b. State the specific reasons for the request; and
  - c. Be signed by the requesting party or the party's representative.

An oral application for a continuance may be made if the presiding officer, or in a disciplinary hearing the executive secretary/director, waives the requirement for a written motion. However, a party making such an oral application for a continuance must confirm that request by written application within five days after the oral request unless that requirement is waived by the presiding officer or, in a disciplinary hearing, by the executive secretary/director. No application for continuance shall be made or granted without notice to all parties except in an emergency where notice is not feasible. The board may waive notice of such requests for a particular case or an entire class of cases.

**35.16(2)** In determining whether to grant a continuance, the presiding officer, or in a disciplinary hearing the executive secretary/director, may consider:

- a. Prior continuances;
- b. The interests of all parties;
- c. The likelihood of informal settlement;
- d. The existence of an emergency;
- e. Any objection;
- f. Any applicable time requirements;
- g. The existence of a conflict in the schedules of counsel, parties, or witnesses;
- h. The timeliness of the request; and
- i. Other relevant factors.

The presiding officer, or in a disciplinary hearing the executive secretary/director, may require documentation of any grounds for continuance.

**657—35.17(17A) Withdrawals.** A party requesting a contested case proceeding may withdraw that request prior to the hearing only in accordance with board rules. Unless otherwise provided, a withdrawal shall be with prejudice.

**657—35.18(17A) Reserved.**

**657—35.19(17A,124B,126,147,155A,205,272C) Hearing procedures in contested cases.**

**35.19(1)** The presiding officer presides at the hearing and may rule on motions, require briefs, issue a proposed decision, and issue such orders and rulings as will ensure the orderly conduct of the proceedings.

**35.19(2)** All objections shall be timely made and stated on the record.

**35.19(3)** Parties have the right to participate or to be represented in all hearings or prehearing conferences related to their case. Partnerships, corporations, or associations may be represented by any member, officer, director, or duly authorized agent. Any party may be represented by an attorney or another person authorized by law.

**35.19(4)** Subject to terms and conditions prescribed by the presiding officer, parties have the right to introduce evidence on issues of material fact, cross-examine witnesses present at the hearing as necessary for a full and true disclosure of the facts, present evidence in rebuttal, and submit briefs and engage in oral argument.

**35.19(5)** The presiding officer shall maintain the decorum of the hearing and may refuse to admit or may expel anyone whose conduct is disorderly.

**35.19(6)** Witnesses may be sequestered during the hearing.

**35.19(7)** The presiding officer shall conduct the hearing in the following manner:

- a. The presiding officer shall give an opening statement briefly describing the nature of the proceedings;
- b. The parties shall be given an opportunity to present opening statements;
- c. Parties shall present their cases in the sequence determined by the presiding officer;
- d. Each witness shall be sworn or affirmed by the presiding officer or the court reporter, and be subject to examination and cross-examination. The presiding officer may limit questioning in a manner consistent with law;
- e. When all parties and witnesses have been heard, parties may be given the opportunity to present final arguments.

**35.19(8)** A license discipline hearing shall be conducted by a qualified administrative law judge and a quorum of the board or panel of not less than three pharmacist members. The administrative law judge's duties shall include:

- a. Opening the record and receiving appearances.
- b. Administering oaths.
- c. Entering notice of the hearing into the record.
- d. Receiving testimony and exhibits presented by the parties.
- e. At the administrative law judge's discretion, interrogating witnesses.
- f. Making initial rulings on objections and motions.
- g. Closing the hearing.
- h. Participating in board or panel deliberations and preparing an order containing findings of fact and conclusions of law in accordance with the board's or panel's decisions.

**35.19(9)** In a license disciplinary hearing, the administrative law judge shall prepare in writing the proposed decision of the panel or the final decision of the board, as applicable. Such decisions shall:

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a. Be in writing and signed by the board chairperson or the chairperson's designee.

b. Set forth the issues, a brief history of the case, findings of fact, the reasons for the decision, and the actual decision.

c. Be based upon the kind of evidence on which reasonably prudent persons are accustomed to rely for the conduct of their serious affairs.

d. Be delivered to the licensee, permittee, or registrant by personal service or by certified mail, return receipt requested.

**35.19(10)** License, permit, or registration disciplinary hearings shall be open to the public except as provided in Iowa Code section 272C.6 and Iowa Code chapter 21.

**35.19(11)** Copies of all decisions of the pharmacy board shall be kept on file for public inspection at the office of the board as per conditions set out in 657—Chapter 14.

**35.19(12)** Oral proceedings in connection with a hearing in a contested case shall be recorded either by mechanized means or by certified shorthand reporters. These records shall be kept in the board office for a period of five years following the date of the hearing.

**35.19(13)** The chairperson of the board shall have the right to vote in all administrative hearings.

**35.19(14)** When a quorum of the board presides over the reception of the evidence at the hearing, its decision is a final decision.

**657—35.20(17A,272C) Evidence.**

**35.20(1)** The presiding officer shall rule on admissibility of evidence and may, where appropriate, take official notice of facts in accordance with all applicable requirements of law.

**35.20(2)** Stipulation of facts is encouraged. The presiding officer may make a decision based on stipulated facts.

**35.20(3)** Evidence in the proceeding shall be confined to the issues as to which the parties received notice prior to the hearing unless the parties waive their right to such notice or the presiding officer determines that good cause justifies expansion of the issues. If the presiding officer decides to admit evidence on issues outside the scope of the notice over the objection of a party who did not have actual notice of those issues, that party, upon timely request, shall receive a continuance sufficient to amend pleadings and to prepare on the additional issue.

**35.20(4)** Irrelevant, immaterial, and unduly repetitious evidence should be excluded. A finding will be based upon the kind of evidence upon which reasonably prudent persons are accustomed to rely for the conduct of their serious affairs, and may be based upon such evidence even if it would be inadmissible in a jury trial.

**35.20(5)** The party seeking admission of an exhibit must provide opposing parties with an opportunity to examine the exhibit prior to the ruling on its admissibility. Copies of documents should normally be provided to opposing parties. All exhibits admitted into evidence shall be appropriately marked and be made part of the record.

**35.20(6)** Any party may object to specific evidence or may request limits on the scope of any examination or cross-examination. Such an objection shall be accompanied by a brief statement of the grounds upon which it is based. The objection, the ruling on the objection, and the reasons for the ruling shall be noted in the record. The presiding officer may rule on the objection at the time it is made or may reserve a ruling until the written decision.

**35.20(7)** Whenever evidence is ruled inadmissible, the party offering that evidence may submit an offer of proof on

the record. The party making the offer of proof for excluded oral testimony shall briefly summarize the testimony or, with permission of the presiding officer, present the testimony. If the excluded evidence consists of a document or exhibit, it shall be marked as part of an offer of proof and inserted in the record.

**35.20(8)** Subject to the above requirements, when a hearing will be expedited and the interest of the patients will not be prejudiced substantially, any part of the evidence may be required to be submitted in verified written form.

**35.20(9)** Documentary evidence may be received in the form of copies or excerpts if the original is not readily available. Accurate copies of the document offered at the hearing shall be furnished to those members of the board sitting at the hearing and to opposing parties.

**657—35.21(17A,272C) Default.**

**35.21(1)** If a party fails to appear or participate in a contested case proceeding after proper service of notice, the presiding officer may, if no adjournment is granted, enter a default decision or proceed with the hearing and render a decision in the absence of the party.

**35.21(2)** Where appropriate and not contrary to law, any party may move for default against a party who has requested the contested case proceeding and has failed to file a required pleading or has failed to appear after proper service.

**35.21(3)** Default decisions or decisions rendered on the merits after a party has failed to appear or participate in a contested case proceeding become final board action unless, within 15 days after the date of notification or mailing of the decision, a motion to vacate is filed and served on all parties or an appeal of a decision on the merits is timely initiated within the time provided by rule 657—35.26(17A,124B,126,147,155A,205,272C). A motion to vacate must state all facts relied upon by the moving party which establish that good cause existed for that party's failure to appear or participate at the contested case proceeding. Each fact so stated must be substantiated by at least one sworn affidavit of a person with personal knowledge of each such fact, which affidavit(s) must be attached to the motion.

**35.21(4)** The time for further appeal of a decision for which a timely motion to vacate has been filed is stayed pending a decision on the motion to vacate.

**35.21(5)** Properly substantiated and timely filed motions to vacate shall be granted only for good cause shown. The burden of proof as to good cause is on the moving party. Adverse parties shall have ten days to respond to a motion to vacate. Adverse parties shall be allowed to conduct discovery as to the issue of good cause and to present evidence on the issue prior to a decision on the motion if a request to do so is included in that party's response.

**35.21(6)** "Good cause," for purposes of this rule, shall have the same meaning as "good cause" for setting aside a default judgment under Iowa Rule of Civil Procedure 236.

**35.21(7)** A decision denying a motion to vacate is subject to further appeal within the time limit allowed for further appeal of a decision on the merits in the contested case proceeding. A decision granting a motion to vacate is subject to interlocutory appeal by the adverse party pursuant to rule 657—35.24(17A,272C).

**35.21(8)** If a motion to vacate is granted and no timely interlocutory appeal has been taken, the presiding officer shall issue another notice of hearing and the contested case shall proceed accordingly.

**35.21(9)** A default decision may award any relief consistent with the request for relief made in the petition and em-

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braced in its issues but, unless the defaulting party has appeared, it cannot exceed the relief demanded.

**35.21(10)** A default decision may provide either that the default decision is to be stayed pending a timely motion to vacate or that the default decision is to take effect immediately, subject to a request for stay under 657—35.28(17A, 272C).

**657—35.22(17A,272C) Ex parte communication.**

**35.22(1)** Prohibited communications. Unless required for the disposition of ex parte matters specifically authorized by statute, following issuance of the notice of hearing there shall be no communication, directly or indirectly, between the presiding officer and any party or representative of any party or any other person with a direct or indirect interest in such case in connection with any issue of fact or law in the case except upon notice and opportunity for all parties to participate. This does not prohibit persons jointly assigned such tasks from communicating with each other. Nothing in this provision is intended to preclude the presiding officer from communicating with members of the board or seeking the advice or help of persons other than those with a personal interest in, or those engaged in personally investigating as defined in subrule 35.9(2), prosecuting, or advocating in, either the case under consideration or a pending factually related case involving the same parties as long as those persons do not directly or indirectly communicate to the presiding officer any ex parte communications they have received of a type that the presiding officer would be prohibited from receiving or that furnish, augment, diminish, or modify the evidence in the record.

**35.22(2)** Prohibitions on ex parte communications commence with the issuance of the notice of hearing in a contested case and continue for as long as the case is pending.

**35.22(3)** Written, oral, or other forms of communication are “ex parte” if made without notice and opportunity for all parties to participate.

**35.22(4)** To avoid prohibited ex parte communications, notice must be given in a manner reasonably calculated to give all parties a fair opportunity to participate. Notice of written communications shall be provided in compliance with 657—35.11(17A,272C) and may be supplemented by telephone, facsimile, electronic mail, or other means of notification. Where permitted, oral communications may be initiated through conference telephone call including all parties or their representatives.

**35.22(5)** Persons who jointly act as presiding officers in a pending contested case may communicate with each other without notice or opportunity for parties to participate.

**35.22(6)** The executive secretary/director or other persons may be present in deliberations or otherwise advise the presiding officer without notice or opportunity for parties to participate as long as they are not disqualified from participating in the making of a proposed or final decision under any provision of law and they comply with subrule 35.22(1).

**35.22(7)** Communications with the presiding officer involving uncontested scheduling or procedural matters do not require notice or opportunity for parties to participate. Parties should notify other parties prior to initiating such contact with the presiding officer when feasible and shall notify other parties when seeking to continue hearings or other deadlines pursuant to 657—35.16(17A,272C).

**35.22(8)** Disclosure of prohibited communications. A presiding officer who receives a prohibited ex parte communication during the pendency of a contested case must initially determine if the effect of the communication is so prejudicial that the presiding officer should be disqualified. If the

presiding officer determines that disqualification is warranted, a copy of any prohibited written communication, all written responses to the communication, a written summary stating the substance of any prohibited oral or other communication not available in written form for disclosure, all responses made, and the identity of each person from whom the presiding officer received a prohibited ex parte communication shall be submitted for inclusion in the record under seal by protective order. If the presiding officer determines that disqualification is not warranted, such documents shall be submitted for inclusion in the record and served on all parties. Any party desiring to rebut the prohibited communication must be allowed the opportunity to do so upon written request filed within ten days after notice of the communication.

**35.22(9)** Promptly after being assigned to serve as presiding officer at any stage in a contested case proceeding, a presiding officer shall disclose to all parties material factual information received through ex parte communication prior to such assignment unless the factual information has already been or shortly will be disclosed pursuant to Iowa Code section 17A.13(2) or through discovery. Factual information contained in an investigative report or similar document need not be separately disclosed by the presiding officer as long as such documents have been or will shortly be provided to the parties.

**35.22(10)** The presiding officer may render a proposed or final decision imposing appropriate sanctions for violations of this rule, including default, a decision against the offending party, censure, or suspension or revocation of the privilege to practice before the board. Violation of ex parte communication prohibitions by board personnel shall be reported to the executive secretary/director for possible sanctions including censure, suspension, dismissal, or other disciplinary action.

**657—35.23(17A,272C) Recording costs.** Upon request, the board of pharmacy examiners shall provide a copy of the whole or any portion of the record at cost. The cost of preparing a copy of the record or of transcribing the hearing record shall be paid by the requesting party. Parties who request that a hearing be recorded by certified shorthand reporters rather than by electronic means shall bear the cost of that recordation, unless otherwise provided by law.

**657—35.24(17A,272C) Interlocutory appeals.** If the board is not serving as the presiding officer, upon written request of a party or on its own motion, the board may review an interlocutory order of the presiding officer. In determining whether to do so, the board shall weigh the extent to which its granting the interlocutory appeal would expedite final resolution of the case and the extent to which review of that interlocutory order by the board at the time it reviews the proposed decision of the presiding officer would provide an adequate remedy. Any request for interlocutory review must be filed within 14 days of issuance of the challenged order, but no later than the time for compliance with the order or the date of hearing, whichever is first.

**657—35.25(17A) Reserved.**

**657—35.26(17A,124B,126,147,155A,205,272C) Appeals and review.**

**35.26(1)** Appeal by party. Any adversely affected party may appeal a proposed decision to the board within 30 days after issuance of the proposed decision.

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**35.26(2) Review.** The board may initiate review of a proposed decision on its own motion at any time within 30 days following the issuance of such a decision.

**35.26(3) Notice of appeal.** An appeal of a proposed decision is initiated by filing a timely notice of appeal with the board of pharmacy examiners. The notice of appeal must be signed by the appealing party or a representative of that party and contain a certificate of service. The notice shall specify:

- a. The parties initiating the appeal;
- b. The proposed decision or order appealed from;
- c. The specific findings or conclusions to which exception is taken and any other exceptions to the decision or order;
- d. The relief sought;
- e. The grounds for relief.

**35.26(4) Requests to present additional evidence.** A party may request the taking of additional evidence only by establishing that the evidence is material, that good cause existed for the failure to present the evidence at the hearing, and that the party has not waived the right to present the evidence. A written request to present additional evidence must be filed with the notice of appeal or, by a nonappealing party, within 14 days of service of the notice of appeal. The board may remand a case to the presiding officer for further hearing or may itself preside at the taking of additional evidence.

**35.26(5) Scheduling.** The board of pharmacy examiners shall issue a schedule for consideration of the appeal.

**35.26(6) Briefs and arguments.** Unless otherwise ordered, within 20 days of the notice of appeal or order for review, each appealing party may file exceptions and briefs. Within 20 days thereafter, any party may file a responsive brief. Briefs shall cite any applicable legal authority and specify relevant portions of the record in that proceeding. Written requests to present oral argument shall be filed with the briefs. The board may resolve the appeal on the briefs or provide an opportunity for oral argument. The board may shorten or extend the briefing period as appropriate.

**657—35.27(17A,124B,126,147,155A,205,272C) Applications for rehearing.**

**35.27(1) By whom filed.** Any party to a contested case proceeding may file an application for rehearing from a final order.

**35.27(2) Content of application.** The application for rehearing shall state on whose behalf it is filed, the specific grounds for rehearing, and the relief sought. In addition, the application shall state whether the applicant desires reconsideration of all or part of the board decision on the existing record and whether, on the basis of the grounds enumerated in subrule 35.26(4), the applicant requests an opportunity to submit additional evidence.

**35.27(3) Time of filing.** The application shall be filed with the board of pharmacy examiners within 20 days after issuance of the final decision.

**35.27(4) Notice to other parties.** A copy of the application shall be timely mailed by the applicant to all parties of record not joining therein. If the application does not contain a certificate of service, the board of pharmacy examiners shall serve copies on all parties.

**35.27(5) Disposition.** Any application for a rehearing shall be deemed denied unless the board grants the application within 20 days after its filing.

**657—35.28(17A,272C) Stays of board actions.**

**35.28(1) When available.**

a. Any party to a contested case proceeding may petition the board of pharmacy examiners for a stay of an order is-

sued in that proceeding or for other temporary remedies, pending review by the board. The petition shall be filed with the notice of appeal and shall state the reasons justifying a stay or other temporary remedy. The board may rule on the stay or authorize the presiding officer to do so.

b. Any party to a contested case proceeding may petition the board of pharmacy examiners for a stay or other temporary remedies, pending judicial review of all or part of that proceeding. The petition shall state the reasons justifying a stay or other temporary remedy.

**35.28(2) When granted.** In determining whether to grant a stay, the presiding officer or board shall consider the following factors:

- a. The extent to which the applicant is likely to prevail when the court finally disposes of the matter;
- b. The extent to which the applicant will suffer irreparable injury if relief is not granted;
- c. The extent to which the grant of relief to the applicant will substantially harm other parties to the proceedings;
- d. The extent to which the public interest relied on by the board is sufficient to justify the board's action in the circumstances.

**35.28(3) Vacation.** A stay may be vacated by the issuing authority upon application of the board or any other party.

**657—35.29(17A,272C) No factual dispute contested cases.** If the parties agree that no dispute of material fact exists as to a matter that would be a contested case if such a dispute of fact existed, the parties may present all relevant admissible evidence either by stipulation or otherwise as agreed by the parties, without necessity for the production of evidence at an evidentiary hearing. If such agreement is reached, a jointly submitted schedule detailing the method and timetable for submission of the record, briefs and oral argument should be submitted to the presiding officer for approval as soon as practicable.

**657—35.30(17A,124B,126,147,155A,205,272C) Emergency adjudicative proceedings.**

**35.30(1) Necessary emergency action.** To the extent necessary to prevent or avoid immediate danger to the public health, safety, or welfare, and consistent with the Constitution and other provisions of law, the board may issue a written order in compliance with Iowa Code section 17A.18 to suspend a license, registration, or permit in whole or in part, order the cessation of any continuing activity, order affirmative action, or take other action within the jurisdiction of the board by emergency adjudicative order. Before issuing an emergency adjudicative order, the board shall consider factors including, but not limited to, the following:

- a. Whether there has been a sufficient factual investigation to ensure that the board is proceeding on the basis of reliable information;
- b. Whether the specific circumstances which pose immediate danger to the public health, safety, or welfare have been identified and determined to be continuing;
- c. Whether the person required to comply with the emergency adjudicative order may continue to engage in other activities without posing immediate danger to the public health, safety, or welfare;
- d. Whether imposition of monitoring requirements or other interim safeguards would be sufficient to protect the public health, safety, or welfare; and
- e. Whether the specific action contemplated by the board is necessary to avoid the immediate danger.

**35.30(2) Issuance of order.**

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a. An emergency adjudicative order shall contain findings of fact, conclusions of law, and policy reasons to justify the determination of an immediate danger in the agency's decision to take immediate action.

b. The written emergency adjudicative order shall be immediately delivered to persons who are required to comply with the order by utilizing one or more of the following procedures:

- (1) Personal delivery;
- (2) Certified mail, return receipt requested, to the last address on file with the board;
- (3) Certified mail to the last address on file with the board;
- (4) First-class mail to the last address on file with the board; or
- (5) Facsimile. Facsimile transmission may be used as the sole method of delivery if the person required to comply with the order has filed a written request that board orders be sent by facsimile and has provided a facsimile telephone number for that purpose.

c. To the degree practicable, the board shall select the procedure for providing written notice that best ensures prompt, reliable delivery.

**35.30(3) Oral notice.** Unless the written emergency adjudicative order is provided by personal delivery on the same day that the order issues, the board shall make reasonable immediate efforts to contact by telephone the persons who are required to comply with the order.

**35.30(4) Completion of proceedings.** After the issuance of an emergency adjudicative order, the board shall proceed as quickly as feasible to complete any proceedings that would be required if the matter did not involve an immediate danger.

Issuance of a written emergency adjudicative order shall include notification of the date on which board proceedings are scheduled for completion. After issuance of an emergency adjudicative order, continuance of further board proceedings to a later date will be granted only in compelling circumstances upon application in writing.

These rules are intended to implement Iowa Code sections 17A.10 to 17A.23 as amended by 1998 Iowa Acts, chapter 1202, 124.304, 124B.12, 126.17, 147.96, 155A.6, 155A.12, 155A.13A, 155A.15 to 155A.18, 155A.26, 205.11, 272C.3 to 272C.6, 272C.9, and 272C.10.

**ARC 8782A****PHARMACY EXAMINERS  
BOARD[657]****Notice of Intended Action**

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)"b."

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code sections 124.301, 126.11, 147.76, and 155A.13, the Board of Pharmacy Examiners hereby gives Notice of Intended Action to amend Chapter 20, "Pharmacy Compounding Practices," Iowa Administrative Code.

The amendments were approved at the February 2, 1999, regular meeting of the Board of Pharmacy Examiners.

The amendments modify definitions, add new definitions, and revise requirements for the compounding of prescription medications for patients in Iowa to ensure compliance with definitions and requirements of the federal Food and Drug Administration Modernization Act of 1997, thereby ensuring that Iowa pharmacists and pharmacies may continue to prepare and dispense medications compounded pursuant to these rules.

Any interested person may present written comments, data, views, and arguments on the proposed amendments not later than 4:30 p.m. on March 30, 1999. Such written materials should be sent to Lloyd K. Jessen, Executive Secretary/Director, Board of Pharmacy Examiners, Executive Hills West, 1209 East Court Avenue, Des Moines, Iowa 50319.

These amendments are intended to implement Iowa Code sections 124.302, 124.303, 124.306, 124.308, 124.501, 126.9, 126.10, 126.18, 155A.2, 155A.28, 155A.33, and 155A.35.

The following amendments are proposed.

ITEM 1. Amend rule 657—20.1(124,126,155A) as follows:

**657—20.1(124,126,155A) Purpose and scope.** The requirements of this chapter apply to compounding of drugs by Iowa-licensed pharmacists and pharmacies and are minimum good compounding practices for the preparation of drug products for dispensing or administration to humans or animals. Pharmacists and pharmacies engaged in the compounding of drugs ~~may shall~~ reference the USP General Chapter entitled <1161> Pharmacy Compounding Practices, ~~which is intended to enhance the pharmacist's ability to compound extemporaneously safe, effective drug preparations in pharmacies,~~ and shall comply with all applicable provisions of Iowa ~~and federal law regulating the practice of pharmacy laws and regulations.~~

ITEM 2. Amend rule 657—20.2(124,126,155A) as follows:

**657—20.2(124,126,155A) Definitions.**

"Bulk drug substance" means any substance that is represented for use in a drug and that, when used in the manufacturing, processing, or packaging of a drug, becomes an active ingredient or a finished dosage form of the drug, but the term does not include intermediates used in the synthesis of such substances.

"Component" means any ingredient, other than a bulk drug substance, intended for use in the compounding of a drug product, including those that may not appear in such be identifiable in the final product.

"Compounding" means the preparation, mixing, assembling, packaging, or labeling of a drug or device:

1. As For an identified individual patient as a result of a practitioner's prescription drug order or initiative based on the prescriber/patient/pharmacist relationship in the course of professional practice, or

2. For the purpose of, or as an incident to, research, teaching, chemical analysis, and not for sale or dispensing.

Compounding also includes the preparation of drugs or devices in anticipation of prescription drug orders based on routine, regularly observed prescribing patterns pursuant to subrule 20.3(3). Compounding does not include mixing or reconstituting according to a product's labeling or to the manufacturer's directions.

"FDA" means the United States Department of Health and Human Services, Food and Drug Administration.

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"Manufacturing" means the production, preparation, propagation, conversion, or processing of a drug or device, either directly or indirectly, by extraction from substances of natural origin or independently by means of chemical or biological synthesis and includes any packaging or repackaging of the substances or labeling or relabeling of its container. Manufacturing also includes the preparation, promotion, and marketing of commercially available products from bulk compounds for resale by pharmacists, practitioners, or other persons.

ITEM 3. Amend rule 657—20.3(124,126,155A) as follows:

**657—20.3(124,126,155A) General requirements.**

**20.3(1)** Compounding commercially available product. Based on the existence of a pharmacist/patient/prescriber relationship and the presentation of a valid prescription, ~~or in anticipation of prescription drug orders based on routine, regularly observed prescribing patterns,~~ pharmacists may compound, for an individual patient, drug products that are commercially available in the marketplace, *if the compounded product is changed to produce for that patient a significant difference, as determined by the prescriber, between the compounded drug and the comparable commercially available drug product.* "Significant difference" would include the removal of a dye for a medical reason such as an allergic reaction. When a compounded product is to be dispensed in place of a commercially available product, the prescriber and patient shall be informed that the product will be compounded.

**20.3(2)** Substances and components. In compounding prescriptions, pharmacists shall receive, store, and use *components which meet the United States Pharmacopeia (USP) or National Formulary (NF) monograph standards, if such a monograph exists, and which comply with the USP chapter on pharmacy compounding.* ~~Pharmacists shall receive, store, and use bulk drug substances and drug components that meet official compendia requirements. If these requirements cannot be met, and pharmacists document such, pharmacists shall use their professional judgment in the procurement of acceptable alternatives, manufactured by an establishment which is registered with FDA under the federal Food, Drug, and Cosmetic Act and which sends a valid certificate of analysis for each drug product. Certificates of analysis shall be maintained pursuant to 657—20.12(124,126,155A). Bulk drug substances to be used in compounding prescriptions:~~

a. *When a monograph exists, shall comply with the applicable USP or NF monograph and the USP chapter on pharmacy compounding; or*

b. *If not subject to a monograph, shall be ingredients of drugs that FDA has approved; or*

c. *If not subject to a monograph and not ingredients of FDA-approved drugs, shall appear on the FDA list of approved bulk drug products not subject to a monograph.*

**20.3(3)** Prescriber/patient/pharmacist relationship. *A prescription for a compounded drug shall either be unsolicited or marked with a notation by the pharmacist, and approved by the physician, that the compounded drug is necessary.* Pharmacists may compound drugs in very limited quantities prior to receiving a valid prescription based on a history of receiving valid prescriptions that have been generated solely within an established pharmacist/patient/prescriber relationship ~~and~~ provided that they maintain the prescriptions on file for all such products compounded at the pharmacy as required by Iowa law *and that such compound-*

*ing is in compliance with the requirements of 657—20.11(126).* The sale or other distribution of compounded products to other pharmacies or to prescribers without a prescriber/patient/pharmacist relationship is considered manufacturing. *However, compounded products may be provided to a prescriber for the prescriber's use in treatment of the prescriber's patients.*

**20.3(4)** Advertising and resale of compounded drug products. Pharmacists shall not offer compounded drug products to other ~~Iowa-licensed licensed~~ persons or commercial entities for subsequent resale except in the course of professional practice for a practitioner to administer to an individual patient. Compounding pharmacies or pharmacists may advertise or otherwise promote the fact that they provide prescription compounding services; however, they shall not make a claim, assertion, or inference of professional superiority in the compounding of drug products which cannot be substantiated, *nor shall they advertise the compounding of any specific drug, class of drug, or type of drug.* All advertisements shall meet the requirements contained in 657—8.6(155A,126).

**20.3(5)** *Compounding prohibited. Pharmacists shall not compound:*

a. *A drug that has been identified by FDA as withdrawn or removed from the market because the drug was found to be unsafe or not effective.*

b. *Regularly or in inordinate amounts drugs which are essentially copies of a commercially available drug product except as provided in subrule 20.3(1).*

c. *Drugs which have been identified by FDA or the board as products which may not be compounded.*

ITEM 4. Amend subrules 20.4(1), 20.4(2), and 20.4(5) as follows:

**20.4(1)** Pharmacist responsible. As in the dispensing of all prescriptions, the pharmacist has the responsibility and authority to inspect and approve or reject all components, *bulk drug substances,* drug product containers, closures, in-process materials, and labeling, and has the authority to prepare and review all compounding records to ensure that no errors have occurred in the compounding process. The pharmacist is also responsible for the proper maintenance, cleanliness, and use of all equipment used in prescription compounding practice.

**20.4(2)** Pharmacist competence. All pharmacists who engage in compounding of drugs shall be proficient in ~~the art of~~ *compounding commensurate with the level of their compounding activity.* ~~and~~ *Pharmacists shall maintain that proficiency through current awareness and documented training.* ~~Also, every~~ *Every* pharmacist who engages in drug compounding shall be aware of, ~~and~~ *familiar with, and comply with* all details of these good compounding practices *and all applicable state and federal laws and regulations.*

**20.4(5)** Health of personnel. Only personnel authorized by the responsible pharmacist shall be in the immediate vicinity of the drug compounding operation. Any person shown at any time, either by medical examination or pharmacist determination, to have an apparent illness or open lesions that may adversely affect the safety or quality of a drug product being compounded shall be excluded from direct contact with components, *bulk drug substances,* drug product containers, closures, in-process materials, and drug products until the condition is corrected or determined by competent medical personnel not to jeopardize the safety or quality of the products being compounded. All personnel who normally assist the pharmacist in compounding procedures shall

## PHARMACY EXAMINERS BOARD[657](cont'd)

be instructed to report to the pharmacist any health conditions that may have an adverse effect on drug products.

ITEM 5. Amend subrule 20.5(1) as follows:

**20.5(1) Component and bulk drug substances storage.** Bulk drugs and other materials used in the compounding of drug products shall be stored in adequately labeled containers in a clean, dry area or, if required, under proper refrigeration.

ITEM 6. Amend rule 657—20.6(126,155A) as follows:

**657—20.6(126,155A) Sterile products and radiopharmaceuticals.**

**20.6(1) Aseptic Sterile products.** If aseptic sterile products are being compounded, the requirements contained in 657—8.30(126,155A) shall be met.

**20.6(2) Radiopharmaceuticals.** If radiopharmaceuticals are being compounded, the requirements of 657—Chapter 16 shall be met.

ITEM 7. Amend rule 657—20.7(126,155A) as follows:

**657—20.7(126,155A) Special precaution products.** If drug products with special precautions for contamination, such as penicillin, are involved in a compounding operation, appropriate measures, including either the dedication of equipment for such operations or the meticulous cleaning of contaminated equipment prior to its return to inventory, shall be utilized in order to prevent cross-contamination.

ITEM 8. Amend subrule 20.8(1) as follows:

**20.8(1) Equipment maintenance.** Equipment and utensils used for compounding shall be cleaned and sanitized immediately prior to use to prevent contamination that would alter the safety, identity, strength, quality, or purity of the drug product beyond that desired. In the case of equipment, utensils, and containers or closures used in the compounding of sterile drug products, cleaning, sterilization, and maintenance procedures as set forth in 657—8.30(126,155A) shall be followed.

ITEM 9. Amend rule 657—20.9(126,155A) as follows:

**657—20.9(126,155A) Control of bulk drug substances, components and drug product containers and closures.** Drug product containers and closures shall not be reactive, additive, or absorptive so as to alter the safety, identity, strength, quality, or purity of the compounded drug beyond the desired result. Container closure systems shall provide adequate protection against foreseeable external factors in storage and use that can cause deterioration or contamination of the compounded drug product. Drug product containers and closures shall be clean and, where indicated by the intended use of the drug, sterilized and processed to remove pyrogenic properties to ensure that they are suitable for their intended use.

**20.9(1) Storage.** Components, bulk drug substances, drug product containers, closures, and bagged or boxed parts of drug product containers and closures used in the compounding of drug products shall be handled and stored in a manner to prevent contamination and to permit inspection and unhindered cleaning of the work area, including floors. Components, bulk drug substances, drug product containers, and closures for use in the compounding of drug products shall be rotated so that the oldest stock is used first.

**20.9(2) Sterile product containers and closures.** Drug product containers and closures intended for the compounding of sterile products shall be handled, sterilized, and stored in keeping with the requirements of 657—8.30(126,155A).

Methods of cleaning, sterilizing, and processing to remove pyrogenic properties shall be written and followed for drug product containers and closures used in the preparation of sterile pharmaceuticals, if these processes are performed by the pharmacist or under the pharmacist's supervision, following the requirements of 657—8.30(126,155A).

ITEM 10. Amend subrules 20.10(1), 20.10(2), and 20.10(6) as follows:

**20.10(1) Procedures required.** There shall be written procedures for the compounding of drug products to ensure that the finished products have the identity, strength, quality, and purity they purport or are represented to possess. Such procedures shall include a listing of the bulk drug products and components, their amounts in weight or volume, the order of drug product and component addition, and a description of the compounding process. All equipment and utensils and the container/closure system, relevant to the sterility and stability of the intended use of the drug product, shall be listed. These written procedures shall be followed in the execution of the drug compounding procedure.

**20.10(2) Accuracy.** Components and bulk drug substances for drug product compounding shall be accurately weighed, measured, or subdivided as appropriate. These operations should be checked and rechecked by the compounding pharmacist at each stage of the process to ensure that each weight or measure is correct as stated in the written compounding procedures. If a component or bulk drug substance is removed from the original container to another, such as a powder taken from the original container, weighed, placed in a container, and stored in another container, the new container shall be identified with the component or bulk drug substance name and weight or measure.

**20.10(6) Labeling and control of excess products.** In the case where a quantity of a compounded drug product in excess of that to be initially dispensed in accordance with the general provisions described above is prepared, the excess product shall be labeled or documentation referenced with the complete list of bulk drug substances and components, the preparation date, and the assigned expiration date based upon professional judgment, appropriate testing, or published data. Excess product shall be stored and accounted for under conditions dictated by its composition and stability characteristics to ensure its strength, quality, and purity.

At the completion of the drug finishing operation, the product shall be examined for correct labeling in compliance with the label information requirements contained in rule 20.11(126).

ITEM 11. Amend subrule 20.11(1) as follows:

**20.11(1) Control record.** Pharmacies Pursuant to the provisions of subrule 20.3(3), pharmacies may compound drugs in bulk quantities for subsequent prescription labeling and dispensing. Such drugs shall be compounded by or under the direct supervision of a pharmacist. For each drug product compounded in bulk quantities, a master formula record shall be prepared containing the following information:

- a. Name of the product.
- b. Specimen or copy of label.
- c. List of ingredients and quantities.
- d. Description of container used.
- e. Compounding instructions, procedures and specifications.

ITEM 12. Amend subrules 20.12(2) and 20.12(3) as follows:

**20.12(2) Record availability.** All records required to be retained under these good compounding practices, or copies

## PHARMACY EXAMINERS BOARD[657](cont'd)

~~of such records~~, shall be readily available for authorized inspection during the retention period at the establishment where the activities described in such records occurred. These records ~~or copies thereof~~ shall be subject to photocopying or other means of reproduction as part of such inspection.

**20.12(3)** Records form. Records required under these good compounding practices may be retained either as the original records or as ~~true copies, such as photocopies, microfilm, microfiche, or other accurate reproductions of the original records.~~

**ARC 8769A****PHARMACY EXAMINERS BOARD[657]****Notice of Termination**

Pursuant to the authority of Iowa Code sections 124.301, 124.306, 147.76, 155A.13, 155A.28, 155A.31, and 155A.36, the Board of Pharmacy Examiners hereby terminates the rule making initiated by its Notice of Intended Action published in the Iowa Administrative Bulletin on July 29, 1998, as **ARC 8212A**, adding a new Chapter 23, "Long-Term Care Pharmacies," Iowa Administrative Code.

The Notice proposed to add a new Chapter 23, providing specific requirements and responsibilities for pharmacies, providing medication services to patients residing in long-term care facilities and addressing circumstances and situations unique to pharmacists and pharmacies engaged in such practice.

Following review of comments regarding the proposed rules, the Board is terminating the rule making commenced in **ARC 8212A** and will renounce the proposed rules to incorporate changes and clarifications to requirements and responsibilities under this chapter.

**ARC 8783A****PHARMACY EXAMINERS BOARD[657]****Notice of Intended Action**

*Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)"b."*

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code sections 17A.9 and 17A.22, the Board of Pharmacy Examiners hereby gives Notice of Intended Action to rescind Chapter 27, "Declaratory Rulings," and to adopt Chapter 27, "Declaratory Orders," Iowa Administrative Code.

The amendment was approved at the February 2, 1999, regular meeting of the Board of Pharmacy Examiners.

The amendment rescinds current Chapter 27 and adopts new rules that provide for the form, contents, and filing of petitions for declaratory orders; the procedures, rights, and responsibilities of persons relative to such petitions; and the procedures and responsibilities of the Board relative to petitions for declaratory orders.

Any interested person may present written comments, data, views, and arguments on the proposed amendment not later than 4:30 p.m. on March 30, 1999. Such written materials should be sent to Lloyd K. Jessen, Executive Secretary/Director, Board of Pharmacy Examiners, Executive Hills West, 1209 East Court Avenue, Des Moines, Iowa 50319-0187.

This amendment is intended to implement Iowa Code section 17A.9 as amended by 1998 Iowa Acts, chapter 1202, section 13.

The following amendment is proposed.

Rescind **657—Chapter 27** and adopt the following **new** chapter in lieu thereof:

**CHAPTER 27  
DECLARATORY ORDERS**

**657—27.1(17A) Petition for declaratory order.** Any person may file a petition with the board of pharmacy examiners, hereinafter referred to as "the board," for a declaratory order as to the applicability to specified circumstances of a statute, rule, or order within the primary jurisdiction of the Board of Pharmacy Examiners at Executive Hills West, 1209 East Court Avenue, Des Moines, Iowa 50319-0187. A petition is deemed filed when it is received by that office. The board shall provide the petitioner with a file-stamped copy of the petition if the petitioner provides the board an extra copy for this purpose. The petition shall be typewritten or legibly handwritten in ink and shall substantially conform to the following form:

**BOARD OF PHARMACY EXAMINERS**

Petition by (Name of  
Petitioner) for a Declaratory  
Order on (Cite provisions of  
law involved).

} **PETITION FOR  
DECLARATORY  
ORDER**

The petition shall provide the following information:

1. A clear and concise statement of all relevant facts on which the order is requested.
2. A citation and the relevant language of the specific statutes, rules, policies, decisions, or orders, whose applicability is questioned, and any other relevant law.
3. The questions petitioner wants answered, stated clearly and concisely.
4. The answers to the questions desired by the petitioner and a summary of the reasons urged by the petitioner in support of those answers.
5. The reasons for requesting the declaratory order and disclosure of the petitioner's interest in the outcome.
6. A statement indicating whether the petitioner is currently a party to another proceeding involving the questions at issue and whether, to the petitioner's knowledge, those questions have been decided by, are pending determination by, or are under investigation by, any governmental entity.
7. The names and addresses of other persons, or a description of any class of persons, known by petitioner to be affected by, or interested in, the questions presented in the petition.
8. Any request by petitioner for a meeting provided for by 657—27.7(17A).

The petition shall be dated and signed by the petitioner or the petitioner's representative. It shall also include the name, mailing address, and telephone number of the petitioner and petitioner's representative and a statement indicating the

## PHARMACY EXAMINERS BOARD[657](cont'd)

person to whom communications concerning the petition should be directed.

**657—27.2(17A) Notice of petition.** Within 15 days after receipt of a petition for a declaratory order, the board shall give notice of the petition to all persons not served by the petitioner pursuant to 657—27.6(17A) to whom notice is required by any provision of law. The board may also give notice to any other persons.

**657—27.3(17A) Intervention.**

**27.3(1)** Persons who qualify under any applicable provision of law as an intervenor and who file a petition for intervention within 20 days of the filing of a petition for declaratory order shall be allowed to intervene in a proceeding for a declaratory order.

**27.3(2)** Any person who files a petition for intervention at any time prior to the issuance of an order may be allowed to intervene in a proceeding for a declaratory order at the discretion of the board.

**27.3(3)** A petition for intervention shall be filed at the board office at Executive Hills West, 1209 East Court Avenue, Des Moines, Iowa 50319-0187. Such a petition is deemed filed when it is received by that office. The board will provide the petitioner with a file-stamped copy of the petition for intervention if the petitioner provides an extra copy for this purpose. A petition for intervention shall be typewritten or legibly handwritten in ink and shall substantially conform to the following form:

## BOARD OF PHARMACY EXAMINERS

Petition by (Name of Original Petitioner) for a Declaratory Order on (Cite provisions of law cited in original petition).	}	PETITION FOR INTERVENTION
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The petition for intervention shall provide the following information:

1. Facts supporting the intervenor's standing and qualifications for intervention.
2. The answers urged by the intervenor to the question or questions presented and a summary of the reasons urged in support of those answers.
3. Reasons for requesting intervention and disclosure of the intervenor's interest in the outcome.
4. A statement indicating whether the intervenor is currently a party to any proceeding involving the questions at issue and whether, to the intervenor's knowledge, those questions have been decided by, are pending determination by, or are under investigation by, any governmental entity.
5. The names and addresses of any additional persons, or a description of any additional class of persons, known by the intervenor to be affected by, or interested in, the questions presented.
6. Whether the intervenor consents to be bound by the determination of the matters presented in the declaratory order proceeding.

The petition shall be dated and signed by the intervenor or the intervenor's representative. It shall also include the name, mailing address, and telephone number of the intervenor and intervenor's representative, and a statement indicating the person to whom communications should be directed.

**657—27.4(17A) Briefs.** The petitioner or any intervenor may file a brief in support of the position urged. The board

may request a brief from the petitioner, any intervenor, or any other person concerning the questions raised.

**657—27.5(17A) Inquiries.** Inquiries concerning the status of a declaratory order proceeding may be made to the Board of Pharmacy Examiners, Executive Hills West, 1209 East Court Avenue, Des Moines, Iowa 50319-0187.

**657—27.6(17A) Service and filing of petitions and other papers.**

**27.6(1)** When service required. Except where otherwise provided by law, every petition for declaratory order, petition for intervention, brief, or other paper filed in a proceeding for a declaratory order shall be served upon each of the parties of record to the proceeding, and on all other persons identified in the petition for declaratory order or petition for intervention as affected by or interested in the questions presented, simultaneously with their filing. The party filing a document is responsible for service on all parties and other affected or interested persons.

**27.6(2)** Filing—when required. All petitions for declaratory orders, petitions for intervention, briefs, or other papers in a proceeding for a declaratory order shall be filed with the Board of Pharmacy Examiners, Executive Hills West, 1209 East Court Avenue, Des Moines, Iowa 50319-0187. All petitions, briefs, or other papers that are required to be served upon a party shall be filed simultaneously with the board.

**27.6(3)** Method of service, time of filing, and proof of mailing. Method of service, time of filing, and proof of mailing shall be as provided by 657—35.11(17A,272C).

**657—27.7(17A) Consideration.** Upon request by petitioner, the board shall schedule a brief and informal meeting between the original petitioner, all intervenors, and the board, a member of the board, or a member of the staff of the board, to discuss the questions raised. The board may solicit comments from any person on the questions raised. Also, comments on the questions raised may be submitted to the board by any person.

**657—27.8(17A) Action on petition.**

**27.8(1)** Within the time allowed by 1998 Iowa Acts, chapter 1202, section 13(5), after receipt of a petition for a declaratory order, the executive secretary/director or designee shall take action on the petition as required by 1998 Iowa Acts, chapter 1202, section 13(5).

**27.8(2)** The date of issuance of an order or of a refusal to issue an order is as defined in 657—35.2(17A,272C).

**657—27.9(17A) Refusal to issue order.**

**27.9(1)** The board shall not issue a declaratory order where prohibited by 1998 Iowa Acts, chapter 1202, section 13(1), and may refuse to issue a declaratory order on some or all questions raised for the following reasons:

1. The petition does not substantially comply with the required form.
2. The petition does not contain facts sufficient to demonstrate that the petitioner will be aggrieved or adversely affected by the failure of the board to issue an order.
3. The board does not have jurisdiction over the questions presented in the petition.
4. The questions presented by the petition are also presented in a current rule making, contested case, or other board or judicial proceeding, that may definitively resolve them.

## PHARMACY EXAMINERS BOARD[657](cont'd)

5. The questions presented by the petition would more properly be resolved in a different type of proceeding or by another body with jurisdiction over the matter.

6. The facts or questions presented in the petition are unclear, overbroad, insufficient, or otherwise inappropriate as a basis upon which to issue an order.

7. There is no need to issue an order because the questions raised in the petition have been settled due to a change in circumstances.

8. The petition is not based upon facts calculated to aid in the planning of future conduct but is, instead, based solely upon prior conduct in an effort to establish the effect of that conduct or to challenge a board decision already made.

9. The petition requests a declaratory order that would necessarily determine the legal rights, duties, or responsibilities of other persons who have not joined in the petition, intervened separately, or filed a similar petition and whose position on the questions presented may fairly be presumed to be adverse to that of petitioner.

10. The petitioner requests the board to determine whether a statute is unconstitutional on its face.

**27.9(2)** A refusal to issue a declaratory order shall indicate the specific grounds for the refusal and constitutes final board action on the petition.

**27.9(3)** Refusal to issue a declaratory order pursuant to this provision does not preclude the filing of a new petition that seeks to eliminate the grounds for the refusal to issue an order.

**657—27.10(17A) Contents of declaratory order—effective date.** In addition to the order itself, a declaratory order shall contain the date of its issuance, the name of petitioner and all intervenors, the specific statutes, rules, policies, decisions, or orders involved, the particular facts upon which it is based, and the reasons for its conclusion. A declaratory order is effective on the date of issuance.

**657—27.11(17A) Copies of orders.** A copy of all orders issued in response to a petition for a declaratory order shall be mailed promptly to the original petitioner and all intervenors.

**657—27.12(17A) Effect of a declaratory order.** A declaratory order has the same status and binding effect as a final order issued in a contested case proceeding. It is binding on the board, the petitioner, and any intervenors and is applicable only in circumstances where the relevant facts and the law involved are indistinguishable from those on which the order was based. As to all other persons, a declaratory order serves only as precedent and is not binding on the board. The issuance of a declaratory order constitutes final board action on the petition.

These rules are intended to implement Iowa Code section 17A.9 as amended by 1998 Iowa Acts, chapter 1202, section 13.

ARC 8784A

PHARMACY EXAMINERS  
BOARD[657]

## Notice of Intended Action

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)“b.”

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code section 17A.22, the Board of Pharmacy Examiners hereby gives Notice of Intended Action to rescind Chapter 28, “Agency Procedure for Rule Making,” Iowa Administrative Code, and to adopt a new Chapter 28 with the same title.

The amendment was approved at the February 2, 1999, regular meeting of the Board of Pharmacy Examiners.

The amendment rescinds current Chapter 28 and adopts new rules identifying the procedures, requirements, formats, and record keeping relative to the notice and adoption of administrative rules. The rules address the rights of individuals, organizations, and businesses regulated by the Board relative to the rule-making processes including regulatory analysis, fiscal impact statements, open comment periods, and requests for review of rules. The rules also address specific instances where it may be necessary for the Board to adopt rules without providing for public notice, comment, or publication.

Any interested person may present written comments, data, views, and arguments on the proposed amendment not later than 4:30 p.m. on March 30, 1999. Such written materials should be sent to Lloyd K. Jessen, Executive Secretary/Director, Board of Pharmacy Examiners, Executive Hills West, 1209 East Court Avenue, Des Moines, Iowa 50319.

These rules are intended to implement Iowa Code sections 17A.3 to 17A.7 as amended by 1998 Iowa Acts, chapter 1202.

The following amendment is proposed.

Rescind **657—Chapter 28** and adopt the following new chapter in lieu thereof:

## CHAPTER 28

## AGENCY PROCEDURE FOR RULE MAKING

**657—28.1(17A) Applicability.** Except to the extent otherwise expressly provided by statute, all rules adopted by the board of pharmacy examiners, hereinafter referred to as “board,” are subject to the provisions of Iowa Code chapter 17A, the Iowa administrative procedure Act, and the provisions of this chapter.

**657—28.2(17A) Advice on possible rules before notice of proposed rule adoption.** In addition to seeking information by other methods, the board may, before publication of a Notice of Intended Action under Iowa Code section 17A.4(1)“a,” solicit comments from the public on a subject matter of possible rule making by the board by causing notice to be published in the Iowa Administrative Bulletin of the subject matter and indicating where, when, and how persons may comment.

**657—28.3(17A) Public rule-making docket.**

**28.3(1)** Docket maintained. The board shall maintain a current public rule-making docket.

## PHARMACY EXAMINERS BOARD[657](cont'd)

**28.3(2) Anticipated rule making.** The rule-making docket shall list each anticipated rule-making proceeding. A rule-making proceeding is deemed "anticipated" from the time a draft of proposed rules is distributed for internal discussion within the board. For each anticipated rule-making proceeding the docket shall contain a listing of the precise subject matter which may be submitted for consideration by the board for subsequent proposal under the provisions of Iowa Code section 17A.4(1)"a," the name and address of board personnel with whom persons may communicate with respect to the matter, and an indication of the present status within the board of that possible rule. The board may also include in the docket other subjects upon which public comment is desired.

**28.3(3) Pending rule-making proceedings.** The rule-making docket shall list each pending rule-making proceeding. A rule-making proceeding is pending from the time it is commenced, by publication in the Iowa Administrative Bulletin of a Notice of Intended Action pursuant to Iowa Code section 17A.4(1)"a," to the time it is terminated, by publication of a Notice of Termination in the Iowa Administrative Bulletin, or the rule becoming effective. For each rule-making proceeding, the docket shall indicate:

- a. The subject matter of the proposed rule;
- b. A citation to all published notices relating to the proceeding;
- c. Where written submissions on the proposed rule may be inspected;
- d. The time during which written submissions may be made;
- e. The names of persons who have made written requests for an opportunity to make oral presentations on the proposed rule, where those requests may be inspected, and where and when oral presentations may be made;
- f. Whether a written request for the issuance of a regulatory analysis or a concise statement of reasons has been filed, whether such an analysis or statement or a fiscal impact statement has been issued, and where any such written request, analysis, or statement may be inspected;
- g. The current status of the proposed rule and any board determinations with respect thereto;
- h. Any known timetable for board decisions or other action in the proceeding;
- i. The date of the rule's adoption;
- j. The date of the rule's filing, indexing, and publication;
- k. The date on which the rule will become effective; and
- l. Where the rule-making record may be inspected.

**657—28.4(17A) Notice of proposed rule making.**

**28.4(1) Contents.** At least 35 days before the adoption of a rule the board shall cause Notice of Intended Action to be published in the Iowa Administrative Bulletin. The Notice of Intended Action shall include:

- a. A brief explanation of the purpose of the proposed rule;
- b. The specific legal authority for the proposed rule;
- c. Except to the extent impracticable, the text of the proposed rule;
- d. Where, when, and how persons may present their views on the proposed rule; and
- e. Where, when, and how persons may demand an oral proceeding on the proposed rule if the notice does not already provide for one.

Where inclusion of the complete text of a proposed rule in the Notice of Intended Action is impracticable, the board shall include in the notice a statement fully describing the

specific subject matter of the omitted portion of the text of the proposed rule, the specific issues to be addressed by that omitted text of the proposed rule, and the range of possible choices being considered by the board for the resolution of each of those issues.

**28.4(2) Incorporation by reference.** A proposed rule may incorporate other materials by reference only if it complies with all of the requirements applicable to the incorporation by reference of other materials in an adopted rule that are contained in subrule 28.12(2) of this chapter.

**28.4(3) Copies of notices.** Persons desiring to receive copies of future Notices of Intended Action by subscription shall file with the board a written request indicating the name and address to which such notices should be sent. Within seven days after submission of a Notice of Intended Action to the administrative rules coordinator for publication in the Iowa Administrative Bulletin, the board shall mail or electronically transmit a copy of that notice to subscribers who have filed a written request for either mailing or electronic transmittal with the board for Notices of Intended Action. The written request shall be accompanied by payment of the subscription price which may cover the full cost of the subscription service, including its administrative overhead and the cost of copying and mailing the Notices of Intended Action for a period of one year.

**657—28.5(17A) Public participation.**

**28.5(1) Written comments.** For at least 20 days after publication of the Notice of Intended Action, persons may submit argument, data, and views, in writing, on the proposed rule. Such written submissions shall identify the proposed rule to which they relate and shall be submitted to the Board of Pharmacy Examiners, Executive Hills West, 1209 East Court Avenue, Des Moines, Iowa 50319-0187, or the person designated in the Notice of Intended Action.

**28.5(2) Oral proceedings.** The board may, at any time, schedule an oral proceeding on a proposed rule. The board shall schedule an oral proceeding on a proposed rule if, within 20 days after the published Notice of Intended Action, a written request for an opportunity to make oral presentations is submitted to the board by the administrative rules review committee, a governmental subdivision, an agency, an association having not less than 25 members, or at least 25 persons. That request shall also contain the following additional information:

- a. A request by one or more individual persons shall be signed by each of them and include the address and telephone number of each of them.
- b. A request by an association shall be signed by an officer or designee of the association and shall contain a statement that the association has at least 25 members and the address and telephone number of the person signing that request.

c. A request by an agency or governmental subdivision shall be signed by an official having authority to act on behalf of the entity and shall contain the address and telephone number of the person signing that request.

**28.5(3) Conduct of oral proceedings.**

a. **Applicability.** This subrule applies only to those oral rule-making proceedings in which an opportunity to make oral presentations is authorized or required by Iowa Code section 17A.4(1)"b" as amended by 1998 Iowa Acts, chapter 1202, section 8, or subrule 28.5(2).

b. **Scheduling and notice.** An oral proceeding on a proposed rule may be held in one or more locations and shall not be held earlier than 20 days after notice of its location and time is published in the Iowa Administrative Bulletin. That

## PHARMACY EXAMINERS BOARD[657](cont'd)

notice shall also identify the proposed rule by ARC number and citation to the Iowa Administrative Bulletin.

c. Presiding officer. The board, a member of the board, or another person designated by the board who will be familiar with the substance of the proposed rule, shall preside at the oral proceeding on a proposed rule. If the board does not preside, the presiding officer shall prepare a memorandum for consideration by the board summarizing the contents of the presentations made at the oral proceeding unless the board determines that such a memorandum is unnecessary because the board will personally listen to or read the entire transcript of the oral proceeding.

d. Conduct of proceeding. At an oral proceeding on a proposed rule, persons may make oral statements and make documentary and physical submissions, which may include data, views, comments or arguments concerning the proposed rule. Persons wishing to make oral presentations at such a proceeding are encouraged to notify the board at least one business day prior to the proceeding and indicate the general subject of their presentations. At the proceeding, those who participate shall indicate their names and addresses, identify any persons or organizations they may represent, and provide any other information relating to their participation deemed appropriate by the presiding officer. Oral proceedings shall be open to the public and shall be recorded by stenographic or electronic means.

(1) At the beginning of the oral proceeding, the presiding officer shall give a brief synopsis of the proposed rule, a statement of the statutory authority for the proposed rule, and the reasons for the board decision to propose the rule. The presiding officer may place time limitations on individual oral presentations when necessary to ensure the orderly and expeditious conduct of the oral proceeding. To encourage joint oral presentations and to avoid repetition, additional time may be provided for persons whose presentations represent the views of other individuals as well as their own views.

(2) Persons making oral presentations are encouraged to avoid restating matters which have already been submitted in writing.

(3) To facilitate the exchange of information, the presiding officer may, where time permits, open the floor to questions or general discussion.

(4) The presiding officer shall have the authority to take any reasonable action necessary for the orderly conduct of the meeting.

(5) Physical and documentary submissions presented by participants in the oral proceeding shall be submitted to the presiding officer. Such submissions become the property of the board.

(6) The oral proceeding may be continued by the presiding officer to a later time without notice other than by announcement at the hearing.

(7) Participants in an oral proceeding shall not be required to take an oath or to submit to cross-examination. However, the presiding officer in an oral proceeding may question participants and permit the questioning of participants by other participants about any matter relating to that rule-making proceeding, including any prior written submissions made by those participants in that proceeding; but no participant shall be required to answer any question.

(8) The presiding officer in an oral proceeding may permit rebuttal statements and request the filing of written statements subsequent to the adjournment of the oral presentations.

**28.5(4) Additional information.** In addition to receiving written comments and oral presentations on a proposed rule according to the provisions of this rule, the board may obtain information concerning a proposed rule through any other lawful means deemed appropriate under the circumstances.

**28.5(5) Accessibility.** The board shall schedule oral proceedings in rooms accessible to and functional for persons with physical disabilities. Persons who have special requirements should contact the board of pharmacy examiners, telephone (515)281-5944, in advance to arrange access or other needed services.

**657—28.6(17A) Regulatory analysis.**

**28.6(1) Definition of small business.** A "small business" is defined in 1998 Iowa Acts, chapter 1202, section 10(7).

**28.6(2) Mailing list.** Small businesses or organizations of small businesses may be registered on the board's small business impact list by making a written application addressed to the Board of Pharmacy Examiners, Executive Hills West, 1209 East Court Avenue, Des Moines, Iowa 50319-0187. The application for registration shall state:

- a. The name of the small business or organization of small businesses;
- b. Its address;
- c. The name of a person authorized to transact business for the applicant;
- d. A description of the applicant's business or organization. An organization representing 25 or more persons who qualify as a small business shall indicate that fact.
- e. Whether the registrant desires copies of Notices of Intended Action at cost, or desires advance notice of the subject of all or some specific category of proposed rule making affecting small business.

The board may at any time request additional information from the applicant to determine whether the applicant is qualified as a small business or as an organization of 25 or more small businesses. The board may periodically send a letter to each registered small business or organization of small businesses asking whether that business or organization wishes to remain on the registration list. The name of a small business or organization of small businesses will be removed from the list if a negative response is received or if no response is received within 30 days after the letter is sent.

**28.6(3) Time of mailing.** Within seven days after submission of a Notice of Intended Action to the administrative rules coordinator for publication in the Iowa Administrative Bulletin, the board shall mail to all registered small businesses or organizations of small businesses, in accordance with their request, either a copy of the Notice of Intended Action or notice of the subject of that proposed rule making. In the case of a rule that may have an impact on small business adopted in reliance upon Iowa Code section 17A.4(2), the board shall mail notice of the adopted rule to registered businesses or organizations prior to the time the adopted rule is published in the Iowa Administrative Bulletin.

**28.6(4) Qualified requesters for regulatory analysis—economic impact.** The board shall issue a regulatory analysis of a proposed rule that conforms to the requirements of 1998 Iowa Acts, chapter 1202, section 10(2a), after a proper request from:

- a. The administrative rules coordinator or
- b. The administrative rules review committee.

**28.6(5) Qualified requesters for regulatory analysis—business impact.** The board shall issue a regulatory analysis of a proposed rule that conforms to the requirements of 1998 Iowa Acts, chapter 1202, section 10(2b), after a proper request from:

## PHARMACY EXAMINERS BOARD[657](cont'd)

- a. The administrative rules review committee;
- b. The administrative rules coordinator;
- c. At least 25 or more persons who sign the request provided that each represents a different small business;
- d. An organization representing at least 25 small businesses. That organization shall list the name, address, and telephone number of not less than 25 small businesses it represents.

**28.6(6)** Time period for analysis. Upon receipt of a timely request for a regulatory analysis the board shall adhere to the time lines described in 1998 Iowa Acts, chapter 1202, section 10(4).

**28.6(7)** Contents of request. A request for a regulatory analysis is made when it is mailed or delivered to the board. The request shall be in writing and satisfy the requirements of 1998 Iowa Acts, chapter 1202, section 10(1).

**28.6(8)** Contents of concise summary. The contents of the concise summary shall conform to the requirements of 1998 Iowa Acts, chapter 1202, section 10(4,5).

**28.6(9)** Publication of a concise summary. The board shall make available, to the maximum extent feasible, copies of the published summary in conformance with 1998 Iowa Acts, chapter 1202, section 10(5).

**28.6(10)** Regulatory analysis contents—rules review committee or rules coordinator. When a regulatory analysis is issued in response to a written request from the administrative rules review committee or the administrative rules coordinator, the regulatory analysis shall conform to the requirements of 1998 Iowa Acts, chapter 1202, section 10(2a), unless a written request expressly waives one or more of the items listed in the section.

**28.6(11)** Regulatory analysis contents—substantial impact on small business. When a regulatory analysis is issued in response to a written request from the administrative rules review committee, the administrative rules coordinator, at least 25 persons signing that request who each qualify as a small business, or by an organization representing at least 25 small businesses, the regulatory analysis shall conform to the requirements of 1998 Iowa Acts, chapter 1202, section 10(2b).

**657—28.7(17A,25B) Fiscal impact statement.**

**28.7(1)** A proposed rule that mandates additional combined expenditures exceeding \$100,000 by all affected political subdivisions or agencies and entities which contract with political subdivisions to provide services shall be accompanied by a fiscal impact statement outlining the costs associated with the rule. A fiscal impact statement shall satisfy the requirements of Iowa Code section 25B.6.

**28.7(2)** If the board determines at the time it adopts a rule that the fiscal impact statement upon which the rule is based contains errors, the board shall, at the same time, issue a corrected fiscal impact statement and publish the corrected fiscal impact statement in the Iowa Administrative Bulletin.

**657—28.8(17A) Time and manner of rule adoption.**

**28.8(1)** Time of adoption. The board shall not adopt a rule until the period for making written submissions and oral presentations has expired. Within 180 days after the later of the publication of the Notice of Intended Action, or the end of oral proceedings thereon, the board shall adopt a rule pursuant to the rule-making proceeding or terminate the proceeding by publication of a notice to that effect in the Iowa Administrative Bulletin.

**28.8(2)** Consideration of public comment. Before the adoption of a rule, the board shall consider fully all of the written submissions and oral submissions received in that rule-making proceeding, or any memorandum summarizing

such oral submissions, and any regulatory analysis or fiscal impact statement issued in that rule-making proceeding.

**28.8(3)** Reliance on board expertise. Except as otherwise provided by law, the board may use its own experience, technical competence, specialized knowledge, and judgment in the adoption of a rule.

**657—28.9(17A) Variance between adopted rule and published notice of proposed rule adoption.**

**28.9(1)** The board shall not adopt a rule that differs from the rule proposed in the Notice of Intended Action on which the rule is based unless:

- a. The differences are within the scope of the subject matter announced in the Notice of Intended Action and are in character with the issues raised in that notice; and

- b. The differences are a logical outgrowth of the contents of that Notice of Intended Action and the comments submitted in response thereto; and

- c. The Notice of Intended Action provided fair warning that the outcome of that rule-making proceeding could be the rule in question.

**28.9(2)** In determining whether the Notice of Intended Action provided fair warning that the outcome of that rule-making proceeding could be the rule in question, the board shall consider the following factors:

- a. The extent to which persons who will be affected by the rule should have understood that the rule-making proceeding on which it is based could affect their interests;

- b. The extent to which the subject matter of the rule or the issues determined by the rule are different from the subject matter or issues contained in the Notice of Intended Action; and

- c. The extent to which the effects of the rule differ from the effects of the proposed rule contained in the Notice of Intended Action.

**28.9(3)** The board shall commence a rule-making proceeding within 60 days of its receipt of a petition for rule making seeking the amendment or repeal of a rule that differs from the proposed rule contained in the Notice of Intended Action upon which the rule is based, unless the board finds that the differences between the adopted rule and the proposed rule are so insubstantial as to make such a rule-making proceeding wholly unnecessary. A copy of any such finding and the petition to which it responds shall be sent to petitioner, the administrative rules coordinator, and the administrative rules review committee, within three days of its issuance.

**28.9(4)** Concurrent rule-making proceedings. Nothing in this rule disturbs the discretion of the board to initiate, concurrently, several different rule-making proceedings on the same subject with several different published Notices of Intended Action.

**657—28.10(17A) Exemptions from public rule-making procedures.**

**28.10(1)** Omission of notice and comment. To the extent the board for good cause finds that public notice and participation are unnecessary, impracticable, or contrary to the public interest in the process of adopting a particular rule, the board may adopt that rule without publishing advance Notice of Intended Action in the Iowa Administrative Bulletin and without providing for written or oral public submissions prior to its adoption. The board shall incorporate the required finding and a brief statement of its supporting reasons in each rule adopted in reliance upon this subrule.

**28.10(2)** Categories exempt. The following narrowly tailored categories of rules are exempted from the usual public notice and participation requirements because those require-

## PHARMACY EXAMINERS BOARD[657](cont'd)

ments are unnecessary, impracticable, or contrary to the public interest with respect to each and every member of the defined class:

a. Temporary designation of controlled substances consistent with federal Drug Enforcement Administration action to add a substance to a drug schedule or to change the schedule within which a substance is controlled under the Controlled Substances Act.

b. Amend references to the Iowa Code, the Iowa Administrative Code, or the Code of Federal Regulations where such references change or are otherwise incorrect.

c. Change the name, address, or telephone number of the board of pharmacy examiners or an authorized contact person.

**28.10(3)** Public proceedings on rules adopted without them. The board may, at any time, commence a standard rule-making proceeding for the adoption of a rule that is identical or similar to a rule it adopts in reliance upon subrule 28.10(1). Upon written petition by a governmental subdivision, the administrative rules review committee, an agency, the administrative rules coordinator, an association having not less than 25 members, or at least 25 persons, the board shall commence a standard rule-making proceeding for any rule specified in the petition that was adopted in reliance upon subrule 28.10(1). Such a petition shall be filed within one year of the publication of the specified rule in the Iowa Administrative Bulletin as an adopted rule. The rule-making proceeding on that rule shall be commenced within 60 days of the receipt of such a petition. After a standard rule-making proceeding commenced pursuant to this subrule, the board may either readopt the rule it adopted without benefit of all usual procedures on the basis of subrule 28.10(1), or may take any other lawful action, including the amendment or repeal of the rule in question, with whatever further proceedings are appropriate.

**657—28.11(17A) Concise statement of reasons.**

**28.11(1)** General. When requested by a person, either prior to the adoption of a rule or within 30 days after its publication in the Iowa Administrative Bulletin as an adopted rule, the board shall issue a concise statement of reasons for the rule. Requests for such a statement shall be in writing and be delivered to the Board of Pharmacy Examiners, Executive Hills West, 1209 East Court Avenue, Des Moines, Iowa 50319-0187. The request shall indicate whether the statement is sought for all or only a specified part of the rule. Requests will be considered made on the date received.

**28.11(2)** Contents. The concise statement of reasons shall contain:

a. The reasons for adopting the rule;

b. An indication of any change between the text of the proposed rule contained in the published Notice of Intended Action and the text of the rule as finally adopted, with the reasons for any such change;

c. The principal reasons urged in the rule-making proceeding for and against the rule, and the board's reasons for overruling the arguments made against the rule.

**28.11(3)** Time of issuance. After a proper request, the board shall issue a concise statement of reasons by the later of the time the rule is adopted or 35 days after receipt of the request.

**657—28.12(17A) Contents, style, and form of rule.**

**28.12(1)** Contents. Each rule adopted by the board shall contain the text of the rule and, in addition:

a. The date the board adopted the rule;

b. A brief explanation of the principal reasons for the rule-making action if such reasons are required by 1998 Iowa Acts, chapter 1202, section 8, or the board in its discretion decides to include such reasons;

c. A reference to all rules repealed, amended, or suspended by the rule;

d. A reference to the specific statutory or other authority authorizing adoption of the rule;

e. Any findings required by any provision of law as a prerequisite to adoption or effectiveness of the rule;

f. A brief explanation of the principal reasons for the failure to provide for waivers to the rule if no waiver provision is included and a brief explanation of any waiver or special exceptions provided in the rule if such reasons are required by 1998 Iowa Acts, chapter 1202, section 8, or the board in its discretion decides to include such reasons; and

g. The effective date of the rule.

**28.12(2)** Incorporation by reference. The board may incorporate by reference in a proposed or adopted rule, and without causing publication of the incorporated matter in full, all or any part of a code, standard, rule, or other matter if the board finds that the incorporation of its text in the board proposed or adopted rule would be unduly cumbersome, expensive, or otherwise inexpedient. The reference in the board proposed or adopted rule shall fully and precisely identify the incorporated matter by location, title, citation, date, and edition, if any; shall briefly indicate the precise subject and the general contents of the incorporated matter; and shall state that the proposed or adopted rule does not include any later amendments or editions of the incorporated matter. The board may incorporate such matter by reference in a proposed or adopted rule only if the board makes copies of it readily available to the public. The rule shall state how and where copies of the incorporated matter may be obtained at cost from the board, and how and where copies may be obtained from the agency of the United States, this state, another state, or the organization, association, or persons, originally issuing that matter. The board shall retain permanently a copy of any materials incorporated by reference in a rule of the board.

If the board adopts standards by reference to another publication, it shall provide a copy of the publication containing the standards to the administrative rules coordinator for deposit in the state law library and may make the standards available electronically.

**28.12(3)** References to materials not published in full. When the administrative code editor decides to omit the full text of a proposed or adopted rule because publication of the full text would be unduly cumbersome, expensive, or otherwise inexpedient, the board shall prepare and submit to the administrative code editor for inclusion in the Iowa Administrative Bulletin and Iowa Administrative Code a summary statement describing the specific subject matter of the omitted material. This summary statement shall include the title and a brief description sufficient to inform the public of the specific nature and subject matter of the proposed or adopted rules and of significant issues involved in these rules. The summary statement shall also describe how a copy of the full text of the proposed or adopted rule, including any unpublished matter and any matter incorporated by reference, may be obtained from the board. The board will provide a copy of that full text, at actual cost upon request, and shall make copies of the full text available for review at the state law library and may make the standards available electronically.

## PHARMACY EXAMINERS BOARD[657](cont'd)

At the request of the administrative code editor, the board shall provide a proposed statement explaining why publication of the full text would be unduly cumbersome, expensive, or otherwise inexpedient.

**28.12(4) Style and form.** In preparing its rules, the board shall follow the uniform numbering system, form, and style prescribed by the administrative rules coordinator.

**657—28.13(17A) Board rule-making record.**

**28.13(1) Requirement.** The board shall maintain an official rule-making record for each rule it proposes by publication in the Iowa Administrative Bulletin of a Notice of Intended Action or adopts. The rule-making record and materials incorporated by reference shall be available for public inspection.

**28.13(2) Contents.** The board rule-making record shall contain:

a. Copies of all publications in the Iowa Administrative Bulletin with respect to the rule or the proceeding upon which the rule is based and any file-stamped copies of board submissions to the administrative rules coordinator concerning that rule or the proceeding upon which it is based;

b. Copies of any portions of the board's public rule-making docket containing entries relating to the rule or the proceeding upon which the rule is based;

c. All written petitions, requests, and submissions received by the board, and all other written materials of a factual nature as distinguished from opinion that are relevant to the merits of the rule and that were created or compiled by the board and considered by the board, in connection with the formulation, proposal, or adoption of the rule or the proceeding upon which the rule is based, except to the extent the board is authorized by law to keep them confidential; provided, however, that when any such materials are deleted because they are authorized by law to be kept confidential, the board shall identify in the record the particular materials deleted and state the reasons for that deletion;

d. Any official transcript of oral presentations made in the proceeding upon which the rule is based or, if not transcribed, the stenographic record or electronic recording of those presentations, and any memorandum prepared by a presiding officer summarizing the contents of those presentations;

e. A copy of any regulatory analysis or fiscal impact statement prepared for the proceeding upon which the rule is based;

f. A copy of the rule and any concise statement of reasons prepared for that rule;

g. All petitions for amendment of, or repeal or suspension of, the rule;

h. A copy of any objection to the issuance of that rule without public notice and participation that was filed pursuant to Iowa Code section 17A.4(2) by the administrative rules review committee, the governor, or the attorney general;

i. A copy of any objection to the rule filed by the administrative rules review committee, the governor, or the attorney general pursuant to Iowa Code section 17A.4(4), and any board response to that objection;

j. A copy of any significant written criticism of the rule, including a summary of any petitions for waiver of the rule; and

k. A copy of any executive order concerning the rule.

**28.13(3) Effect of record.** Except as otherwise required by a provision of law, the board rule-making record required by this rule need not constitute the exclusive basis for board action on that rule.

**28.13(4) Maintenance of record.** The board shall maintain the rule-making record for a period of not less than five years from the later of the date the rule to which it pertains became effective or the date of the Notice of Intended Action. The board shall maintain a record of significant written criticism as described in 28.13(2), paragraphs "g," "h," "i," or "j," for a period of not less than five years from the date of the written criticism.

**657—28.14(17A) Filing of rules.** The board shall file each rule it adopts in the office of the administrative rules coordinator. The filing shall be executed as soon after adoption of the rule as is practicable. At the time of filing, each rule shall have attached to it any fiscal impact statement and any concise statement of reasons that was issued with respect to that rule. If a fiscal impact statement or statement of reasons for that rule was not issued until a time subsequent to the filing of that rule, the note or statement shall be attached to the filed rule within five working days after the note or statement is issued. In filing a rule, the board shall use the standard form prescribed by the administrative rules coordinator.

**657—28.15(17A) Effectiveness of rules prior to publication.**

**28.15(1) Grounds.** The board may make a rule effective after its filing at any stated time prior to 35 days after its indexing and publication in the Iowa Administrative Bulletin if it finds that a statute so provides, the rule confers a benefit or removes a restriction on some segment of the public, or that the effective date of the rule is necessary to avoid imminent peril to the public health, safety, or welfare. The board shall incorporate the required finding and a brief statement of its supporting reasons in each rule adopted in reliance upon this subrule.

**28.15(2) Special notice.** When the board makes a rule effective prior to its indexing and publication in reliance upon the provisions of Iowa Code section 17A.5(2)"b"(3), the board shall employ all reasonable efforts to make its contents known to the persons who may be affected by that rule prior to the rule's indexing and publication. The term "all reasonable efforts" requires the board to employ the most effective and prompt means of notice rationally calculated to inform potentially affected parties of the effectiveness of the rule that is justified and practical under the circumstances considering the various alternatives available for this purpose, the comparative costs to the board of utilizing each of those alternatives, and the harm suffered by affected persons from any lack of notice concerning the contents of the rule prior to its indexing and publication. The means that may be used for providing notice of such rules prior to their indexing and publication include, but are not limited to, any one or more of the following means: radio, newspaper, television, signs, mail, telephone, personal notice, electronic transmission, newsletter, or other timely publication.

A rule made effective prior to its indexing and publication in reliance upon the provisions of Iowa Code section 17A.5(2)"b"(3) shall include in that rule a statement describing the reasonable efforts that will be used to comply with the requirements of this subrule.

**657—28.16(17A) General statements of policy.**

**28.16(1) Compilation, indexing, public inspection.** The board shall maintain an official, current, and dated compilation that is indexed by subject containing all of its general statements of policy within the scope of Iowa Code section 17A.2(10)"a," "c," "f," "g," "h," and "k." Each addition to, change in, or deletion from the official compilation shall also be dated, indexed, and a record maintained. Except for those

## PHARMACY EXAMINERS BOARD[657](cont'd)

portions containing rules governed by Iowa Code section 17A.2(7)“f,” or otherwise authorized by law to be kept confidential, the compilation shall be made available for public inspection and copying.

**28.16(2) Enforcement of requirements.** A general statement of policy subject to the requirements of this rule shall not be relied on by the board to the detriment of any person who does not have actual, timely knowledge of the contents of the statement until the requirements of subrule 28.16(1) are satisfied. This provision is inapplicable to the extent necessary to avoid imminent peril to the public health, safety, or welfare.

**657—28.17(17A) Review by board of rules.**

**28.17(1)** Any interested person, association, agency, or political subdivision may submit a written request to the administrative rules coordinator requesting the board to conduct a formal review of a specified rule. Upon approval of that request by the administrative rules coordinator, the board shall conduct a formal review of a specified rule to determine whether a new rule should be adopted or the rule should be amended or repealed. The board may refuse to conduct a review if it has conducted such a review of the specified rule within five years prior to the filing of the written request.

**28.17(2)** In conducting the formal review, the board shall prepare, within a reasonable time, a written report summarizing its findings, its supporting reasons, and any proposed course of action. The report shall include a concise statement of the board's findings regarding the rule's effectiveness in achieving its objectives, including a summary of any available supporting data. The report shall also concisely describe significant written criticisms of the rule received during the previous five years, including a summary of any petitions for waiver of the rule received by the board or granted by the board. The report shall describe alternative solutions to resolve the criticisms of the rule, the reasons any were rejected, and any changes made in the rule in response to the criticisms as well as the reasons for the changes. A copy of the board's report shall be sent to the administrative rules review committee and the administrative rules coordinator. The report shall also be available for public inspection.

These rules are intended to implement Iowa Code sections 17A.3 to 17A.7 as amended by 1998 Iowa Acts, chapter 1202.

**ARC 8754A****PROFESSIONAL LICENSURE  
DIVISION[645]**

BOARD OF COSMETOLOGY ARTS  
AND SCIENCES EXAMINERS

**Amended Notice of Intended Action**

Pursuant to Iowa Code section 157.14, Notice is hereby given that a public hearing will be held on Thursday, April 1, 1999, from 9 to 11 a.m. on the Iowa Communications Network in order to receive oral or written comments on the proposed amendments to subrules 60.2(4), 60.3(1), paragraph “b,” 60.3(2), paragraph “c,” 60.3(4), 60.4(4), paragraph “a,” 60.4(4), paragraph “c,” 60.13(1), paragraph “a,” which eliminate the practical examination requirement for licensure, published in the Iowa Administrative Bulletin on January 27, 1999, as **ARC 8629A**. At the hearing, persons will be asked

to give their names and addresses for the record and to confine their remarks to the subject of the proposed amendments. The following are the sites for the hearing:

Iowa Department of Public Health  
ICN Room—Sixth Floor  
Lucas State Office Building  
Des Moines, Iowa

Loess Hills Area Education Agency 13  
ICN Room  
24997 Highway 92  
Council Bluffs, Iowa

Iowa Central Community College  
Library Room 206  
330 Avenue M  
Fort Dodge, Iowa

Southern Prairie Area Education Agency 15  
ICN Classroom  
2814 North Court Street  
Ottumwa, Iowa

Hawkeye Community College  
Tama Hall, Room 110  
1501 East Orange Road  
Waterloo, Iowa

**ARC 8751A****PROFESSIONAL LICENSURE  
DIVISION[645]**

BOARD OF MORTUARY SCIENCE EXAMINERS

**Notice of Intended Action**

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)“b.”

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code section 147.76, the Board of Mortuary Science Examiners gives Notice of Intended Action to amend Chapter 101, “Board of Mortuary Science Examiners,” Iowa Administrative Code.

These proposed amendments clarify the requirements for internship, which must be completed in Iowa and be supervised by an Iowa licensed funeral director. These proposed amendments allow the board to extend an internship if the applicant does not meet the minimum requirements for the practice of mortuary science.

Any interested person may make written suggestions or comments on the proposed amendments on or before March 31, 1999.

There will be a public hearing on April 1, 1999, from 9 to 11 a.m., Fifth Floor Board Conference Room, Lucas State Office Building, Des Moines, Iowa, at which time persons may present their views either orally or in writing. At the hearing, persons will be asked to give their names and addresses for the record and to confine their remarks to the subject of the amendments.

These amendments are intended to implement Iowa Code chapter 156.

The following amendments are proposed.

## PROFESSIONAL LICENSURE DIVISION[645](cont'd)

ITEM 1. Amend paragraphs 101.3(1)"a" and 101.3(1)"b" as follows:

a. The intern applicant must serve a minimum of one year of internship in Iowa under the direct supervision of a board-certified preceptor. *The beginning and ending dates of the internship shall be indicated on the internship certificate. The intern applicant shall only engage in the practice of mortuary science during the time indicated on the internship certificate. The intern applicant must be approved and licensed following a successful internship before the intern applicant may practice mortuary science.*

b. The intern applicant shall, during this internship, embalm not less than 25 dead human bodies and direct or assist in the direction of not less than 25 funerals under the direct supervision of the certified preceptor and report on forms furnished by the department of public health. *Work on the first 5 embalming cases and funeral cases must be completed in the physical presence of the preceptor. The first 12 embalming cases and first 12 funeral case reports must be completed and submitted by the completion of the sixth month of the internship.*

ITEM 2. Adopt new paragraph 101.3(1)"g" as follows:

g. The length of an internship may be extended if the board determines that the intern applicant requires additional time or supervision in order to meet the minimum proficiency in the practice of mortuary science.

ITEM 3. Amend paragraph 101.3(2)"b" as follows:

b. Any duly Iowa licensed and practicing funeral director in good standing for a minimum of five years with the board of mortuary science examiners will be eligible to be certified as a preceptor. This certificate is awarded after completion of a training course as prescribed by the board covering the subjects specified by the board. The training course may be counted toward the continuing education hours required for that licensing period.

ITEM 4. Adopt new paragraph 101.3(2)"e" as follows:

e. Certify that the intern shall engage in the practice of mortuary science only during the time frame designated on the official intern certificate.

ITEM 5. Adopt new subparagraph 101.3(2)"f"(1) as follows:

(1) Be physically present and supervise the first five embalmings and first five funeral cases.

**ARC 8752A**

**PROFESSIONAL LICENSURE  
DIVISION[645]**

**BOARD OF SPEECH PATHOLOGY  
AND AUDIOLOGY EXAMINERS**

**Notice of Intended Action**

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)"b."

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code section 147.76, the Board of Speech Pathology and Audiology Examiners hereby gives Notice of Intended Action to rescind Chapter 300,

"Board of Speech Pathology and Audiology Examiners," adopt Chapter 300 with the same title, and amend Chapter 301, "Speech Pathology and Audiology Continuing Education and Disciplinary Procedures," Iowa Administrative Code.

These proposed amendments change the license continuing education compliance period, clarify the requirements for the different types of licensure, eliminate the need for accredited sponsors to report to the Board a list of attendees within 30 days after the completion of each continuing education activity, and establish a fee for a returned check.

Any interested person may make written comments on the proposed amendments not later than March 30, 1999, addressed to Judy Manning, Professional Licensure, Department of Public Health, Lucas State Office Building, Des Moines, Iowa, 50319-0075.

There will be a public hearing on March 30, 1999, from 9 to 11 a.m. in the Fifth Floor South Conference Room 2, Department of Public Health, Lucas State Office Building, Des Moines, Iowa 50319-0075. Persons may present their views at the public hearing either orally or in writing. At the hearing, persons will be asked to give their names and addresses for the record and to confine their remarks to the subject of the proposed amendments.

The Board has determined that the amendments will have no impact on small business within the meaning of Iowa Code section 17A.31.

The proposed amendments are intended to implement Iowa Code chapters 147 and 272C.

The following amendments are proposed.

ITEM 1. Rescind 645—Chapter 300 and adopt the following new chapter in lieu thereof:

**CHAPTER 300  
BOARD OF SPEECH PATHOLOGY  
AND AUDIOLOGY EXAMINERS**

**645—300.1(147) Definitions.**

"Audiologist" means a person who engages in the application of principles, methods and procedures for measurement, testing, evaluation, prediction, consultation, counseling, instruction, habilitation, rehabilitation, or remediation related to hearing and disorders of hearing and associated communication disorders for the purpose of nonmedically evaluating, identifying, preventing, ameliorating, modifying, or remediating such disorders and conditions in individuals or groups of individuals, including the determination and use of appropriate amplification.

"Board" means the board of speech pathology and audiology examiners.

"Department" means the Iowa department of public health.

"Speech pathologist" means a person who engages in the application of principles, methods, and procedures for the measurement, testing, evaluation, prediction, consultation, counseling, instruction, habilitation, rehabilitation, or remediation related to the development and disorders of speech, fluency, voice, or language for the purposes of non-medically evaluating, preventing, ameliorating, modifying, or remediating such disorders and conditions in individuals or groups of individuals.

**645—300.2(147) General.**

300.2(1) No person shall engage in the practice of speech pathology or audiology unless the person has obtained from the department of public health a license or a temporary clin-

## PROFESSIONAL LICENSURE DIVISION[645](cont'd)

ical license. Licenses issued by the board shall be for licensure by examination, except as provided by rule 300.5(147).

**300.2(2)** All information regarding rules, forms, time and place of meetings, minutes of meetings, records of hearing, and examination scores are available to the public between the hours of 8 a.m. and 4:30 p.m. Monday through Friday, except holidays. Written information may be obtained from the Professional Licensure Division, Department of Public Health, Lucas State Office Building, Des Moines, Iowa 50319-0075.

**300.2(3)** All material sent to the board for review must be submitted at least one week before a regularly scheduled meeting. Materials received after this time will be reviewed at the next regularly scheduled meeting of the board.

**300.2(4)** For those persons conducting hearing tests under the direct supervision of a licensed physician and surgeon or licensed osteopathic physician and surgeon functioning under Iowa Code section 147.152(1), "direct supervision" means the physician must order the hearing test performed on each individual patient and maintain control over the reading of the results. The person working under direct supervision of a physician must be able to show that the person did so at the direction of the physician and did nothing more than perform the hearing test. Direct supervision by a physician means the person conducting the hearing test does so in the usual location in which the physician performs medical services and sees patients. The physician must be readily available to respond to a request by a patient or the person conducting the hearing test.

**300.2(5)** Applications for license which do not meet the minimum criteria for licensure shall be retained by the board office for a maximum of two years from the date the application was received. After two years, incomplete applications shall be considered invalid and shall be destroyed. The application fee is nonrefundable.

**645—300.3(147) Examination requirements.** The examination which demonstrates the applicant's professional competence to the board shall be the National Teacher Examination in speech pathology or audiology. This examination is administered by the Educational Testing Service. The applicant should contact the nearest accredited college or university for the time and place of the examination or may contact the department for further information.

**300.3(1)** The applicant has full responsibility for making arrangements to take the National Teacher Examination in speech pathology or audiology and for bearing all expenses associated with taking the examination. The applicant also has the responsibility for having the examination scores sent directly to the board from the Educational Testing Service.

**300.3(2)** The board shall determine the qualifying scores for both the speech pathology and audiology examinations.

**300.3(3)** The examination required in this rule may, at the discretion of the board, be waived for any of the following persons:

- a. Individuals licensed by examination in other states.
- b. Holders of certificates of clinical competence as of January 1, 1977.

**645—300.4(147) Licensure requirements.**

**300.4(1)** Licensure. The applicant shall submit the following to the board:

- a. An official application form provided by the department.
- b. Official transcripts showing proof of possession of a master's degree or its equivalent.

c. Official verification of completion of not less than 300 hours of supervised clinical training in an accredited college or university.

d. Verification of not less than nine months of full-time clinical experience, or equivalent, under the supervision of a licensed speech pathologist or audiologist, as appropriate, following the receipt of the master's degree. Such verification must be signed by the licensed supervisor.

e. Results of the National Teacher Examination as described in this rule.

f. American Speech-Language Hearing Association (ASHA) certificate of clinical competence eliminates the need for "b" to "e" above.

g. A nonrefundable application fee in the form of a check or money order made payable to the Iowa Department of Public Health.

**300.4(2)** Temporary clinical license. A person who wishes to practice speech pathology or audiology in Iowa under the supervision of an Iowa licensed speech pathologist or audiologist for the purpose of obtaining clinical experience as a prerequisite for licensure shall apply to the board for a temporary clinical license prior to obtaining clinical experience. A temporary clinical license shall be issued only upon evidence that the applicant will be supervised by a person licensed in Iowa as a speech pathologist or audiologist, as appropriate. The temporary clinical license is valid for one year and may be renewed once at the discretion of the board. The board shall revoke any temporary clinical license at any time it shall determine either that the work done by the temporary clinical licensee or the supervision being given the temporary clinical licensee does not conform to reasonable standards. To fulfill requirements for a temporary clinical license, the applicant must submit the following to the board.

a. An official application form provided by the department.

b. Official transcripts showing proof of possession of a master's degree or its equivalent.

c. Official verification of completion of not less than 300 hours of supervised clinical training in an accredited college or university.

d. A plan of action to complete at least nine months of full-time clinical experience, or equivalent, under the supervision of an Iowa licensed speech pathologist or audiologist, as appropriate. At the completion of the nine months, a supervised clinical experience report on a board-approved form is required within 30 days. Verification shall be signed by the licensed supervisor.

(1) If the plan is not initiated, the board shall be notified in writing within 30 days of the anticipated start date.

(2) Any change made to the plan must be submitted to the board in writing for approval within 30 days of the change.

(3) If the plan is discontinued, the supervised clinical experience report should be completed and submitted to the board within 30 days of discontinuing the plan.

**300.4(3)** Temporary permit. A nonresident may apply to the board for a temporary permit to practice speech pathology or audiology for a period not to exceed three months by submitting documents to support the need for such a permit and documents to show that the applicant has substantially the same qualifications as required for a license. The application for temporary permit must be received by the board at least 30 days prior to the date the applicant intends to begin practice.

**645—300.5(147) Licensure by interstate endorsement.**

## PROFESSIONAL LICENSURE DIVISION[645](cont'd)

**300.5(1)** An out-of-state applicant seeking a license to practice speech pathology or audiology in Iowa is required to complete the same application as that required in subrule 300.4(1) except that the board may waive the examination requirement if the applicant has a license which was obtained by examination and if, in the opinion of the board, the examination and the examination score were essentially the same as for Iowa.

**300.5(2)** An out-of-state applicant shall, in addition, submit certification of all licenses obtained in another state. The certification shall include the license number, date issued, expiration date and whether any disciplinary action has been taken. If a license or certificate has ever been revoked or suspended, the applicant shall furnish a sworn statement detailing the circumstances.

**645—300.6(147) License renewal.**

**300.6(1)** The biennial license renewal period for a license to practice as a speech pathologist or audiologist shall extend from January 1 of each even-numbered year until December 31 of the next odd-numbered year. Continuing education requirements shall be completed within the same renewal period for each license holder.

An application and a continuing education report form for renewal of license to practice as a speech pathologist or audiologist shall be mailed to the licensee at least 60 days prior to the expiration of the license. Failure to receive the renewal application shall not relieve the license holder of the obligation to pay biennial renewal fees on or before the renewal date.

**300.6(2)** Beginning January 1, 2000, the continuing education requirements will coincide with the renewal compliance period. The licensee shall submit to the board office 30 days before licensure expiration the application and continuing education report form with the renewal fee as specified in rule 300.7(147). Individuals who were issued their initial licenses within six months of the start of the next renewal period will not be required to renew their licenses until the next renewal two years later. The new licensee is exempt from meeting the continuing education requirements for the continuing education biennium in which the license is originally issued. Individuals will be required to report 30 hours of continuing education for the first renewal and every renewal thereafter.

**300.6(3)** Late renewal. If the renewal fees are received by the board within 30 days after the renewal expiration date, a penalty fee is charged. If renewal fees are received more than 30 days after the renewal expiration date, the license is lapsed. An application for reinstatement must be filed with the board with the reinstatement fee, the renewal fee and the penalty fee as outlined in rule 300.7(147). Individuals who submit the renewal application and complete documentation of continuing education hours after the end of the compliance period shall be required to pay a penalty fee and shall be subject to an audit of their continuing education report.

**300.6(4)** Speech pathologists and audiologists who have not fulfilled the requirements for license renewal or an exemption in the required time frame will have a lapsed license and shall not engage in the practice of speech pathology or audiology.

**645—300.7(147) Licensure fees.** All fees are nonrefundable.

**300.7(1)** The application fee for a license to practice speech pathology or audiology is \$105, the application fee for a temporary clinical license is \$65, and the application fee for a temporary permit is \$25.

**300.7(2)** The renewal fee of a license to practice speech pathology or audiology for a biennial period is \$80. The annual renewal fee for a temporary clinical license is \$40.

**300.7(3)** The penalty fee for failure to renew a license within 30 days following its expiration is \$40.

**300.7(4)** The reinstatement fee for a lapsed license or to reinstate a license under certificate of exemption status is \$25.

**300.7(5)** The fee for certification of Iowa license is \$10.

**300.7(6)** The fee for license replacement is \$10.

**300.7(7)** The penalty fee for failure to obtain the required continuing education within the compliance period is \$25.

**300.7(8)** The penalty fee for failure to notify the board office of an address change within 30 days is \$15. If the penalty is not paid by the time of license renewal, the license may not be renewed.

**300.7(9)** Licensees who submit their continuing education report form after the deadline shall be assessed a \$25 late fee and their reports will be audited.

**300.7(10)** Fee for a returned check is \$15.

**645—300.8(272C) Exemptions for inactive practitioners.**

A licensee who is not engaged in practice in the state of Iowa, but who wishes to retain a license, may be granted a waiver of compliance with continuing education requirements. The licensee shall apply to the board on a form provided by the board. The application shall contain a statement that the licensee will not engage in the practice of speech pathology or audiology in Iowa without first complying with all regulations governing reinstatement after exemption.

**645—300.9(272C) Reinstatement of inactive practitioners.** Inactive practitioners who have been granted a waiver of compliance with these regulations shall, prior to engaging in the practice of speech pathology or audiology in the state of Iowa, satisfy the following requirements for reinstatement:

**300.9(1)** Submit written application for reinstatement on a form provided by the board.

**300.9(2)** Furnish, in addition to the application, evidence of one of the following:

a. The full-time practice of speech pathology or audiology in another state of the United States or District of Columbia and completion of continuing education for each year of inactive status substantially equivalent in the opinion of the board to that required under these rules; or

b. Completion of a total number of hours of accredited continuing education computed by multiplying 15 by the number of years a waiver of compliance shall have been in effect for such applicant, including the biennium during which the request for inactive status was requested if the continuing education requirement for that biennium had not yet been satisfied to a maximum of 75 hours; or

c. Successful completion of the licensing examination (the National Teacher Examination (NTE) for Speech Pathology or Audiology) conducted within one year immediately prior to the submission of such application for reinstatement. A passing score of 600 or greater is required.

**300.9(3)** Pay the current biennial license renewal fee and reinstatement fee.

**645—300.10(272C) Reinstatement of lapsed license.**

**300.10(1)** A license to practice speech pathology and audiology shall be considered lapsed if not renewed within 30 days of the renewal date and if no certificate of exemption has been granted.

**300.10(2)** Those persons who have failed to renew a license to practice and have not previously received a certificate of exemption shall pay the past due renewal fees, rein-

## PROFESSIONAL LICENSURE DIVISION[645](cont'd)

statement and penalty fees to a maximum of \$350. In addition, those persons shall complete all past due continuing education by multiplying 15 by the number of years the license shall have been lapsed to a maximum of 90 hours. Application shall be made on a form provided by the board.

**645—300.11(147) Organization of board of speech pathology and audiology examiners.****300.11(1) Chair.**

- a. Shall be selected by the members of the board.
- b. Shall preside at all meetings of the board and conduct the meeting following Robert's Rules of Order.
- c. Shall appoint committees as is deemed necessary to study issues.

**300.11(2) Vice-chair.**

- a. Shall be selected by the members of the board.
- b. Shall act in capacity of chair in the absence of that officer.

**300.11(3) Secretary.**

- a. Shall be selected by the members of the board.
- b. Shall act in capacity of chair in the absence of officers representing the chair and vice-chair.
- c. Shall keep an accurate and complete record of all transactions of the board.

**300.11(4) Quorum.** Four members of the seven-member board shall represent a quorum. Business shall not be conducted in the absence of a quorum.

These rules are intended to implement Iowa Code chapters 147 and 272C.

ITEM 2. Rescind rule 645—301.2(272C) and adopt the following new rule in lieu thereof:

**645—301.2(272C) Continuing education requirements.**

**301.2(1)** Each person licensed to practice speech pathology or audiology in this state shall complete during each continuing education compliance period a minimum of 30 hours of approved continuing education directly related to the clinical practice of speech pathology or audiology. A licensee can elect to successfully complete the Educational Testing Service National Teacher Examination in speech pathology or audiology as appropriate during the compliance period. Compliance with the requirement of continuing education is a prerequisite for license renewal in each subsequent biennial license renewal period. A person holding licensure in both speech pathology and audiology must meet the requirements for each profession.

**301.2(2)** Beginning January 1, 2000, the continuing education compliance period shall be each biennium beginning January 1 of each even-numbered year until December 31 of the next odd-numbered year.

**301.2(3)** Hours of continuing education credit may be obtained by attending and participating in a continuing education activity which meets the requirements herein and is approved by the board pursuant to rule 645—301.3(272C).

**301.2(4)** Carryover credit of continuing education hours into the next continuing education period will not be permitted.

**301.2(5)** The new licensee is exempt from meeting the continuing education requirements for the continuing education biennium in which the license is originally issued. The new license holder will be required to obtain 30 hours of continuing education for each subsequent license renewal.

**301.2(6)** It is the responsibility of each licensee to finance the cost of continuing education.

ITEM 3. Rescind subrule 301.4(1), paragraph "c," and adopt the following new paragraph in lieu thereof:

c. All accredited sponsors shall keep on file for three years, on a form approved by the board, a list of attendees, license number, number of continuing education clock hours, and a program description and objectives.

ITEM 4. Rescind rule 645—301.5(272C) and adopt the following new rule in lieu thereof:

**645—301.5(272C) Reporting continuing education credits.**

**301.5(1)** A report of continuing education activities shall be submitted on a board-approved form with the application for renewal by the end of the biennial license renewal period. The information included on the form shall include the title of continuing education activity, date(s), sponsor of activity, sponsor number (if board approved), and continuing education hours earned; or the date and location the licensee successfully completed the National Teacher Examination in speech pathology or audiology, as appropriate. A licensee who takes the licensing examination in lieu of earning continuing education credits shall have the results of the examination sent to the board by the agency administering the examination. The licensee's signature upon this form shall be regarded as verification that the licensee did attend and participate in the activities listed on the form. All continuing education activities submitted must be completed in the continuing education compliance period for which the license was issued as specified in 301.2(2) or a late fee will be assessed as outlined in 645—subrule 300.7(7).

**301.5(2)** Failure to receive renewal application shall not relieve the licensee of the responsibility of meeting continuing education requirements and submitting the renewal fee by the end of the compliance period.

**301.5(3) Audit of continuing education reports.**

a. After each educational biennium, the board will audit a percentage of the continuing education reports before granting the renewal of licenses to those being audited.

b. The licensee shall make available to the board for auditing purposes a verification of attendance for all reported activities that includes the following information:

- (1) Date, place, course title, schedule, presenter(s).
- (2) Number of contact hours for program attended.
- (3) Official signature of sponsor indicating successful completion of course.

(4) For activities not provided by an accredited sponsor, the licensee shall submit a description of the program content indicating that the content is integrally related to the practice of speech pathology or audiology and contributes directly to the provision of speech pathology or audiology services to the public.

c. For auditing purposes the licensee must retain the above information for three years after the biennium has ended.

d. Submission of a false report of continuing education or failure to meet continuing education requirements will cause the license to lapse and may result in formal disciplinary action.

e. All renewal license applications that are submitted late (after the end of the compliance period) shall be subject to audit of continuing education report.

f. Any licensee against whom a complaint is filed may be subject to an audit of continuing education.

ITEM 5. Rescind rule 645—301.6(272C) and adopt the following new rule in lieu thereof:

**645—301.6(272C) Disability or illness.** The board may, in individual cases involving disability or illness, grant waivers

## PROFESSIONAL LICENSURE DIVISION[645](cont'd)

of the minimum education requirements or extensions of time within which to fulfill the same or make the required reports. No waiver or extension of time shall be granted unless written application is made on forms provided by the board and signed by the licensee and appropriately licensed health care professional and the waiver is acceptable to the board. Waivers of the minimum education requirements may be granted by the board for any period of time not to exceed one calendar year. In the event that the disability or illness upon which a waiver has been granted continues beyond the period of the waiver, the licensee must reapply for an extension of the waiver. The board may, as a condition of any waiver granted, require the applicant to make up a certain portion or all of the minimum educational requirements waived by such methods as may be prescribed by the board.

ITEM 6. Rescind rule 645—301.7(272C) and adopt the following new rule in lieu thereof:

**645—301.7(272C) Hearings.** In the event of denial, in whole or part, of credit for a continuing education activity, the licensee shall have the right to request a hearing. The request must be sent within 20 days after receipt of the notification of denial. The hearing shall be held within 90 days after receipt of the request for hearing. The hearing shall be conducted by the board or a qualified hearing officer designated by the board. If the hearing is conducted by a hearing officer, the hearing officer shall submit a transcript or tape recording of the hearing including exhibits to the board after the hearing with the proposed decision of the hearing officer. The final decision of the hearing shall be rendered by the board.

ITEM 7. Rescind and reserve rules 645—301.8(272C) to 645—301.10(272C).

ARC 8758A

## PUBLIC EMPLOYMENT RELATIONS BOARD[621]

### Notice of Intended Action

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)“b.”

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code sections 17A.3 and 20.6, the Public Employment Relations Board hereby gives Notice of Intended Action to amend Chapter 1, “General Provisions”; Chapter 2, “General Practice and Hearing Procedures”; Chapter 7, “Impasse Procedures”; Chapter 10, “Declaratory Rulings”; and Chapter 12, “Public Records and Fair Information Practices,” Iowa Administrative Code.

Item 1 makes the Agency’s existing rule concerning a petition for the Agency’s adoption of rules more specific by utilizing more of the relevant statute’s language and by incorporating much of the language of the uniform rule.

Item 2 adds a definition of the term “contested case” which includes the concept of a “no factual dispute” contested case now included in Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202.

Item 3 reflects a change in the numbering of a statute cited in the rule, concerning the computation of time.

Item 4 amends the existing rule to incorporate the statutory term “contested case” and to specify that notices of contested case hearings shall include the date, as well the time, place and nature of the hearing.

Items 5 and 6 amend existing rules concerning a party’s failure to appear and prohibited ex parte communications to make the rules more specific and to reflect amendments to Iowa Code chapter 17A made by 1998 Iowa Acts, chapter 1202. The amendments are based upon the uniform rules, with some omissions and modifications to better fit the Agency.

Item 7 amends the existing rule by substituting statutory terms in place of existing language, including the term “declaratory order” utilized by 1998 Iowa Acts, chapter 1202.

Item 8 corrects citation errors in the existing rule and substitutes the term “declaratory order” utilized by 1998 Iowa Acts, chapter 1202.

Item 9 is based upon the language of the uniform rules and amends the existing chapter concerning “declaratory rulings” by substituting the terminology of 1998 Iowa Acts, chapter 1202, and by providing greater specificity concerning declaratory order proceedings in accordance with that legislation.

Item 10 amends an existing subrule so as to more closely mirror language utilized by 1998 Iowa Acts, chapter 1202.

Any interested person may make written suggestions or comments on or before March 30, 1999. Such written materials should be directed to the Chairperson, Public Employment Relations Board, Suite 202, 514 East Locust Street, Des Moines, Iowa 50309. Persons who wish to convey their views orally should contact the Chairperson, Public Employment Relations Board, at (515)281-4414 or at the Board’s offices at the address noted above.

There will also be a public hearing on Tuesday, March 30, 1999, at 11 a.m. in the Board’s hearing room located on the second floor at 514 East Locust Street, Des Moines, Iowa. Persons may present their views at this public hearing either orally or in writing. Persons who wish to make an oral presentation at the public hearing should contact the Chairperson of the Public Employment Relations Board at least one day prior to the date of the public hearing.

These amendments are intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202, Iowa Code chapter 20 and Iowa Code section 19A.14.

The following amendments are proposed.

ITEM 1. Amend rule 621—1.5(20) as follows:

**621—1.5(20) Petition for adoption of rules rule making.** Any person may *file a petition with* the board for the adoption, *amendment or repeal* of a rule. Such petition shall be in writing and shall include:

1.5(1) The name and address of the person requesting the adoption, *amendment or repeal* of the rule;

1.5(2) A statement of the ~~proposed rule~~; *specific rule-making action sought by the petitioner including the text or a summary of the contents of the proposed rule or amendment to a rule and, if it is a petition to amend or repeal a rule, a citation to and the relevant language of the particular portion or portions of the rule proposed to be amended or repealed.*

1.5(3) A ~~statement of why the rule is being proposed for adoption~~ *brief summary of petitioner’s arguments in support of the action urged in the petition.*

1.5(4) A *brief summary of any data supporting the action urged in the petition.*

## PUBLIC EMPLOYMENT RELATIONS BOARD[621](cont'd)

1.5(5) *The names and addresses of other persons, or a description of any class of persons, known by petitioner to be affected by or interested in the proposed action which is the subject of the petition. Within 60 days of the board's receipt of the proposed rule after the filing of a petition, the board shall either deny the petition in writing, stating its reasons for the denial, or shall initiate rule-making proceedings in accordance with Iowa Code chapter 17A.*

ITEM 2. Amend rule 621—1.6(20) by adopting new subrule 1.6(7) as follows:

1.6(7) "Contested case" means a proceeding defined by Iowa Code section 17A.2(5) and includes any matter defined as a no factual dispute contested case under 1998 Iowa Acts, chapter 1202, section 14.

ITEM 3. Amend rule 621—1.7(20) as follows:

**621—1.7(20) Computation of time.** Time periods established by these rules shall be computed pursuant to Iowa Code section 4.1(22) (34).

ITEM 4. Amend rule 621—2.2(20), introductory paragraph and subrule 2.2(1), as follows:

**621—2.2(20) Notice of hearing—contents.** Written notice of the a contested case hearing shall be delivered by the board to all parties by ordinary mail. The notice shall include:

2.2(1) A statement of the *date*, time, place and nature of the hearing.

ITEM 5. Amend rule 621—2.3(20) as follows:

**621—2.3(20) Failure to appear Default.**

2.3(1) If a party fails to appear or participate in a contested case hearing after proper service of notice, the administrative law judge presiding officer may, if no continuance is granted, enter a default decision or proceed with the hearing and render a decision in the absence of the party.

2.3(2) *Default decisions or decisions rendered on the merits after a party has failed to appear or participate in a contested case hearing become final agency action unless, within 20 days after the mailing of the decision to the parties, a motion to vacate pursuant to subrule 2.3(3) is filed and served on all parties or, if the decision is a proposed decision within the meaning of Iowa Code section 17A.15(2), an appeal from the decision to the board on the merits is filed within the time provided by rule 621—9.2(20) or, in cases brought pursuant to Iowa Code section 19A.14, a petition for review by the board on the merits is filed within the time provided by rule 621—11.8(19A,20).*

2.3(3) *A motion to vacate may be filed only by a party who failed to appear for the hearing and against whom the decision was rendered. The motion must state all facts relied upon by the moving party which establish that good cause existed for that party's failure to appear. Each fact so stated must be substantiated by at least one sworn affidavit of a person with personal knowledge of each such fact, which affidavit(s) must be attached to and filed and served with the motion.*

2.3(4) *Properly substantiated and timely filed motions to vacate shall be granted only for good cause shown. The burden of proof as to the existence of good cause is on the moving party. Adverse parties may, within ten days of the service of the motion and supporting affidavit(s) upon them, file a response to the motion. Adverse parties shall be allowed to conduct discovery as to the issue of the existence of good cause and to present evidence on the issue prior to a ruling on the motion, if a request to do so is included in that party's response.*

2.3(5) *The time for the filing of an intra-agency appeal from or petition for review of a decision for which a timely motion to vacate has been filed is stayed pending the issuance of the presiding officer's ruling on the motion to vacate.*

ITEM 6. Amend rule 621—2.20(20) as follows:

**621—2.20(20) Ex parte communications.**

~~2.20(1) Communications prohibited~~ *Prohibited communications.* Unless required for the disposition of ex parte matters specifically authorized by statute, ~~an individual assigned to render a proposed or final decision or to make findings of fact or conclusions of law a presiding officer~~ in a contested case, or *in proceedings on a petition for declaratory ruling order* in which there are two or more parties, shall not communicate directly or indirectly with any ~~person or party, representative of any party or any other person with a direct or indirect interest in such case, nor shall any such person or party, representative or person~~ communicate directly or indirectly with ~~such an individual the presiding officer~~ concerning any issues of fact or law pending in that case, ~~unless each party or its representative is given prior written notice of the communication except upon notice and opportunity for all parties to participate. Such notice shall contain a summary of the communication, if oral, or a copy of the communication if written, and the time, place and means of such communication. Nothing in this provision precludes the presiding officer, without such notice and opportunity for all parties to participate, from communicating with members of the agency or seeking the advice or help of persons other than those with a personal interest in, or those engaged in personally investigating, either the case under consideration or a pending factually related case involving the same parties as long as those persons do not directly or indirectly communicate to the presiding officer any ex parte communications they have received of a type that the presiding officer would be prohibited from receiving or that furnish, augment, diminish or modify the evidence in the record. The term "personally investigated" means taking affirmative steps to interview witnesses directly or to obtain documents or other information directly. The term "personally investigated" does not include general direction and supervision of assigned investigators, unsolicited receipt of information which is relayed to assigned investigators, review of another's investigative work product in the course of determining whether to initiate a proceeding or exposure to factual information while performing other agency functions, including fact-gathering for purposes other than investigation of the matter which culminates in a contested case. Factual information relevant to the merits of a contested case received by a person who later serves as a presiding officer in that case shall be disclosed if required by Iowa Code section 17A.17 as amended by 1998 Iowa Acts, chapter 1202.~~

2.20(2) *Prohibitions on ex parte communications commence with the issuance of the notice of hearing in a contested case and with the filing of the petition in a declaratory order proceeding in which there are two or more parties, and continue for as long as the case is pending.*

2.20(3) *Communications with a presiding officer involving uncontested scheduling or procedural matters do not require notice or opportunity for parties to participate. Parties should notify other parties prior to initiating such contact with the presiding officer when feasible, and shall notify other parties prior to seeking to continue hearings or other deadlines.*

## PUBLIC EMPLOYMENT RELATIONS BOARD[621](cont'd)

**2.20(2.4)** Disclosure of prohibited communications. Any communication between a party and an individual assigned to render a proposed or final decision, or to make findings of fact or conclusions of law in a contested case, or a declaratory ruling where there are two or more parties, which is made under circumstances and procedures which do not substantially comply with those set forth in subrule 2.20(1) is a prohibited communication. The recipient of a prohibited communication is required to submit the communication if written, or a summary of the communication if oral, for inclusion in the record of the case proceeding. After such submission, all parties shall have the right, upon written demand, to respond to such communication. A presiding officer who receives a prohibited ex parte communication during the pendency of a contested case or proceedings on a petition for declaratory order in which there are two or more parties shall disclose to all parties and place on the record of the pending matter all such written communications, all written responses to the communication, and a memorandum stating the substance of all such oral and other communications received, all responses made and the identity of each person from whom the presiding officer received a prohibited ex parte communication. The presiding officer shall notify all parties that these matters have been placed on the record. Any party desiring to rebut the prohibited communication will be allowed the opportunity to do so upon written request filed within ten days after the giving of notice that the matters have been placed on the record.

**2.20(5)** If the presiding officer determines that the effect of a prohibited ex parte communication is so prejudicial that it cannot be cured by the procedure specified in subrule 2.20(4), the presiding officer shall be disqualified and the portions of the record pertaining to the communication shall be sealed by protective order.

**2.20(6)** Promptly after being assigned to serve as presiding officer, either individually, on a hearing panel or on an intra-agency appeal, a presiding officer shall disclose to all parties any material factual information received through ex parte communication prior to such assignment, unless the factual information has or soon will be disclosed pursuant to Iowa Code section 17A.13(2) or through discovery.

**2.20(3.7)** **Penalty Sanctions** for prohibited communications.

a. The agency and any party may report any violation of this rule to appropriate authorities for any disciplinary proceedings provided by law.

b. The penalty for making a prohibited communication may be The presiding officer may render a proposed decision or, in the case of the board or a majority thereof, a final decision, imposing appropriate sanctions for violations of this rule including a decision against the offending party, censure, suspension, or revocation of the privilege to practice before the board in the case of a party or their representative, and censure, suspension, or dismissal in the case of agency personnel agency.

b. The censure, suspension or revocation of a person's right to practice before the board due to an alleged violation of the prohibition against ex parte communications shall constitute a contested case as that term is defined in Iowa Code section 17A.2 and no person shall be censured or the right to practice before the board be suspended or revoked without notice and an opportunity to be heard as provided in Iowa Code chapter 17A, "The Iowa Administrative Procedure Act."

c. Alleged violations of ex parte communication prohibitions by agency personnel shall be reported to the chair-

person for the possible imposition of sanctions including censure, suspension, dismissal or other disciplinary action.

ITEM 7. Amend rule 621—2.21(20) as follows:

**621—2.21(20)** Transcripts of record. Testimony Oral proceedings in all hearings before the board shall be taken recorded by a certified shorthand reporter or, unless a party objects, by other mechanized means. The board does not furnish copies of transcriptions, but recorded. Oral proceedings shall be transcribed at the expense of any party requesting the transcription. Arguments on motions, oral arguments on appeal to the board, and arguments made in declaratory ruling order and expedited negotiability dispute proceedings, need not be recorded.

ITEM 8. Amend subrule 7.7(5) as follows:

**7.7(5)** Negotiability disputes. Disputes concerning the negotiability of any subject of bargaining shall be submitted to the board for determination pursuant to 621—subrule 6.3(20) no later than March 1. An arbitration award rendered prior to final determination of the negotiability dispute will be made conditional upon such determination. Notwithstanding the provisions of 621—subrule 2.19(20), no stay of impasse procedures will be granted during the pendency of any negotiability dispute, petition for declaratory ruling request order, or prohibited practice complaint.

ITEM 9. Amend 621—Chapter 10 as follows:

Amend the chapter title and rules 621—10.1(17A,20) to 10.4(17A,20) as follows:

#### CHAPTER 10

#### DECLARATORY RULINGS ORDERS

**621—10.1(17A,20)** Who may petition. Any person, public employer or employee organization may file a petition with the board to issue for a declaratory ruling order as to the applicability to specified circumstances of any statutory provision a statute, rule or other written statement of law or policy, decision or order within the primary jurisdiction of the agency.

**621—10.2(20)** Contents of petition. A petition for a declaratory ruling shall order must include:

**10.2(1)** The name, address and phone telephone number of the petitioner.

**10.2(2)** The A clear and concise statement of the specific facts upon which the board is to base its the declaratory ruling upon the questions presented order.

**10.2(3)** A citation to and the relevant language of the specific statute, rule or order whose applicability is questioned, and any other relevant law.

**10.2(3.4)** The specific questions upon which the petitioner seeks a declaratory ruling wants answered, stated clearly and concisely.

**10.2(5)** The answers to the questions desired by the petitioner and a summary of the reasons urged by the petitioner in support of those answers.

**10.2(6)** The reasons for requesting the declaratory order and disclosure of the petitioner's interest in the outcome.

**10.2(7)** A statement indicating whether the petitioner is currently a party to another proceeding involving the questions at issue and whether, to the petitioner's knowledge, those questions have been decided by, are pending determination by, or are under investigation by any governmental entity.

**10.2(8)** The names and addresses of other persons or entities, or a description of any class of persons or entities known by petitioner to be affected by or interested in the questions presented in the petition.

PUBLIC EMPLOYMENT RELATIONS BOARD[621](cont'd)

**10.2(4-9) Certificate** A certificate of service of the petition upon any other parties directly involved in the matter persons or entities required to be served with a copy by rule 10.7(17A,20).

~~**621—10.3(17A,20) Clarifications.** The board may require the petitioner to clarify either the facts or questions presented by the petition.~~

**621—10.43(17A,20) Caption.** The following caption is suggested for petitions for declaratory rulings orders:

BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD	
IN THE MATTER OF:	CASE NO.
(NAME OF THE PARTY REQUESTING THE RULING), PETITIONER.	} PETITION FOR DECLARATORY RULING ORDER

Further amend 621—Chapter 10 by rescinding 621—10.5(17A,20) and 621—10.6(17A,20) and adopting the following new rules:

**621—10.4(17A,20) Notice of petition.** Within ten days after receipt of a petition for a declaratory order, the board shall give notice of the petition to all persons not served by the petitioner pursuant to rule 10.7(17A,20) to whom notice is required by any provision of law. The board may also give notice to any other persons or entities.

**621—10.5(17A,20) Intervention.**

**10.5(1)** Persons who qualify under any applicable provision of law as an intervenor and who file a petition for intervention which complies with subrule 10.5(3) within 20 days of the filing of a petition for declaratory order shall be allowed to intervene in the proceeding.

**10.5(2)** Any person who files a petition for intervention which complies with subrule 10.5(3) at any time prior to the issuance of the agency's final order in the matter may be allowed to intervene in the proceeding at the discretion of the board.

**10.5(3)** A petition for intervention in a declaratory order proceeding must include:

- a. The name, address and telephone number of the person seeking intervention.
- b. A clear and concise statement of the facts supporting the intervenor's standing and qualifications for intervention.
- c. A citation to and the relevant language of any additional statutes, rules or orders and any other additional, relevant law not specified in the petition for declaratory order.
- d. The answers to the questions presented in the petition for declaratory order desired by the intervenor and a summary of the reasons urged by the intervenor in support of those answers.
- e. The reasons for requesting intervention and disclosure of the intervenor's interest in the outcome.
- f. A statement indicating whether the intervenor is currently a party to any proceeding involving the questions at issue and whether, to the intervenor's knowledge, those questions have been decided by, are pending determination by, or are under investigation by any governmental entity.
- g. The names and addresses of other persons or entities, or a description of any class of persons or entities known by intervenor to be affected by or interested in the questions presented.

**621—10.6(17A,20) Briefs.** The petitioner or any intervenor may file a brief in support of the position urged by that party.

The board may request a brief from the petitioner, any intervenor or any other person or entity concerning the questions raised.

**621—10.7(17A,20) Service of petitions and other papers.**

Every petition for declaratory order, petition for intervention, brief or other paper filed in a proceeding for a declaratory order shall be served upon each of the parties of record to the proceeding and on all other persons or entities identified in the petition for declaratory order or petition for intervention as affected by or interested in the questions presented, simultaneously with their filing with the board. The party filing a document is responsible for service on all parties and other affected or interested persons.

**621—10.8(17A,20) Action on petition.** Within the time allowed by 1998 Iowa Acts, chapter 1202, section 13(5), after receipt of a petition for a declaratory order, the board or its designee shall take action on the petition as required by that section.

**621—10.9(17A,20) Refusal to issue order.**

**10.9(1)** The board shall not issue a declaratory order where prohibited by 1998 Iowa Acts, chapter 1202, section 13(1), and may refuse to issue a declaratory order on some or all questions raised for the following reasons:

- a. The petition does not substantially comply with rule 10.2(20).
- b. The petition does not contain facts sufficient to demonstrate that the petitioner will be aggrieved or adversely affected by the board's failure to issue a declaratory order.
- c. The board does not have jurisdiction over the questions presented in the petition.
- d. The questions presented by the petition are also presented in a current rule-making, contested case or other agency or judicial proceeding that may definitively resolve them.
- e. The questions presented by the petition would more properly be resolved in a different type of proceeding or by another body with jurisdiction over the matter.
- f. The facts or questions presented in the petition are unclear, overbroad, insufficient or otherwise inappropriate as a basis upon which to issue a declaratory order.
- g. There is no need to issue a declaratory order because the questions raised in the petition have been settled due to a change in circumstances.
- h. The petition is not based upon facts calculated to aid in the planning of future conduct but is, instead, based solely upon prior conduct in an effort to establish the effect of that conduct or to challenge an agency decision already made.
- i. The petition requests a declaratory order that would necessarily determine the legal rights, duties or responsibilities of persons or entities who have not joined in the petition, intervened separately or filed a similar petition and whose position on the questions presented may fairly be presumed to be adverse to that of the petitioner.
- j. The petitioner requests the board to determine whether a statute is unconstitutional on its face.

**10.9(2)** A refusal to issue a declaratory order shall indicate the ground or grounds for the refusal and constitutes final agency action on the petition.

**10.9(3)** Refusal to issue a declaratory order pursuant to this rule does not preclude the filing of a new petition that seeks to eliminate the grounds for the prior refusal.

**621—10.10(17A,20) Copies of orders.** A copy of all orders issued in response to a petition for declaratory order or peti-

## PUBLIC EMPLOYMENT RELATIONS BOARD[621](cont'd)

tion for intervention shall be promptly mailed to the petitioner and all intervenors.

ITEM 10. Amend the chart accompanying subrule 12.13(3) as follows:

IV. Declaratory Ruling Order Case Files	0	N/A	Y/N	Y-names, addresses and phone numbers of individuals.	20.6(4)	P
Any person, public employer or employee organization may petition the agency to issue a declaratory ruling order as to the applicability of any statutory provision a statute, rule or other written statement of law or policy, decision or order within the primary jurisdiction of the agency. Such files contain documents concerning the proceedings, including the agency's determination.			Y-only if petitioner is an individual.			

## ARC 8759A

SOIL CONSERVATION  
DIVISION[27]

## Notice of Intended Action

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)"b."

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code section 161A.4(1), the Division of Soil Conservation gives Notice of Intended Action to amend Chapter 12, "Water Protection Practices—Water Protection Fund," Iowa Administrative Code.

These amendments are being proposed to change the method of recalling and reallocating unobligated funds previously allocated to soil and water conservation districts under the Resource Enhancement and Protection (REAP) Practices Program. Two additional practices for wetlands and stream bank stabilization are also being added to the list of eligible practices.

Any interested person may submit written suggestions or comments on the amendments proposed in this Notice of Intended Action. Such written materials should be directed to William McGill, Chief, Financial Incentives Bureau, Division of Soil Conservation, Department of Agriculture and Land Stewardship, Wallace State Office Building, Des Moines, Iowa 50319, and must be received by the Division no later than 4:30 p.m., Tuesday, March 30, 1999. To telephone comments, contact the Financial Incentives Bureau at (515)281-5851 or fax comments to (515)281-6170.

A public hearing will be held on Tuesday, March 30, 1999, at 10 a.m. in the west half of the Third Floor Conference Room of the Wallace State Office Building, East Ninth and Grand Avenue, Des Moines, Iowa. Comments at the hearing may be presented either orally or in writing.

These amendments are intended to implement Iowa Code chapter 161A.

The following amendments are proposed.

ITEM 1. Rescind rule 27—12.51(161C) and adopt the following new rule in lieu thereof:

## 27—12.51(161C) Allocation to soil and water conservation districts.

12.51(1) Original allocation. July 1 of each year, funds appropriated to the water protection practices account will be allocated to districts. Seventy-three and one-half percent of the funds will be divided equally among 100 soil and water conservation districts. Twenty-five percent of the funds plus any additional appropriations for reforestation will be kept in a separate account for woodland establishment and protection, and establishment of native grasses and forbs. One and one-half percent will be held in a reserve fund.

12.51(2) Recall of funds. Any funds allocated to the districts that have not been obligated in 12 months and any funds that were obligated for projects for which construction has not been started during that time period will be recalled by the division.

12.51(3) Supplemental allocations. Unobligated funds recalled by the division will be provided to the districts in a supplemental allocation. The districts shall submit their requests identifying valid applications and cost estimates for supplemental allocations to the division by October 15. The allocation to any district will be the lesser amount of:

a. The amount of remaining available funds divided by the number of districts applying for a supplemental allocation.

b. The amount requested.

12.51(4) Reallocation of recalled funds. Funds that were obligated for projects for which construction has been started but not reimbursed by the state during the 12 months following allocation will be recalled and reallocated back to the district.

12.51(5) Woodland, native grass and forbs fund. Twenty-five percent of the funds and any additional appropriations for reforestation will be allocated to districts.

a. Original allocation. Seventy-five percent of the funds distributed to this program will be allocated equally to districts at the beginning of each fiscal year.

b. Supplemental allocation. The remaining balance of the funds and any unobligated recalled funds will be provided to the districts in a supplemental allocation. The districts shall submit their requests identifying valid applications and cost estimates for supplemental allocations to the division by October 15. The allocation to any district will be the lesser amount of:

(1) The amount of remaining available funds divided by the number of districts applying for a supplemental allocation.

(2) The amount requested.

c. Recall of funds. Any funds allocated to the districts that have not been obligated in 12 months and any funds that were obligated for projects for which construction has not been started during that time period will be recalled by the division.

d. Reallocation of recalled funds. Funds that were obligated for projects for which construction has been started but not reimbursed by the state during the 12 months following allocation will be recalled and reallocated back to the district.

e. Eligibility of soil and water conservation districts for supplemental allocation. For a district to qualify for a supplemental allocation, it must meet the following requirement: 90 percent of the woodland, native grass and forbs funds shall be obligated to landowners.

12.51(6) Reserve funds. The division shall administer a reserve fund for the program consisting of 1.5 percent of each year's appropriated funds.

SOIL CONSERVATION DIVISION[27](cont'd)

a. Purpose and use of the reserve fund. The reserve fund will be set aside and used only to fund contingencies that occur in the application of practices in the districts.

b. On June 30 each year the division will transfer the unspent reserve fund balance into the water protection practices account to be allocated to districts under subrule 12.51(1).

ITEM 2. Amend rule 27—12.72(161C) by adopting the following new subrules:

12.72(7) Restored or constructed wetlands in buffer systems. An area where hydric (wetland) soil, vegetation, and hydrology are established within or adjacent to a buffer system designed to help filter pollutants from runoff or underground tile lines, or both. (Land enrolled in the Conservation Reserve Program, or other similar programs, is eligible, if this practice is not an allowable practice under that program.)

12.72(8) Bioengineering for stabilization of banks along waterways. A system designed to emphasize the use of live vegetation, natural materials, and structural practices to produce living, functioning systems to stabilize stream banks, reduce sedimentation, provide habitat, and filter pollutants. Bioengineering uses combinations of stream-side plantings or trees, other vegetation, structural practices such as modification of slopes, and installation of reinforcing materials and in-stream structures. (Land enrolled in the Conservation Reserve Program, or other similar programs, is eligible, if this practice is not an allowable practice under that program.)

ITEM 3. Amend rule 27—12.76(161C) by adopting the following new subrules:

12.76(8) Restored or constructed wetlands in buffer systems. Wetland Restoration, Enhancement, or Creation (Acres), USDA-NRCS-Iowa, Field Office Technical Guide, Section IV, Code No. Interim Standard 657-1, July 1992.

12.76(9) Bioengineering for stabilization of banks along waterways. USDA-NRCS-Iowa, Field Office Technical Guide, Section IV, Code No. 580-1, September 1983 or Section IV, Code No. 391-1.

NOTICE—USURY

In accordance with the provisions of Iowa Code section 535.2, subsection 3, paragraph "a," the Superintendent of Banking has determined that the maximum lawful rate of interest shall be:

February 1, 1998 — February 28, 1998	7.75%
March 1, 1998 — March 31, 1998	7.50%
April 1, 1998 — April 30, 1998	7.50%
May 1, 1998 — May 31, 1998	7.75%
June 1, 1998 — June 30, 1998	7.75%
July 1, 1998 — July 31, 1998	7.75%
August 1, 1998 — August 31, 1998	7.50%
September 1, 1998 — September 30, 1998	7.50%
October 1, 1998 — October 31, 1998	7.25%
November 1, 1998 — November 30, 1998	6.75%
December 1, 1998 — December 31, 1998	6.50%
January 1, 1999 — January 31, 1999	6.75%
February 1, 1999 — February 28, 1999	6.75%
March 1, 1999 — March 31, 1999	6.75%

ARC 8760A

WORKERS' COMPENSATION DIVISION[876]

Notice of Intended Action

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)"b."

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code section 86.8, the Workers' Compensation Commissioner hereby gives Notice of Intended Action to amend Chapter 4, "Contested Cases"; rescind Chapter 5, "Declaratory Rulings," and adopt a new Chapter 5, "Declaratory Orders"; and adopt Chapter 12, "Formal Review and Waiver of Rules," Iowa Administrative Code.

These amendments revise the Agency's rules governing procedures for contested cases, declaratory orders, and review and waiver of rules.

The Seventy-seventh General Assembly amended the Iowa Administrative Procedure Act in 1998 Iowa Acts, chapter 1202. A task force from the Attorney General's Office drafted amendments to the Uniform Rules on Agency Procedure to implement the amendments to the Administrative Procedure Act. The Agency's proposed amendments to its rules are based on the amendments of the Attorney General's task force, with some omissions and modifications to fit the Agency.

With these revisions, the Agency's rules will be in compliance with 1998 Iowa Acts, chapter 1202. The major changes governing contested case proceedings, declaratory rulings and the rule-making process in 1998 Iowa Acts, chapter 1202, which will become effective July 1, 1999, are as follows:

• Certain provisions relating to contested case proceedings are included. They consist of providing that a type of contested case may be a matter where there is no factual dispute under rule 4.1(85,85A,85B,86,87,17A) and making the rule consistent with 1998 Iowa Acts, chapter 1202, section 14; eliminating reference to special appearance in subrule 4.9(6) which has been abolished under the current Rules of Civil Procedure and providing that motions for summary judgment under the subrule will be governed by Iowa Rule of Civil Procedure 237; providing that requests for default in a contested case proceeding will be governed by Iowa Rules of Civil Procedure 230 to 236; clarifying how the Agency will deal with defaults which are allowed under 1998 Iowa Acts, chapter 1202, section 16; and replacing the current rule on disqualification and making the rule consistent with 1998 Iowa Acts, chapter 1202, section 19.

The Administrative Rules Review Committee, the Administrative Rules Coordinator, a political subdivision, a state agency, 25 persons signing one request, or an association having not less than 25 members may request the agency to conduct a formal review of a specified rule to determine whether the rule should be repealed or amended or a new rule adopted instead. If the Agency has not conducted such a review of the specified rule within a period of five years prior to the filing with the agency of that written request, the Agency shall prepare within a reasonable time a written report with respect to the rule summarizing the Agency's findings, its supporting reasons, and any proposed course of ac-

## WORKERS' COMPENSATION DIVISION[876](cont'd)

tion. The report must include a concise statement of the rule's effectiveness, including a summary of data supporting the conclusions reached; written criticisms of the rule received during the previous five years, including a summary of any petitions for waiver of the rule (i.e., requests for exceptions to policy) tendered to the Agency or granted by the Agency; and alternative solutions regarding the subject matter of the criticisms and the reasons they were rejected or the changes made in the rule in response to those criticisms and the reasons for the changes. A copy of the report is sent to the Administrative Rules Review Committee and the Administrative Rules Coordinator.

- The form and manner for requesting a waiver of a rule is specified.

- The current law regarding declaratory rulings is deleted and replaced with declaratory orders. The purpose is the same, but requirements are more specific than in current law. Rules are added to provide for petitions for intervention.

The Division of Workers' Compensation has determined that these proposed amendments will not necessitate additional annual expenditures exceeding \$100,000 by political subdivisions or agencies which contract with political subdivisions. Therefore, no fiscal note accompanies this Notice.

The Division of Workers' Compensation has determined that these amendments will not have an impact on small business within the meaning of Iowa Code section 17A.31.

Any interested person may make written suggestions or comments on these proposed amendments on or before March 30, 1999, to the Workers' Compensation Commissioner, Division of Workers' Compensation, 1000 East Grand Avenue, Des Moines, Iowa 50319.

These amendments are intended to implement Iowa Code section 86.8 and Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202.

The following amendments are proposed.

**ITEM 1.** Amend rule 876—4.1(85,85A,85B,86,87,17A) by adopting a **new** subrule 4.1(16) as follows and renumbering subrule 4.1(16) as 4.1(17).

**4.1(16)** Matters that would be a contested case if there were a dispute over the existence of material facts.

**ITEM 2.** Amend subrule 4.8(2), paragraph "a," to read as follows:

a. On or after July 1, 1988, for all original notices and petitions for arbitration or review-reopening seeking weekly benefits filed on account of each injury, gradual injury, occupational disease or occupational hearing loss alleged by an employee, a filing fee of \$65 shall be paid at the time of filing. No filing fee is due for the filing of other actions where the sole relief sought is one of the following or a combination of any of them: medical and other benefits under Iowa Code section 85.27; burial benefits, Iowa Code section 85.28; determination of dependency, Iowa Code sections 85.42, 85.43, and 85.44; equitable apportionment, Iowa Code section 85.43; second injury fund, Iowa Code sections 85.63 to 85.69; vocational rehabilitation benefits, Iowa Code section 85.70; approval of legal, medical and other fees under Iowa Code section 86.39; commutation, Iowa Code sections 85.45 to 85.48; employee's examination, Iowa Code section 85.39; employee's examination or sanctions, Iowa Code section 85.39; application for alternate care, Iowa Code section 85.27; ~~and~~ determination of liability, reimbursement for benefits paid and recovery of interest, Iowa Code section 85.21; *and petitions for declaratory orders or petitions for interventions filed pursuant to chapter 5.* An amendment that is filed on or after July 1, 1988, which alleges an addi-

tional injury date will be treated like an original notice and petition. No filing fee is due when an amendment corrects an erroneous injury date.

**ITEM 3.** Rescind subrule 4.9(6) and insert in lieu thereof the following **new** subrule:

**4.9(6)** Form, submission and ruling on motions. All motions, including pre-answer motions, motions for summary judgment and applications for adjudication of law points, shall have appended to them a concise memorandum brief and argument. All motions and applications for adjudication of law points except motions for summary judgment shall be deemed submitted without hearing on the record presented on the tenth day following filing. Motions for summary judgment shall be deemed submitted as provided in Iowa Rule of Civil Procedure 237. Resistances to motions and applications for adjudication of law points shall have appended to them a concise memorandum brief and argument, and shall be filed on or before the date of submission. Briefs and arguments are waived unless appended to the motion, application or resistance.

An order may be entered consolidating any motion for ruling with hearing of the contested case. Any party desiring a ruling on a motion prior to hearing may concisely set forth the necessity of prior ruling in the motion, application or resistance. If a pre-answer motion alleging lack of jurisdiction is overruled or consolidated with hearing of the contested case, the party shall plead to the merits and proceed to hearing of the contested case without submitting to the jurisdiction of the workers' compensation commissioner. If a motion attacking a pleading is consolidated with hearing of the contested case, the party shall respond to the pleading in the same manner as if the motion had been overruled.

**ITEM 4.** Amend rule 876—4.9(17A) by adopting a **new** subrule 4.9(9).

**4.9(9)** Requests for default. Requests or motions for default shall be as provided in Iowa Rules of Civil Procedure 230 to 236 except that entry of default shall be by order of the workers' compensation commissioner or a deputy workers' compensation commissioner.

**ITEM 5.** Rescind rule 876—4.38(17A) and insert the following **new** rule in lieu thereof:

**876—4.38(17A) Recusal.**

**4.38(1)** The workers' compensation commissioner, a chief deputy workers' compensation commissioner or a deputy workers' compensation commissioner shall withdraw from participation in the making of any proposed or final decision in a contested case if that person:

a. Has a personal bias or prejudice concerning a party or a representative of a party;

b. Has personally investigated, prosecuted or advocated in connection with that case the specific controversy underlying that case, another pending factually related contested case, or a pending factually related controversy that may culminate in a contested case involving the same parties;

c. Is subject to the authority, direction or discretion of any person who has personally investigated, prosecuted or advocated in connection with that contested case, the specific controversy underlying that contested case, or a pending factually related contested case or controversy involving the same parties;

d. Has acted as counsel to any person who is a private party to that proceeding within the past two years;

## WORKERS' COMPENSATION DIVISION[876](cont'd)

e. Has a personal financial interest in the outcome of the case or any other significant personal interest that could be substantially affected by the outcome of the case;

f. Has a spouse or relative within the third degree of relationship that (1) is a party to the case, or an officer, director or trustee of a party; (2) is a lawyer in the case; (3) is known to have an interest that could be substantially affected by the outcome of the case; or (4) is likely to be a material witness in the case;

g. Has even the appearance of impropriety; or

h. Has any other legally sufficient cause to withdraw from participation in the decision making in that case.

**4.38(2)** The term "personally investigated" means taking affirmative steps to interview witnesses directly or to obtain documents or other information directly. The term "personally investigated" does not include general direction and supervision of assigned investigators, unsolicited receipt of information which is relayed to assigned investigators, review of another person's investigative work product in the course of determining whether there is probable cause to initiate a proceeding, or exposure to factual information while performing other agency functions, including fact gathering for purposes other than investigation of the matter which culminates in a contested case. Factual information relevant to the merits of a contested case received by a person who later serves as presiding officer in that case shall be disclosed if required by Iowa Code section 17A.17 as amended by 1998 Iowa Acts, chapter 1202, section 19, and rule 4.38(3).

**4.38(3)** In a situation where the workers' compensation commissioner, chief deputy workers' compensation commissioner or deputy workers' compensation commissioner knows of information which might reasonably be deemed to be a basis for recusal and decides voluntary withdrawal is unnecessary, that person shall submit the relevant information for the record by affidavit and shall provide for the record a statement of the reasons for the determination that withdrawal is unnecessary.

**4.38(4)** If a party asserts disqualification on any appropriate ground, including those listed in subrule 4.38(1), the party shall file a motion supported by an affidavit pursuant to 1998 Iowa Acts, chapter 1202, section 19, subsection 7. The motion must be filed as soon as practicable after the reason alleged in the motion becomes known to the party.

If, during the course of the hearing, a party first becomes aware of evidence of bias or other grounds for disqualification, the party may move for recusal but must establish the grounds by the introduction of evidence into the record.

If the workers' compensation commissioner, chief deputy workers' compensation commissioner or deputy workers' compensation commissioner determines that recusal is appropriate, that person shall withdraw. If that person determines that withdrawal is not required, that person shall enter an order to that effect.

This rule is intended to implement Iowa Code section 17A.17 as amended by 1998 Iowa Acts, chapter 1202, section 19.

ITEM 6. Rescind 876—Chapter 5 and insert the following new chapter in lieu thereof:

CHAPTER 5  
DECLARATORY ORDERS

**876—5.1(17A) Petition for declaratory order.** Any person may file a petition with the workers' compensation commissioner for a declaratory order as to the applicability to specified circumstances of a statute, rule, or order within the primary jurisdiction of the workers' compensation commission-

er, at the office of the workers' compensation commissioner. A petition is deemed filed when it is received by that office. The workers' compensation commissioner shall provide the petitioner with a file-stamped copy of the petition if the petitioner provides the agency an extra copy for this purpose. The petition must be typewritten or legibly handwritten in ink and must substantially conform to the following form:

BEFORE THE WORKERS' COMPENSATION COMMISSIONER

Petition by (Name of  
Petitioner) for a Declaratory  
Order on (Cite provisions of  
law involved).

} PETITION FOR  
DECLARATORY  
ORDER

The petition must provide the following information:

1. A clear and concise statement of all relevant facts on which the order is requested.

2. A citation and the relevant language of the specific statutes, rules, policies, decisions, or orders, whose applicability is questioned, and any other relevant law.

3. The questions petitioner wants answered, stated clearly and concisely.

4. The answers to the questions desired by the petitioner and a summary of the reasons urged by the petitioner in support of those answers.

5. The reasons for requesting the declaratory order and disclosure of the petitioner's interest in the outcome.

6. A statement indicating whether the petitioner is currently a party to another proceeding involving the questions at issue and whether, to the petitioner's knowledge, those questions have been decided by, are pending determination by, or are under investigation by, any governmental entity.

7. The names and addresses of other persons, or a description of any class of persons, known by petitioner to be affected by, or interested in, the questions presented in the petition.

8. Any request by petitioner for a meeting provided for by rule 876—5.7(17A).

The petition must be dated and signed by the petitioner or the petitioner's representative. It must also include the name, mailing address, and telephone number of the petitioner and petitioner's representative and a statement indicating the person to whom communications concerning the petition should be directed.

**876—5.2(17A) Notice of petition.** Within five working days after receipt of a petition for a declaratory order, the workers' compensation commissioner shall give notice of the petition to all persons not served by the petitioner pursuant to rule 876—5.6(17A) to whom notice is required by any provision of law. The workers' compensation commissioner may also give notice to any other persons.

**876—5.3(17A) Intervention.**

**5.3(1) Nondiscretionary intervention.** Persons who qualify under any applicable provision of law as an intervenor and who file a petition for intervention within 15 working days of the filing of a petition for declaratory order and before 30-day time for agency action under rule 876—5.8(17A) shall be allowed to intervene in a proceeding for a declaratory order.

**5.3(2) Discretionary intervention.** Any person who files a petition for intervention at any time prior to the issuance of an order may be allowed to intervene in a proceeding for a declaratory order at the discretion of the workers' compensation commissioner.

WORKERS' COMPENSATION DIVISION[876](cont'd)

5.3(3) Filing and form of petition for intervention. A petition for intervention shall be filed at the office of the workers' compensation commissioner. Such a petition is deemed filed when it is received by that office. The workers' compensation commissioner will provide the petitioner with a file-stamped copy of the petition for intervention if the petitioner provides an extra copy for this purpose. A petition for intervention must be typewritten or legibly handwritten in ink and must substantially conform to the following form:

BEFORE THE WORKERS' COMPENSATION COMMISSIONER	
Petition by (Name of Original Petitioner) for a Declaratory Order on (Cite provisions of law cited in Original Petition) Petition for Intervention (Name of Intervenor).	}
PETITION FOR INTERVENTION	

The petition for intervention must provide the following information:

1. Facts supporting the intervenor's standing and qualifications for intervention.
2. The answers urged by the intervenor to the question or questions presented and a summary of the reasons urged in support of those answers.
3. Reasons for requesting intervention and disclosure of the intervenor's interest in the outcome.
4. A statement indicating whether the intervenor is currently a party to any proceeding involving the questions at issue and whether, to the intervenor's knowledge, those questions have been decided by, are pending determination by, or are under investigation by, any governmental entity.
5. The names and addresses of any additional persons, or a description of any additional class of persons, known by the intervenor to be affected by, or interested in, the questions presented.
6. Whether the intervenor consents to be bound by the determination of the matters presented in the declaratory order proceeding.

The petition must be dated and signed by the intervenor or the intervenor's representative. It must also include the name, mailing address, and telephone number of the intervenor and intervenor's representative, and a statement indicating the person to whom communications should be directed.

**876—5.4(17A) Briefs.** The petitioner or any intervenor may file a brief in support of the position urged. The workers' compensation commissioner may request a brief from the petitioner, any intervenor, or any other person concerning the questions raised.

**876—5.5(17A) Inquiries.** Inquiries concerning the status of a declaratory order proceeding may be made to the Workers' Compensation Commissioner, 1000 E. Grand, Des Moines, Iowa 50319-0209.

**876—5.6(17A) Service and filing of petitions and other papers.**

**5.6(1) Service.** Except where otherwise provided by law, every petition for declaratory order, petition for intervention, brief, or other paper filed in a proceeding for a declaratory order shall be served upon each of the parties of record to the proceeding, and on all other persons identified in the petition for declaratory order or petition for intervention as affected by or interested in the questions presented, simultaneously with their filing. The party filing a document is responsible for service on all parties and other affected or interested per-

sons. All documents filed shall indicate all parties or other persons served and the date and method of service.

**5.6(2) Filing.** All petitions for declaratory orders, petitions for intervention, briefs, or other papers in a proceeding for a declaratory order shall be filed with the Workers' Compensation Commissioner, 1000 E. Grand, Des Moines, Iowa 50319-0209.

**5.6(3) Method of service, time of filing, and proof of service.** Method of service and proof of service shall be as provided by rules 876—4.13(86) and 4.15(86). All documents are considered filed when received by the agency.

**876—5.7(17A) Consideration.** Upon request by petitioner, the workers' compensation commissioner must schedule a brief and informal meeting between the original petitioner, all intervenors, and the workers' compensation commissioner or a member of the staff of the workers' compensation commissioner to discuss the questions raised. The workers' compensation commissioner may solicit comments from any person on the questions raised. Also, comments on the questions raised may be submitted to the workers' compensation commissioner by any person.

**876—5.8(17A) Action on petition.**

**5.8(1) Time frames for action.** Within 30 days after receipt of a petition for a declaratory order, the workers' compensation commissioner or the commissioner's designee shall take action on the petition as required by 1998 Iowa Acts, chapter 1202, section 13, subsection 5.

**5.8(2) Date of issuance of order.** The date of issuance of an order or of a refusal to issue an order is the date the order or refusal is filed unless another date is specified in the order.

**876—5.9(17A) Refusal to issue order.**

**5.9(1)** The workers' compensation commissioner shall not issue a declaratory order where prohibited by 1998 Iowa Acts, chapter 1202, section 13, subsection 1, and may refuse to issue a declaratory order on some or all questions raised for the following reasons:

1. The petition does not substantially comply with the required form.
2. The petition does not contain facts sufficient to demonstrate that the petitioner will be aggrieved or adversely affected by the failure of the workers' compensation commissioner to issue an order.
3. The workers' compensation commissioner does not have jurisdiction over the questions presented in the petition.
4. The questions presented by the petition are also presented in a current rule making, contested case, or other agency or judicial proceeding, that may definitively resolve them.
5. The questions presented by the petition would more properly be resolved in a different type of proceeding or by another body with jurisdiction over the matter.
6. The facts or questions presented in the petition are unclear, overbroad, insufficient, or otherwise inappropriate as a basis upon which to issue an order.
7. There is no need to issue an order because the questions raised in the petition have been settled due to a change in circumstances.
8. The petition is not based upon facts calculated to aid in the planning of future conduct but is, instead, based solely upon prior conduct in an effort to establish the effect of that conduct or to challenge an agency decision already made.
9. The petition requests a declaratory order that would necessarily determine the legal rights, duties, or responsibilities of other persons who have not joined in the petition, intervened separately, or filed a similar petition and whose

WORKERS' COMPENSATION DIVISION[876](cont'd)

position on the questions presented may fairly be presumed to be adverse to that of petitioner.

10. The petitioner requests the workers' compensation commissioner to determine whether a statute is unconstitutional on its face.

5.9(2) Action on refusal. A refusal to issue a declaratory order must indicate the specific grounds for the refusal and constitutes final agency action on the petition.

5.9(3) Filing of new petition. Refusal to issue a declaratory order pursuant to this provision does not preclude the filing of a new petition that seeks to eliminate the grounds for the workers' compensation commissioner's refusal to issue a ruling.

876—5.10(17A) Contents of order—effective date. In addition to the ruling itself, a declaratory order must contain the date of its issuance, the name of petitioner and all intervenors, the specific statutes, rules, policies, decisions, or orders involved, the particular facts upon which it is based, and the reasons for its conclusion.

A declaratory order is effective on the date of issuance.

876—5.11(17A) Copies of orders. A copy of all orders issued in response to a petition for a declaratory order shall be mailed promptly to the original petitioner and all intervenors.

876—5.12(17A) Effect of a declaratory order. A declaratory order has the same status and binding effect as a final order issued in a contested case proceeding. It is binding on the workers' compensation commissioner, the petitioner, and any intervenors who consent to be bound and is applicable only in circumstances where the relevant facts and the law involved are indistinguishable from those on which the order was based. As to all other persons, a declaratory ruling serves only as precedent and is not binding on the workers' compensation commissioner. The issuance of a declaratory order constitutes final agency action on the petition.

876—5.13(17A) Filing fee. No filing fee is due for filing a petition for declaratory order or a petition for intervention. See 876—paragraph 4.8(2)“a.”

These rules are intended to implement 1998 Iowa Acts, chapter 1202, section 13.

ITEM 7. Adopt the following new chapter:

CHAPTER 12

FORMAL REVIEW AND WAIVER OF RULES

876—12.1(17A) Requests to review. Any interested person, association, agency, or political subdivision may submit a written request to the workers' compensation commissioner requesting the agency to conduct a formal review of a specified rule. Upon approval of that request by the workers' compensation commissioner, the agency shall conduct a formal review of a specified rule to determine whether a new rule should be adopted instead or the rule should be amended or repealed. The agency may refuse to conduct a review if it has conducted such a review of the specified rule within five years prior to the filing of the written request.

876—12.2(17A) Review of rules. In conducting the formal review, the agency shall prepare within a reasonable time a written report summarizing its findings, its supporting reasons, and any proposed course of action. The report must include a concise statement of the agency's findings regarding the rule's effectiveness in achieving its objectives, including

a summary of any available supporting data. The report shall also concisely describe significant written criticisms of the rule received during the previous five years, including a summary of any petitions for waiver of the rule received by the agency or granted by the agency. The report shall describe alternative solutions to resolve the criticisms of the rule, the reasons any were rejected, and any changes made in the rule in response to the criticisms as well as the reasons for the changes. A copy of the agency's report shall be sent to the administrative rules review committee and the administrative rules coordinator. The report must also be available for public inspection.

876—12.3(17A) Form of criticism. The Workers' Compensation Commissioner, 1000 E. Grand, Des Moines, Iowa 50319-0209, is designated as the office where interested persons may submit written criticism regarding an administrative rule of the Workers' Compensation Division[876]. A criticism of a specific rule must be more than a mere lack of understanding of a rule or a dislike regarding the rule. To constitute a criticism of a rule, the criticism must be in writing, indicate it is a criticism of a specific rule, be signed by the complainant, not be part of any other filing with the workers' compensation commissioner or department of workforce development, and have a valid legal basis for support. All criticisms received on any rule will be kept in a separate record for a period of five years by the workers' compensation commissioner and be a public record open for public inspection. All criticisms must substantially conform to the following form:

BEFORE THE WORKERS' COMPENSATION COMMISSIONER

CRITICISM BY (NAME OF PERSON SUBMITTING CRITICISM).	}	CRITICISM OF (SPECIFY RULE THAT IS CRITICIZED).
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Reasons for criticism:  
Name, address, telephone number and signature of person submitting criticism.

876—12.4(17A) Requests for waiver of rules. Requests for waiver of a rule in the Workers' Compensation Division[876] of the Iowa Administrative Code shall be made to the Workers' Compensation Commissioner, 1000 E. Grand, Des Moines, Iowa 50319-0209. All requests for waiver of a rule must be in writing and are a public record open for inspection. The person requesting the waiver must submit all facts relied upon in requesting the waiver. The person requesting waiver of the rule must provide clear and convincing evidence that compliance with the rule will create an undue hardship on the person requesting the waiver. A concise memorandum brief and argument, if any is filed, shall be attached to the request for waiver at the time the request is filed. The workers' compensation commissioner shall grant or deny the waiver within 60 days of the date the request is filed with the agency. The workers' compensation commissioner shall deny the request if the request is for waiver of a statute. If the request for waiver relates to a time requirement of a rule, the request must be received before the time specified in the rule has expired. The workers' compensation commissioner may deny the request if the request does not comply with the provisions of this rule. All requests for waiver must substantially conform to the following form:

WORKERS' COMPENSATION DIVISION[876](cont'd)

BEFORE THE WORKERS' COMPENSATION COMMISSIONER

(NAME OF PERSON REQUESTING WAIVER) } REQUEST FOR WAIVER OF (SPECIFY RULE FOR WHICH WAIVER IS REQUESTED).

Reasons for requesting waiver:  
Name, address, telephone number and signature of person submitting waiver request.

These rules are intended to implement Iowa Code section 17A.7 as amended by 1998 Iowa Acts, chapter 1202, section 11.

ARC 8732A

WORKFORCE DEVELOPMENT BOARD/SERVICES DIVISION[877]

Notice of Intended Action

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)"b."

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code sections 84A.1B(9) and 96.11, the Department of Workforce Development hereby gives Notice of Intended Action to amend Chapter 2, "Mission and Structure," Iowa Administrative Code.

On February 11, 1999, the Workforce Development Board approved the proposed amendment, which allows persons to submit criticisms of agency rules. This rule is proposed to comply with the Iowa Administrative Procedure Act, which goes into effect on July 1, 1999.

Public comments concerning the proposed amendment will be accepted until 4:30 p.m. on March 30, 1999. Interested persons may submit written or oral comments by contacting Maggie Wilcox, Policy Office, Department of Workforce Development, 150 Des Moines Street, Des Moines, Iowa 50309; telephone (515)281-9019.

A public hearing to receive comments about the proposed amendment will be held at 10 a.m. on March 30, 1999, in the Director's Conference Room, 1000 East Grand Avenue, Des Moines, Iowa. Individuals interested in providing comments at the hearing should contact Maggie Wilcox (515)281-9019 by 4 p.m. on March 29, 1999, to be placed on the hearing agenda.

This amendment is intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202, and chapter 84A.

The following amendment is proposed.

Amend 877—Chapter 2 by adopting the following new rule:

**877—2.3(17A,84A) Criticism of agency rule.** The division administrator of the Division of Workforce Development Center Administration, Workforce Development Department, 150 Des Moines Street, Des Moines, Iowa 50309, is designated as the office where interested persons may submit by mail criticism regarding an administrative rule of the

workforce development board/services division. A criticism of a specific rule must be more than a mere lack of understanding of a rule or a dislike regarding the rule. To constitute a criticism of a rule, the criticism must be in writing, indicate it is a criticism of a specific rule, be signed by the complainant, not be part of any other filing with the department of workforce development, and have a valid or legal basis for support. All requests for criticism received on any rule will be kept in a separate record for a period of five years by the division of workforce development center administration and be a public record open for public inspection. All requests for criticism must be in the following format:

DEPARTMENT OF WORKFORCE DEVELOPMENT  
DIVISION OF WORKFORCE DEVELOPMENT CENTER  
ADMINISTRATION

(NAME OF PERSON SUBMITTING CRITICISM) } CRITICISM OF (SPECIFY RULE THAT IS UNDER CRITICISM).

Reasons for criticism:  
Name, address, telephone number and signature of person submitting the criticism.

The administrative rules committee of the workforce development board will periodically review criticisms received for potential rule changes.

This rule is intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202, and chapter 84A.

ARC 8731A

WORKFORCE DEVELOPMENT BOARD/SERVICES DIVISION[877]

Notice of Intended Action

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)"b."

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code sections 84A.1B(9) and 96.11, the Department of Workforce Development hereby gives Notice of Intended Action to amend Chapter 26, "Petitions," Iowa Administrative Code.

On February 11, 1999, the Workforce Development Board approved the proposed amendment which makes revisions to the procedures to file petitions for declaratory orders in order to comply with amendments to the administrative procedure Act.

Public comments concerning the proposed amendment will be accepted until 4:30 p.m. on March 30, 1999, for written comments. Interested persons may submit written or oral comments by contacting Maggie Wilcox, Policy Office, Department of Workforce Development, 150 Des Moines Street, Des Moines, Iowa 50309; telephone (515)281-9019.

A public hearing to receive comments about the proposed amendment will be held at 10 a.m. on March 30, 1999, in the Director's Conference Room, 1000 East Grand Avenue, Des Moines, Iowa. Individuals interested in providing com-

WORKFORCE DEVELOPMENT BOARD/SERVICES DIVISION[877](cont'd)

ments at the hearing should contact Maggie Wilcox at (515) 281-9019 by 4 p.m. on March 29, 1999, to be placed on the hearing agenda.

This amendment is intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202, and chapter 96.

The following amendment is proposed.

Rescind rule 877—26.2(17A,96) and adopt the following new rule in lieu thereof:

**877—26.2(17A,96) Petition for declaratory order.** Any person may file a petition with the department of workforce development for a declaratory order as to the applicability to specified circumstances of a statute, rule, or order within the primary jurisdiction of the department of workforce development at its offices at 1000 East Grand Avenue, Des Moines, Iowa 50319. A petition is deemed filed when it is received by that office. The department of workforce development shall provide the petitioner with a file-stamped copy of the petition if the petitioner provides the agency an extra copy for this purpose. The petition must be typewritten or legibly handwritten in ink and must substantially conform to the following form:

DEPARTMENT OF WORKFORCE DEVELOPMENT  
DIVISION OF WORKFORCE DEVELOPMENT CENTER  
ADMINISTRATION

Petition by (Name of  
Petitioner) for a Declaratory  
Order on (Cite provisions of  
law involved).



PETITION FOR  
DECLARATORY  
ORDER

DEPARTMENT OF WORKFORCE DEVELOPMENT  
DIVISION OF WORKFORCE DEVELOPMENT CENTER  
ADMINISTRATION

Petition by (Name of Original  
Petitioner) for a Declaratory  
Order on (Cite provisions of  
law cited in the original  
petition).



PETITION FOR  
INTERVENTION

- The petition must provide the following information:
1. A clear and concise statement of all relevant facts on which the order is requested.
  2. A citation and the relevant language of the specific statutes, rules, policies, decisions, or orders, whose applicability is questioned, and any other relevant law.
  3. The questions petitioner wants answered, stated clearly and concisely.
  4. The answers to the questions desired by the petitioner and a summary of the reasons urged by the petitioner in support of those answers.
  5. The reasons for requesting the declaratory order and disclosure of the petitioner's interest in the outcome.
  6. A statement indicating whether the petitioner is currently a party to another proceeding involving the questions at issue and whether, to the petitioner's knowledge, those questions have been decided by, are pending determination by, or are under investigation by, any governmental entity.
  7. The names and addresses of other persons, or a description of any class of persons, known by petitioner to be affected by, or interested in, the questions presented in the petition.
  8. Any request by petitioner for a meeting provided for by subrule 26.2(6).

The petition must be dated and signed by the petitioner or the petitioner's representative. It must also include the name, mailing address, and telephone number of the petitioner and the petitioner's representative and a statement indicating the person to whom communications concerning the petition should be directed.

**26.2(1) Notice of petition.** Within 10 days after receipt of a petition for a declaratory order, the department of work-

force development shall give notice of the petition to all persons not served by the petitioner pursuant to subrule 26.2(5) to whom notice is required by any provision of law. The department of workforce development may also give notice to any other persons.

**26.2(2) Interventions.** Persons who qualify under applicable provision of law as an intervenor and who file a petition for intervention within 20 days of the filing of a petition for declaratory order shall be allowed to intervene in a proceeding for a declaratory order. Any person who files a petition for intervention at any time prior to the issuance of an order may be allowed to intervene in a proceeding for a declaratory order at the discretion of the department of workforce development. A petition for intervention shall be filed at 1000 East Grand Avenue, Des Moines, Iowa 50319. Such petition is deemed filed when it is received by that office. The department of workforce development will provide the petitioner with a file-stamped copy of the petition for intervention if the petitioner provides an extra copy for this purpose. A petition for intervention must be typewritten or legibly handwritten in ink and must substantially conform to the following form:

The petition for intervention must provide the following information:

1. Facts supporting the intervenor's standing and qualification for intervention.
2. The answers urged by the intervenor to the question or questions presented and a summary of the reasons urged in support of those answers.
3. Reasons for requesting intervention and disclosure of the intervenor's interest in the outcome.
4. A statement indicating whether the intervenor is currently a party to any proceeding involving the questions at issue and whether, to the intervenor's knowledge, those questions have been decided by, are pending determination by, or are under investigation by, any governmental entity.
5. The names and addresses of any additional persons, or a description of any additional class of persons, known by the intervenor to be affected by, or interested in, any governmental entity.
6. Whether the intervenor consents to be bound by the determination of the matters presented in the declaratory order proceeding.

The petition must be dated and signed by the intervenor or the intervenor's representative. It must also include the name, mailing address, and telephone number of the intervenor and intervenor's representative, and a statement indicating the person to whom communications should be directed.

**26.2(3) Briefs.** The petitioner or intervenor may file a brief in support of the position urged. The department of workforce development may request a brief from the petitioner, any intervenor or any other person concerning the questions raised.

**26.2(4) Inquiries.** Inquiries concerning the status of a declaratory order proceeding may be made to the Director, De-

## WORKFORCE DEVELOPMENT BOARD/SERVICES DIVISION{877}(cont'd)

partment of Workforce Development, 1000 East Grand Avenue, Des Moines, Iowa 50319.

**26.2(5) Service and filing of petitions and other papers.**

a. Except where otherwise provided by law, every petition for declaratory order, petition for intervention, brief, or other paper filed in a proceeding for a declaratory order shall be served upon each of the parties of record to the proceeding, and on all other persons identified in the petition for declaratory order or petition for intervention as affected by or interested in the questions presented, simultaneously with their filing. The party filing a document is responsible for service on all parties and other affected or interested parties.

b. All petitions for declaratory orders, petitions for intervention, briefs, or other papers in a proceeding for a declaratory order shall be filed with the Director, Department of Workforce Development, 1000 East Grand Avenue, Des Moines, Iowa 50319. All petitions, briefs, or other papers that are required to be served upon a party shall be filed simultaneously with the department of workforce development.

c. Service upon a party represented by an attorney shall be made upon the attorney and a copy will be sent to the petitioner. Service is made by delivery or by mailing a copy to the person's last known address. Service by mail is complete upon mailing, except where otherwise specifically provided by statute, rule, or order.

d. After the notice of hearing, all pleadings, motions, documents or other papers that are required to be served upon a party shall be filed simultaneously with the department of workforce development.

e. Except where otherwise provided by law, a document is deemed filed at the time it is delivered to the department of workforce development, delivered to an established courier service for immediate delivery to that office, or mailed by first-class mail or state interoffice mail to that office, so long as there is proof of mailing.

f. Proof of mailing includes either: a legible United States postal service postmark on the envelope, a certificate of service, a notarized affidavit, or a certification in substantially the following form:

I certify under penalty of perjury and pursuant to the laws of Iowa that, on (date of mailing), I mailed copies of (describe document) addressed to the Department of Workforce Development, 1000 East Grand Avenue, Des Moines, Iowa 50319, and to the names and addresses of the parties listed below by depositing the same in (a United States post office mailbox with correct postage properly affixed or state interoffice mail).

(Date) (Signature)

**26.2(6) Consideration.** Upon request by petitioner, the department of workforce development must schedule a brief and informal meeting between the original petitioner, all intervenors, and the department, a member of the department, or a member of the staff of the department, to discuss the questions raised. The department may solicit comments from any person on the questions raised. Also, comments on the questions raised may be submitted to the department by any person.

**26.2(7) Action on petition.** Within the time allowed by 1998 Iowa Acts, chapter 1202, section 13(5), after receipt of a petition for a declaratory order, the director or designee shall take action on the petition as required by 1998 Iowa Acts, chapter 1202, section 13(5). The date of issuance of an order or of a refusal to issue an order is the date of mailing of the decision or date of delivery if service by another means unless another date is specified in the order. The administra-

tive rules committee of the workforce development board will be advised of the disposition of all petitions.

**26.2(8) Refusal to issue order.** The department of workforce development shall not issue a declaratory order where prohibited by 1998 Iowa Acts, chapter 1202, section 13(1), and may refuse to issue a declaratory order on some or all of the questions raised for the following reasons:

a. The petition does not substantially comply with the required form.

b. The petition does not contain facts sufficient to demonstrate that the petitioner will be aggrieved or adversely affected by the failure of the department of workforce development to issue an order.

c. The department of workforce development does not have jurisdiction over the questions presented in the petition.

d. The questions presented by the petition are also presented in a current rule making, contested case, or other agency or judicial proceeding, that may definitively resolve them.

e. The questions presented by the petition would more properly be resolved in a different type of proceeding or by another body with jurisdiction over the matter.

f. The facts or questions presented in the petition are unclear, overbroad, insufficient, or otherwise inappropriate as a basis upon which to issue an order.

g. There is no need to issue an order because the questions raised in the petition have been settled due to a change in circumstances.

h. The petition is not based upon facts calculated to aid in the planning of future conduct but is, instead, based solely upon prior conduct in an effort to establish the effect of that conduct or to challenge an agency decision already made.

i. The petition requests a declaratory order that would necessarily determine the legal rights, duties, or responsibilities of other persons who have not joined in the petition, intervened separately, or filed a similar petition and whose position on the questions presented may fairly be presumed to be adverse to that of petitioner.

j. The petitioner requests the department of workforce development to determine whether a statute is unconstitutional on its face.

A refusal to issue a declaratory order must indicate the specific grounds for the refusal and constitutes final agency action on the petition.

Refusal to issue a declaratory order pursuant to this provision does not preclude the filing of a new petition that seeks to eliminate the grounds for the refusal to issue an order.

**26.2(9) Contents of declaratory order—effective date.** In addition to the order itself, a declaratory order must contain the date of its issuance, the name of petitioner and all intervenors, specific statutes, rules, policies, decisions, or orders involved, the particular facts upon which it is based, and the reasons for its conclusion.

A declaratory order is effective on the date of issuance.

**26.2(10) Copies of orders.** A copy of all orders issued in response to a petition for a declaratory order shall be mailed promptly to the original petitioner and all intervenors.

**26.2(11) Effect of a declaratory order.** A declaratory order has the same status and binding effect as a final order issued in a contested case proceeding. It is binding on the department of workforce development and the petitioner, and any intervenors who consent to be bound and is applicable only in circumstances where the relevant facts and the law involved are indistinguishable from those on which the order was based. As to all other persons, a declaratory order serves only as precedent and is not binding on the department of

WORKFORCE DEVELOPMENT BOARD/SERVICES DIVISION[877](cont'd)

workforce development. The issuance of a declaratory order constitutes final agency action on the petition. The administrative rules committee of the workforce development board will be advised of the disposition of all declaratory orders.

This rule is intended to implement Iowa Code chapter 17A as amended by 1998 Iowa Acts, chapter 1202, and chapter 96.

## ARC 8734A

## AGRICULTURE AND LAND STEWARDSHIP DEPARTMENT[21]

### Adopted and Filed Emergency

Pursuant to the authority of Iowa Code section 160.9, the Department of Agriculture and Land Stewardship hereby adopts an amendment to Chapter 22, "Apiary," Iowa Administrative Code.

This amendment is intended to prohibit honeybees from being transported into Iowa from the states of Florida, Georgia, South Carolina and North Carolina because these states are known to be infested with the small hive beetle, *Aethina tumida*, a recently introduced serious pest of honeybee colonies. This rule shall remain effective until one year after its effective date unless extended by administrative rule.

In compliance with Iowa Code section 17A.4(2), the Department finds that notice and public participation are impracticable because this situation has developed recently and the shipping season for bees is commencing immediately. No chemical control is currently registered by the U.S. Environmental Protection Agency for the control of this pest in Iowa. Beekeepers have no treatment available if the beetles were to be transported to Iowa in shipments of bees. The spread of these beetles into Iowa would place in jeopardy the health of Iowa's honeybee population and the pollination service provided by the bees. Preventing or delaying the spread of these beetles into Iowa will give the time needed to fully test and register chemical control products.

The Department also finds, pursuant to Iowa Code section 17A.5(2)"b"(2 and 3), that the normal effective date of the amendment should be waived and this amendment should be made effective upon filing with the Administrative Rules Coordinator on February 18, 1999, as it protects the public welfare and confers a benefit upon the public by protecting Iowa's honeybee pollinators from a serious pest.

This amendment is also being simultaneously published herein under Notice of Intended Action as **ARC 8733A** to allow for public comment.

This amendment became effective February 18, 1999.

This amendment is intended to implement Iowa Code section 160.9.

The following amendment is adopted.

Amend rule 21—22.10(160) as follows:

**21—22.10(160) Prohibit movement of infested bees from designated states.** A person shall not directly or indirectly transport or cause to be transported into the state of Iowa honeybees originating in the ~~state~~ *states of Florida, Georgia, North Carolina and South Carolina. As used in this rule, "honeybees" shall include, but is not limited to, the following: colonies, nucs, packages, banked queens and queen battery boxes. However, the shipping of honeybee queens and attendants in individual queen cages will be allowed when accompanied by a valid certificate of health indicating that the bees are from an apiary free of small hive beetles. This rule shall remain effective until February 18, 2000.*

[Filed Emergency 2/18/99, effective 2/18/99]

[Published 3/10/99]

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## ARC 8740A

## CRIMINAL AND JUVENILE JUSTICE PLANNING DIVISION[428]

### Adopted and Filed Emergency

Pursuant to the authority of Iowa Code section 17A.3 and Public Law 105-119, the Criminal and Juvenile Justice Planning Division hereby adopts and implements a new Chapter 5, "Juvenile Accountability Incentive Block Grant Program (JAIBG)," Iowa Administrative Code.

The purpose of this new chapter is to implement Public Law 105-119, November 26, 1997, which appropriated funds to the states for the Juvenile Accountability Incentive Block Grants (JAIBG) program described in Title III of H.R. 3, as passed by the House of Representatives on May 8, 1997, to develop programs to promote greater accountability in the juvenile justice system.

In compliance with Iowa Code section 17A.4(2), the Division finds that notice and public participation are impracticable and contrary to the public interest in that adherence to the process prescribed by Iowa Code section 17A.4(1) would significantly delay the awarding of funds available to the state, units of local government, and communities; thus placing restrictions on the implementation of those juvenile accountability services and activities that this program was created to support.

The Division also finds, pursuant to Iowa Code section 17A.5(2)"b"(2), that the normal effective date of these rules should be waived and this rule should be made effective upon filing with the Administrative Rules Coordinator on February 19, 1999, as it confers a benefit upon the public to receive funds for juvenile accountability programs.

These rules are also published herein under Notice of Intended Action as **ARC 8739A** to allow for public comment. This emergency filing permits the Division to immediately begin the process to make funding available to units of local government and communities.

These rules became effective on February 19, 1999.

These rules are intended to implement Iowa Code section 216A.133 and Public Law 105-119.

The following new chapter is adopted:

#### CHAPTER 5

#### JUVENILE ACCOUNTABILITY INCENTIVE BLOCK GRANT PROGRAM (JAIBG)

#### 428—5.1(216A) Purpose and goals.

5.1(1) The purpose of the program is to provide the state and units of local government with federal Juvenile Accountability Incentive Block Grant Program funds to develop programs to promote greater accountability in the juvenile justice system.

5.1(2) The goals of the program are to reduce juvenile delinquency, improve the juvenile justice system, and increase accountability for juvenile offenders.

#### 428—5.2 (216A) Definitions. As used in this chapter:

"Administrator" means the administrator of the division of criminal and juvenile justice planning within the department of human rights.

"Criminal and juvenile justice planning advisory council (CJJPAC)" means the advisory council established in Iowa Code section 216A.132.

"Decategorization," as established in Iowa Code section 232.188, means the department of human services program

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whereby approved counties are permitted to pool their allocations of designated state and federal child welfare and juvenile justice funding streams, establish local planning and governance structures, and design and implement service systems that are more effective in meeting local needs.

"Decategorization project governance board" means the board required to provide direction and governance for a decategorization project, pursuant to Iowa Code section 232.188.

"Division" means the division of criminal and juvenile justice planning within the department of human rights.

"Justice Research and Statistics Association (JRSA)" is a national nonprofit organization that provides a clearinghouse of current information on state criminal justice research, programs, and publications.

"Juvenile" means an individual who is 17 years of age or younger. However, individuals who are under the original or extended jurisdiction of the juvenile justice system beyond the age of 17 are eligible to receive services under the JAIBG program.

"Juvenile Accountability Incentive Block Grant (JAIBG) purpose areas" means the 12 program purpose areas for which JAIBG funds must be spent. The purpose areas are as follows:

Purpose area 1: Building, expanding, renovating, or operating temporary or permanent juvenile correction or detention facilities, including training of correctional personnel;

Purpose area 2: Developing and administering accountability-based sanctions for juvenile offenders;

Purpose area 3: Hiring additional juvenile judges, probation officers, and court-appointed defenders, and funding pre-trial services for juveniles, to ensure the smooth and expeditious administration of the juvenile justice system;

Purpose area 4: Hiring additional prosecutors, so that more cases involving violent juvenile offenders can be prosecuted and backlogs can be reduced;

Purpose area 5: Providing funding to enable prosecutors to address drug, gang, and youth violence problems more effectively;

Purpose area 6: Providing funding for technology, equipment, and training to assist prosecutors in identifying and expediting the prosecution of violent juvenile offenders;

Purpose area 7: Providing funding to enable juvenile courts and juvenile probation offices to be more effective and efficient in holding juvenile offenders accountable and reducing recidivism;

Purpose area 8: Establishing court-based juvenile justice programs that target young firearms offenders through the establishment of juvenile gun courts for the adjudication and prosecution of juvenile firearms offenders;

Purpose area 9: Establishing drug court programs for juveniles so as to provide continuing judicial supervision over juvenile offenders with substance abuse problems and to provide the integrated administration of other sanctions and services;

Purpose area 10: Establishing and maintaining interagency information-sharing programs that enable the juvenile and criminal justice system, schools, and social services agencies to make more informed decisions regarding the early identification, control, supervision, and treatment of juveniles who reportedly commit serious delinquent or criminal acts;

Purpose area 11: Establishing and maintaining accountability-based programs that work with juvenile offenders who are referred by law enforcement agencies, or which are

designed, in cooperation with law enforcement officials, to protect students and school personnel from drug, gang, and youth violence; and

Purpose area 12: Implementing a policy of controlled substance testing for appropriate categories of juveniles within the juvenile justice system.

"Juvenile correction facility" means any public or private residential facility that includes permanent and temporary construction fixtures which are designed to physically restrict the movements and activities of juveniles or other individuals held in lawful custody and that is used for the placement, after adjudication and disposition, of any juvenile who has been adjudicated as having committed an offense, any nonoffender, or any other individual convicted of a criminal offense.

"Juvenile detention facility" means any public or private residential facility that includes permanent and temporary construction fixtures designed to physically restrict the movements and activities of juveniles or other individuals held in lawful custody and that is used for the temporary placement of any juvenile who is accused of having committed an offense, of any nonoffender, or of any other individual accused of having committed a criminal offense.

"Juvenile justice advisory council (JJAC)" means the federally mandated board assigned to the division of criminal and juvenile justice planning to administer federal grant funds and to improve the juvenile justice system in Iowa.

"Juvenile Justice and Delinquency Prevention Act (JJDP) competitive grant process" means the procedures established in rule 428—3.7(216A).

"Law enforcement expenditures" means the expenditures associated with police, prosecutorial, legal, and judicial services, and corrections as reported by the local units of government to the U.S. Census Bureau, during the Census of Governments.

"Local juvenile crime enforcement coalition (JCEC)" means a group of individuals that develop the coordinated enforcement plan for reducing juvenile crime for units of local government. Membership shall include, unless impracticable, individuals representing the police, sheriff, prosecutor, probation services, juvenile court judge, schools, business, and religious affiliated, fraternal, nonprofit, or social service organizations involved in crime prevention.

"Office of Juvenile Justice and Delinquency Prevention (OJJDP)" means the federal office within the U.S. Department of Justice that administers the Juvenile Accountability Incentive Block Grant Program (JAIBG).

"Part 1 violent crimes" means murder and nonnegligent manslaughter, forcible rape, robbery, and aggravated assault as reported to the Federal Bureau of Investigation for purposes of the Uniform Crime Reports.

"Serious violent crimes" means murder, aggravated sexual assault, or assault with a firearm.

"State juvenile crime enforcement coalition (JCEC)" means a group of individuals that develops a state plan to achieve the goals of JAIBG. The CJJPAC and the JJAC shall jointly act as the state JCEC.

"Subgrantee" means any local unit of government, decategorization project governance board, state department, or other nonprofit entity that receives funds from the division for JAIBG activities.

"Unit of local government" means a county, township, city, or political subdivision of a county, township, or city that is a unit of local government as determined by the Secretary of Commerce for general statistical purposes, and the

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recognized governing body of an Indian tribe that carries out substantial governmental duties and powers.

**428—5.3 (216A) Distribution of funds.** The division shall distribute the JAIBG funds as follows:

1. In accordance with rule 5.5(216A), a percentage of the funds shall be distributed directly to qualified units of local government.

2. In accordance with rule 5.8(216A), a percentage of the funds may be distributed to decategorization project governance boards and any counties not participating in decategorization.

3. In accordance with rule 5.11(216A), a percentage of the funds may be distributed through the existing JJDP competitive grant process.

**428—5.4(216A) Determination of funding levels.**

**5.4(1)** Each year funding is available, the division shall conduct a review of state and local expenditures in the JAIBG purpose areas in order to determine the primary financial burden for the administration of juvenile justice within the state of Iowa.

If, after conducting this review, the state's financial burden in the program purpose areas is greater than 50 percent of the expenditures, the division may request OJJDP's approval to distribute to units of local government a lower percentage of the available funding than the percentage initially established by Congress for units of local government. The division shall consult with units of local government or organizations representing such units prior to submitting such a request.

**5.4(2)** OJJDP shall determine the amount of funds available for units of local government. With the approval of the state JCEC, the division shall determine the amount of funds available in the categories described in 5.3"2" and "3."

**428—5.5(216A) Allocation of funds to units of local government.**

**5.5(1)** The allocations for units of local government shall be determined by formula, based on a combination of law enforcement expenditures for each unit of local government and the number of Uniform Crime Report part 1 violent crime reports by each unit of local government. Two-thirds of each unit of local government's allocation will be based on the law enforcement expenditure data and one-third will be based on the reported violent crime data, in the same ratio to the aggregate of all other units of general local government in the state.

**5.5(2)** In determining allocations, the division shall use data collected by the U.S. Census Bureau pertaining to law enforcement expenditures and the Federal Bureau of Investigation (FBI) pertaining to reported part 1 violent crime, as compiled by the JRSA, and the department of public safety (DPS) of the state of Iowa.

a. If data, as compiled by JRSA, indicates that units of local government have not reported law enforcement expenditures, or have reported only partial law enforcement expenditures, the division may request complete law enforcement expenditure reports directly from the affected units of local government to determine the correct allocation. If no additional information is received from local units of government within 15 calendar days after requesting such expenditure reports, the division shall use the data as presented by JRSA.

b. If data, as compiled by JRSA, indicates that units of local government have not reported crime data to the DPS or have reported only partial crime data, the division may request complete violent crime data directly from the affected

local units of government to determine the correct allocation. If no additional data is received from local units of government within 15 calendar days after requesting such data, the division shall use the data as presented by JRSA.

**5.5(3)** No unit of local government shall receive an allocation that exceeds 100 percent of the law enforcement expenditures of such unit as reported to the Census Bureau.

**5.5(4)** In order to qualify for JAIBG funds, a unit of local government's allocation for a subgrant must be \$5,000 or more. If, based on the formula, the allocation for a unit of local government is less than \$5,000 during a fiscal year, the amount shall be distributed by the division to the local decategorization project governance board plan for those areas encompassing the unit of local government, as described in rule 5.8(216A).

**5.5(5)** If a unit of local government qualifies for a subgrant of \$5,000 or more but is unable, unwilling, ineligible, or otherwise declines to participate in the JAIBG program, such funds shall be retained by the state to be reallocated among eligible units of local government in the current or the next fiscal year.

**428—5.6 (216A) Units of local government acceptance of allocations.**

**5.6(1)** Each unit of local government that is eligible to receive JAIBG funds shall be contacted by the division and shall be provided an application which must be completed prior to receipt of the allocation. The division may require submission of the following:

a. Documentation of the establishment of a local JCEC.  
b. A coordinated enforcement plan for reducing juvenile crime, which includes a budget for the proposed use of the funds within the 12 JAIBG purpose areas.

c. A certification that a policy of testing appropriate categories of juveniles within the juvenile justice system for use of controlled substances has been or will be implemented.

d. Assurances that, other than funds set aside for administration, not less than 45 percent is allocated for JAIBG purpose areas 3 through 9, and not less than 35 percent is allocated for JAIBG purpose areas 1, 2, and 10. This allocation is required unless a unit of local government certifies to the division that the interests of public safety and juvenile crime control would be better served by expending its funds in a proportion other than the above percentages. Such certification shall provide information concerning the availability of existing structures or initiatives within the intended areas of expenditure, the availability of alternative funding sources for those areas, and the reasons for the unit of local government's alternative use.

**5.6(2)** The units of local government shall submit the required information by the deadline established and announced by the division. The division reserves the right to extend the deadline.

**5.6(3)** Following its receipt and acceptance of the required application, the division shall offer the units of local government a contract authorizing the obligation of funds. These rules and all applicable state and federal laws and regulations shall become part of the contract by reference.

**5.6(4)** Qualifying units of local government may enter into regional coalitions by utilizing combined allocations from all participating units of local government to expend JAIBG funds using a regional juvenile crime enforcement coalition. A unit of local government, a legally authorized combination, or a decategorization project governance board shall serve as the fiscal agent(s) for receiving the award from the state and obligating and expending funds for the benefit

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of the combined units. The division's instructions to units of local government shall describe the process to form regional coalitions.

**5.6(5)** Qualifying units of local government may waive the right to a direct subgrant award and request that such unit's funds be awarded to and expended for its benefit by a larger or contiguous unit of local government, or decategorization project governance board.

A written waiver is required from the unit of local government which waives its right to a direct subgrant and names the requested unit of local government or decategorization project governance board to receive and expend the funds. The unit of local government or decategorization project governance board to receive the funds must agree, in writing, to accept the redirected funds and serve as the fiscal agent. The division's instructions to units of local government shall describe the process to waive a direct subcontract.

**428—5.7(216A) Units of local government required reports and expenditure reimbursements.**

**5.7(1)** Expenditure claim reports shall be required on provided forms from units of local government receiving an allocation. The division, pursuant to regular reimbursement procedures of the state of Iowa, shall reimburse expenditures to subgrantees for actual expenditures specified in the approved budget.

**5.7(2)** Progress reports on program outcomes, program status, and financial status shall be required from units of local government on provided forms.

**5.7(3)** Other reports, including audit reports prepared by independent auditors, may be required by the division and specified in its contract with the unit of local government to assist in the monitoring and evaluation of this program.

**5.7(4)** Failure to submit required reports by the due date shall result in suspension of financial payments to the units of local government by the division until such time as the reports are received. Other remedies provided by the contract may also be pursued.

**428—5.8(216A) Allocation of funds to decategorization project governance boards.**

**5.8(1)** In any year in which funds are provided for JAIBG, the division may make funds available to local decategorization project governance boards. The division shall calculate allocations to each of the decategorization project governance boards based on the number of children aged 5 to 17 years residing in the respective areas. The most recent available population data for children aged 5 to 17 years shall be used to calculate the allocations.

**5.8(2)** In any year in which the division makes JAIBG funds available to local decategorization project governance boards, the division shall make funds available to any county that is not participating in decategorization. The division shall calculate allocations to each county that is not participating in decategorization based on the number of children aged 5 to 17 years residing in the respective areas. The most recent available population data for children aged 5 to 17 years shall be used to calculate the allocations.

**428—5.9(216A) Decategorization project governance boards—acceptance of allocations.**

**5.9(1)** Each decategorization project governance board and any counties not participating in decategorization shall be contacted by the division and shall be provided an application which must be completed prior to receipt of the allocations. The division may require submission of the following:

a. Documentation of participation, or efforts to obtain participation, from representatives of law enforcement, county attorneys, and city governments to participate in the development of the plan.

b. A plan for reducing juvenile crime. The plan shall include a budget for the proposed use of the funds within the 12 JAIBG purpose areas. For decategorization project governance boards, the plan shall be developed in conjunction with the annual child welfare and delinquency plan.

**5.9(2)** The decategorization project governance boards and counties not participating in decategorization shall submit the required information by the deadline established by the division. The division reserves the right to extend the deadline.

**5.9(3)** Following its receipt and acceptance of the required information, the division shall offer the decategorization project governance boards and counties not participating in decategorization a contract authorizing the obligation of funds. These rules and all applicable state and federal laws and regulations shall become part of the contract by reference.

**5.9(4)** When a decategorization project governance board or a county not participating in decategorization is unable, unwilling, or otherwise declines to participate in the JAIBG program, such funds shall be retained by the state to be used for the development of services that have a statewide impact.

**5.9(5)** Decategorization project governance boards and counties not participating in decategorization may enter into regional coalitions by utilizing combined allocations from participating units of local government, counties not participating in decategorization, and other decategorization project governance boards to expend JAIBG funds. A unit of local government, a county, or a decategorization project governance board shall serve as the fiscal agent for receiving the award from the state and obligating and expending funds for the benefit of the combined units. The division's instructions to decategorization project governance boards and counties not participating in decategorization shall describe the process to form regional coalitions.

**428—5.10(216A) Decategorization project governance boards—required reports and expenditure reimbursements.**

**5.10(1)** Expenditure claim reports shall be required on provided forms from decategorization project governance boards receiving an allocation. The division, pursuant to regular reimbursement procedures of the state of Iowa, shall reimburse expenditures to subgrantees for actual expenditures specified in the approved budget.

**5.10(2)** Progress reports on program outcomes, program status, and financial status shall be required from decategorization project governance boards on provided forms.

**5.10(3)** Other reports, including audit reports prepared by independent auditors, may be required by the division and specified in the contract to assist in the monitoring and evaluation of this program.

**5.10(4)** Failure to submit required reports by the due date shall result in suspension of financial payments to the decategorization project governance boards by the division until such time as the reports are received. Other remedies provided by the contract may also be pursued.

**5.10(5)** Counties not participating in decategorization shall be required to submit all reports required of decategorization project governance boards, pursuant to subrules 5.10(1) to 5.10(4).

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**428—5.11(216A) Competitive grant application process.** In any year in which funds are provided for this program, the division may make a percentage of funds available through the existing JJDPA competitive grant application procedures, pursuant to rule 428—3.7(216A), for projects to address one or more of the JAIBG purpose areas.

**428—5.12(216A) Appeals.**

**5.12(1)** Units of local governments, decategorization project governance boards, and counties not participating in decategorization choosing to appeal the division's allocation decisions must file a written appeal with the administrator within ten calendar days of the postmarked date of the written notification of the program's funding decisions. Appeals received after 4:30 p.m. on the tenth day will not be reviewed.

**5.12(2)** All letters of appeal must clearly state the reasons for the appeal and evidence of the reasons stated. All appeals must clearly state in what manner the division failed to follow the rules of the allocation process as governed by these administrative rules or procedures outlined in any instructions provided by the division. The letter of appeal must also describe the remedy sought.

**5.12(3)** The division shall not enter into a contract with any unit of local government for a period of ten calendar days following the written notice of the division's funding decisions for units of local governments. If an appeal is filed within the ten calendar days, the division shall not enter into a contract with any unit of local government until the administrator has reviewed and decided on all appeals received in accordance with subrules 5.12(1) and 5.12(2). The review shall be conducted as expeditiously as possible so that all funds can be distributed in a timely manner.

**5.12(4)** The division shall not enter into a contract with any decategorization project governance board or county not participating in decategorization for a period of ten calendar days following the written notice of the division's funding decisions for decategorization projects. If an appeal is filed within the ten calendar days, the division shall not enter into a contract with any decategorization project governance board or county not participating in decategorization until the administrator has reviewed and decided on all appeals re-

ceived in accordance with subrules 5.12(1) and 5.12(2). The review shall be conducted as expeditiously as possible so that all funds can be distributed in a timely manner.

**5.12(5)** The appeals process for the competitive grant applicants shall be the same as the existing JJDPA competitive grant application procedures, pursuant to rule 428—3.8(216A).

**5.12(6)** The administrator's decision represents the final agency action for the purpose of judicial review under Iowa Code chapter 17A.

**428—5.13(216A) Redistribution of funds.** The division reserves the right to recapture and redistribute funds based upon projected expenditures if it appears that funds will not be expended by a subgrantee according to the conditions of the subgrantee's contract. Recaptured funds may be distributed by the administrator to subgrantees for services and activities with the purposes and goals of the program.

**428—5.14(216A) Allowable costs and cost restrictions.**

**5.14(1)** Block grant funds from this program shall be used to support only those activities and services specified and agreed to in the contract between the subgrantee and the division. The coordinated enforcement plan for reducing juvenile crime shall identify specific cost categories against which all allowable costs must be consistently charged.

**5.14(2)** Federal funds appropriated for this program shall not be expended for supplantation of federal, state, or local funds supporting existing programs or activities. Instructions for the acceptance of JAIBG allocations and competitive grant application announcements may specify other cost limitations including, but not limited to, costs related to political activities, interest costs, fines, penalties, lawsuits or legal fees, and certain fixed assets and program equipment.

These rules are intended to implement Iowa Code section 216A.133 and Public Law 105-119.

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EDITOR'S NOTE: For replacement pages for IAC, see IAC Supplement 3/10/99.

ARC 8722A

HUMAN SERVICES DEPARTMENT[441]

Adopted and Filed

Pursuant to the authority of Iowa Code sections 217.6 and 249A.4 and 1998 Iowa Acts, chapter 1218, section 11, subsection 1, section 32, subsection 14, and section 80, the Department of Human Services hereby amends Chapter 51, "Eligibility," Chapter 52, "Payment," Chapter 75, "Conditions of Eligibility," and Chapter 177, "In-Home Health Related Care," appearing in the Iowa Administrative Code.

These amendments implement the annual adjustment in the maximum amount of resources to be attributed to the community spouse and the amount used for determining the community spouse's maintenance needs and the following changes to the State Supplementary Assistance Program:

- Pass along the January 1, 1999, Supplemental Security Income (SSI) cost-of-living adjustment increases.

The Department received confirmation from the Department of Health and Human Services (DHHS) that the social security cost-of-living increase which became effective January 1, 1999, is established at 1.3 percent. The Department has decided to pass along this increase to recipients of state supplementary assistance. Therefore, the SSI increase of \$6 for an individual resulted in an increase in the total allowance in a family life home from \$576.20 to \$582.20. Individuals in family life homes will receive the same personal needs allowance as residents in residential care facilities. The benefit rate for an essential person increased by \$4 from \$247 to \$251 resulting in the same increase for a dependent person.

• Increase the personal needs allowance for residents of residential care facilities. The Seventy-seventh General Assembly in 1998 Iowa Acts, chapter 1218, section 11, subsection 1, required the Department to increase the personal needs allowance for residents of residential care facilities (RCFs) by the same percentage and at the same time as federal Supplemental Security Income and federal social security benefits are increased due to a recognized increase in the cost of living. At the current time, residents of RCFs receive a total personal needs allowance of \$70, of which \$64.39 is for personal expenses and \$5.35 is for Medicaid copayment expenses. A 1.3 percent increase in the personal expenses part of the allowance increases that part of the allowance to \$65.23. This amount added to the average copayment of \$5.26 totals \$70.49. Thus, the personal needs allowance is rounded up to \$71 effective January 1, 1999.

• Increase the maximum and flat State Supplementary Assistance (SSA) residential care facility (RCF) and in-home health related care (IHHRC) reimbursement rate by 2.47 percent. The maximum RCF reimbursement rate will be increased from \$23.26 to \$23.83 per day. The flat RCF reimbursement rate will be increased from \$16.64 to \$17.05 per day. The monthly IHHRC reimbursement rate will be increased from \$447.16 to \$458.20.

The Seventy-seventh Iowa General Assembly in 1998 Iowa Acts, chapter 1218, section 32, subsection 2, directed that the Department increase the RCF and IHHRC reimbursement rates to the amounts indicated in these amendments.

The maximum amount of resources to be attributed to a community spouse and the maintenance needs of a community spouse are indexed annually by the consumer price in-

dex. The Department has received confirmation from DHHS that the maximum amount of resources to be attributed to the community spouse has increased from \$80,760 to \$81,960 and the maintenance needs of the community spouse have increased from \$2,019 to \$2,049.

The Council on Human Services adopted these amendments February 10, 1999.

These amendments were previously Adopted and Filed Emergency and published in the December 30, 1998, Iowa Administrative Bulletin as ARC 8582A. Notice of Intended Action to solicit comments on that submission was published in the December 30, 1998, Iowa Administrative Bulletin as ARC 8581A.

These amendments are identical to those published under Notice of Intended Action.

These amendments are intended to implement Iowa Code sections 249.3, 249.4, and 249A.4 and 1998 Iowa Acts, chapter 1218, section 11, subsection 1, and section 32, subsection 2.

These amendments shall become effective April 15, 1999, at which time the Adopted and Filed Emergency amendments are hereby rescinded.

The following amendments are adopted.

ITEM 1. Amend subrule 51.4(1) as follows:

51.4(1) Income. Income of a dependent relative shall be less than \$247 \$251. When the dependent's income is from earnings, an exemption of \$65 shall be allowed to cover work expense.

ITEM 2. Amend rule 441—51.7(249) as follows:

441—51.7(249) Income from providing room and board. In determining profit from furnishing room and board or providing family life home care, \$247 \$251 per month shall be deducted to cover the cost, and the remaining amount treated as earned income.

This rule is intended to implement Iowa Code sections 249.3 and 249.4.

ITEM 3. Amend rule 441—52.1(249) as follows:

Amend subrules 52.1(1) and 52.1(2) as follows:

52.1(1) Protective living arrangement. The following assistance standards have been established for state supplementary assistance for persons living in a protective living arrangement:

Family life home certified under rules in 441—Chapter 111.

\$506.20	\$511.20	care allowance
70.00	71.00	personal allowance
<u>\$576.20</u>	<u>\$582.20</u>	Total

52.1(2) Dependent relative. The following assistance standards have been established for state supplementary assistance for dependent relatives residing in a recipient's home.

a. Aged or disabled client and a dependent relative.....	\$741	\$751
b. Aged or disabled client, eligible spouse, and a dependent relative.....	\$988	\$1002
c. Blind client and a dependent relative.....	\$763	\$773
d. Blind client, aged or disabled spouse, and a dependent relative.....	\$1010	\$1024
e. Blind client, blind spouse, and a dependent relative.....	\$1032	\$1046

## HUMAN SERVICES DEPARTMENT[441](cont'd)

Amend subrule 52.1(3), introductory paragraph, as follows:

**52.1(3) Residential care.** Payment to a recipient in a residential care facility shall be made on a flat per diem rate of ~~\$16.64~~ ~~\$17.05~~ or on a cost-related reimbursement system with a maximum reimbursement per diem rate of ~~\$23.26~~ ~~\$23.83~~. A cost-related per diem rate shall be established for each facility choosing this method of payment according to rule 441—54.3(249).

Further amend subrule 52.1(3), paragraph "a," subparagraph (2), as follows:

(2) Effective ~~January 1, 1998~~ ~~January 1, 1999~~, a ~~\$70~~ ~~\$71~~ allowance to meet personal expenses and Medicaid copayment expenses.

ITEM 4. Amend subrule 75.5(3), paragraph "d," as follows:

d. Method of attribution. The resources attributed to the institutionalized spouse shall be one-half of the documented resources of both the institutionalized and community spouse as of the first moment of the first day of the month of the spouse's first entry to a medical facility. However, if one-half of the resources is less than \$24,000, then \$24,000 shall be protected for the community spouse. Also, when one-half the resources attributed to the community spouse exceeds ~~\$80,760~~ ~~\$81,960~~, the amount over ~~\$80,760~~ ~~\$81,960~~ shall be attributed to the institutionalized spouse. (The maximum limit shall be indexed annually by the consumer price index.)

If the institutionalized spouse has transferred resources to the community spouse under a court order for the support of the community spouse, the amount transferred shall be the amount attributed to the community spouse if it exceeds the specified limits above.

ITEM 5. Amend subrule 75.16(2), paragraph "d," subparagraph (3), as follows:

(3) Needs of spouse. The maintenance needs of the spouse shall be determined by subtracting the spouse's gross income from ~~\$2,019~~ ~~\$2,049~~. (This amount shall be indexed for inflation annually according to the consumer price index.)

However, if either spouse established through the appeal process that the community spouse needs income above ~~\$2,019~~ ~~\$2,049~~, due to exceptional circumstances resulting in significant financial duress, an amount adequate to provide additional income as is necessary shall be substituted.

Also, if a court has entered an order against an institutionalized spouse for monthly income to support the community spouse, then the community spouse income allowance shall not be less than this amount.

ITEM 6. Amend rule 441—177.4(249) as follows:

Amend subrule 177.4(3) as follows:

**177.4(3) Maximum costs.** The maximum cost of service shall be ~~\$447.16~~ ~~\$458.20~~. The provider shall accept the payment made and shall make no additional charges to the recipient or others.

Amend subrule 177.4(7), introductory paragraph, as follows:

**177.4(7) Income for adults.** The gross income of the individual and spouse, living in the home, shall be limited to ~~\$447.16~~ ~~\$458.20~~ per month if one needs care or ~~\$894.32~~ ~~\$916.40~~ if both need care, with the following disregards:

Amend subrule 177.4(8), paragraph "b," introductory statement, as follows:

b. The income of the child shall be limited to ~~\$447.16~~ ~~\$458.20~~ per month with the following disregards:

[Filed 2/10/99, effective 4/15/99]

[Published 3/10/99]

EDITOR'S NOTE: For replacement pages for IAC, see IAC Supplement 3/10/99.

**ARC 8723A**

## HUMAN SERVICES DEPARTMENT[441]

### Adopted and Filed

Pursuant to the authority of Iowa Code section 249A.4, the Department of Human Services hereby amends Chapter 77, "Conditions of Participation for Providers of Medical and Remedial Care," Chapter 78, "Amount, Duration and Scope of Medical and Remedial Services," Chapter 79, "Other Policies Relating to Providers of Medical and Remedial Care," and Chapter 83, "Medicaid Waiver Services," appearing in the Iowa Administrative Code.

The Council on Human Services adopted these amendments February 10, 1999. Notice of Intended Action regarding these amendments was published in the Iowa Administrative Bulletin on December 16, 1998, as **ARC 8544A**.

The following revisions are being made to the Home- and Community-Based Services waiver programs:

- All references to Purchase of Service (P.O.S.) are being removed. The Department is no longer purchasing waiver services under a P.O.S. contract. Contracts are now being developed only for local purchase of services on behalf of counties.

- Nursing care services are redefined for the ill and handicapped waiver to include all nursing tasks recognized by the Iowa Board of Nursing.

- Policy governing consumer-directed attendant care services is revised to clarify that assistance while the consumer is on the job site and the actual cost of transportation are not covered services; that a copy of the Consumer-Directed Attendant Care Agreement shall be attached to the service plan and kept in the record; that the claim form must be signed by the guardian if there is a guardian; that the frequency or intensity of services shall be indicated in the service plan; that consumer-directed attendant care services may not be simultaneously reimbursed with any other HCBS waiver service; and that consumer-directed attendant care services may be provided to a recipient of in-home health-related care services, but not at the same time.

- The limit of 16 weeks of service for the supported employment service of instructional activities on the job is removed for the HCBS MR and brain injury waiver services. The limit of 40 units per week for the MR waiver and 5 units per week for the brain injury waiver remains.

- Policy is revised for the HCBS brain injury waiver to define qualified brain injury professionals and to allow them to provide family counseling and training and to train and supervise staff who implement the plan of behavioral programming. A qualified brain injury professional shall be one of the following who meets the educational and licensure or certification requirements for the profession as required in the state of Iowa and who has two years' experience working with people living with a brain injury: a psychologist; psychiatrist; physician; registered nurse; certified teacher; so-

## HUMAN SERVICES DEPARTMENT[441](cont'd)

cial worker; mental health counselor; physical, occupational, recreational, or speech therapist; or a person with a bachelor of arts or science degree in psychology, sociology, or public health.

- Policy is revised for the HCBS ill and handicapped waiver to require the social worker to establish an interdisciplinary team for the consumer and to complete a service plan prior to services provision and annually thereafter. The requirement that the Human Services Area Administrator sign the service plan is removed.

- The waiver process for allowing persons to request the Division of Medical Services to grant an exception to exceed the monthly cost limit for the level of care is being eliminated as this is duplicative of the exception to policy process already built into the Department's rules at rule 441—1.8(217).

- Policy is amended to clarify that the upper limit for costs of services for all waivers is calculated using the costs for the waiver services only, not all Medicaid expenditures.

- Policy is clarified to provide that if services are not initiated within 180 days of the written notice to the applicant, the slot reverts for use by the next applicant on the waiting list, if applicable.

- Policy is revised for the HCBS MR waiver to require that consumers receive one unit of the required services per quarter, rather than per month.

- Policy is revised for the HCBS brain injury waiver to provide that consumers may receive any waiver service each quarter to qualify for the waiver rather than requiring the consumers to receive specific services.

- Time lines are added for the HCBS MR waiver for determining when a diagnosis of mental retardation needs to be updated.

The following revisions were made to the Notice of Intended Action in response to comments from the public:

The amendments to subparagraphs 77.30(7)"a"(3), 77.33(15)"a"(3), 77.34(8)"a"(3), 77.37(21)"a"(3), and 77.39(24)"a"(3) which would have added guardians to the list of people who may not provide consumer-directed attendant care were removed.

Subrule 78.34(4) was revised to remove the list of approvable nursing tasks and instead to define approvable services as all nursing tasks recognized by the Iowa Board of Nursing.

Subrule 83.2(2), paragraph "a," subparagraph (3), was revised to remove the requirement for the service plan to be signed by the Human Services Area Administrator.

Subrule 83.3(3), paragraph "e," was revised for clarification.

These amendments are intended to implement Iowa Code section 249A.4.

These amendments shall become effective May 1, 1999. The following amendments are adopted.

ITEM 1. Amend subrule 77.30(3), paragraph "b," by rescinding and reserving subparagraph (3).

ITEM 2. Amend rule 441—77.33(249A) as follows:

Amend subrule 77.33(1), paragraph "b," by rescinding and reserving subparagraph (3).

Amend subrule 77.33(11) by rescinding and reserving paragraph "d."

Amend subrule 77.33(15), paragraph "a," subparagraph (3), as follows:

(3) Not the spouse of the consumer or a parent or stepparent of a consumer aged 17 or under.

ITEM 3. Amend subrule 77.34(7), paragraph "b," by rescinding and reserving subparagraph (3).

ITEM 4. Amend rule 441—77.39(249A) as follows:

Amend subrule 77.39(21), introductory paragraph, as follows:

77.39(21) Family counseling and training providers. Family counseling and training providers shall be *one of the following*:

Further amend subrule 77.39(21) by adopting the following new paragraph "d."

d. Providers which are qualified brain injury professionals. A qualified brain injury professional shall be one of the following who meets the educational and licensure or certification requirements for the profession as required in the state of Iowa and who has two years' experience working with people living with a brain injury: a psychologist; psychiatrist; physician; registered nurse; certified teacher; social worker; mental health counselor; physical, occupational, recreational, or speech therapist; or a person with a bachelor of arts or science degree in psychology, sociology, or public health.

Amend subrule 77.39(23), paragraph "a," as follows:

a. Behavior assessment, and development of an appropriate intervention plan, and periodic reassessment of the plan, and training of staff who shall implement the plan must be done by a ~~psychologist or psychiatrist who is professionally trained to assess qualified brain injury professional. Formal assessment of the consumers' intellectual and behavioral functioning and evaluate their adaptive skills must be done by a licensed psychologist or a psychiatrist who is certified by the American Board of Psychiatry.~~

*A qualified brain injury professional is defined in paragraph 77.39(21) "d."*

Further amend subrule 77.39(23), paragraph "b," introductory paragraph, as follows:

b. Implementation of the plan and training and supervision of caregivers, including family members, must be done by behavioral aides who have been trained by ~~the psychologist or psychiatrist~~ *a qualified brain injury professional* with the qualifications described in paragraph 77.39(23)"a," 77.39(21) "d" and who are employees of one of the following:

ITEM 5. Amend subrule 78.13(10), paragraph "a," as follows:

a. Payment may be made to the agency which provided transportation if the agency is certified by the department of transportation, ~~has a purchase of service contract for transportation services with the department of human services,~~ and requests direct payment by submitting Form 625-5297, Claim Order/Claim Voucher, within 90 days after the trip. *Reimbursement for transportation shall be based on a fee schedule by mile or by trip.*

ITEM 6. Amend rule 441—78.34(249A) as follows:

Amend subrule 78.34(4) as follows:

78.34(4) Nursing care services. Nursing care services are services ~~provided by licensed agency nurses to clients in the home which are ordered by and included in the plan of treatment established approved by the physician and which are provided by licensed nurses to consumers in the home and community.~~ The services shall be reasonable and necessary to the treatment of an illness or injury and include: ~~observation; evaluation; teaching; training; supervision; therapeutic exercise; bowel and bladder care; administration of medications; intravenous, hypodermoclysis, and enteral feedings; skin care; preparation of clinical and progress notes; coor-~~

## HUMAN SERVICES DEPARTMENT[441](cont'd)

dination of services; and informing the physician and other personnel of changes in the patient's condition and needs all nursing tasks recognized by the Iowa board of nursing. A unit of service is a visit.

Amend subrule 78.34(7), paragraph "a," subparagraphs (9) and (12), as follows:

(9) ~~Employment support Assistance needed to go to or return from a place of employment. Assistance while the consumer is on the job site and the cost of transportation for the consumer are not included in consumer-directed attendant care services.~~

(12) ~~Transportation essential to the health and welfare of the consumer Assisting or accompanying a consumer in using transportation essential to the health and welfare of the consumer. The cost of the transportation is not included.~~

Further amend subrule 78.34(7), paragraph "g," as follows:

g. The consumer and provider shall complete and sign Form 470-3372, HCBS Consumer-Directed Attendant Care Agreement, ~~when consumer-directed attendant care is part of the consumer's case plan or individual comprehensive plan. A copy of the completed agreement shall be provided to the service worker or case manager prior to the initiation of services attached to the service plan which is signed by the service worker prior to the initiation of services, and kept in the consumer's and department's records.~~

Further amend subrule 78.34(7) by adopting the following new paragraphs "h," "i," "j," "k," and "l."

h. If the consumer has a guardian, the care plan shall address how consumer-directed attendant care services will be monitored to ensure the consumer's needs are being adequately met.

i. If the consumer has a guardian, the guardian shall sign the claim form in place of the consumer, indicating that the service has been provided as presented on the claim.

j. The frequency or intensity of services shall be indicated in the service plan.

k. Consumer-directed attendant care services may not be simultaneously reimbursed with any other HCBS waiver services.

l. Consumer-directed attendant care services may be provided to a recipient of in-home health-related care services, but not at the same time.

ITEM 7. Amend subrule 78.37(15) as follows:

Amend paragraph "a," subparagraphs (9) and (12), as follows:

(9) ~~Employment support Assistance needed to go to or return from a place of employment. Assistance while the consumer is on the job site and the cost of transportation for the consumer are not included in consumer-directed attendant care services.~~

(12) ~~Transportation essential to the health and welfare of the consumer Assisting or accompanying a consumer in using transportation essential to the health and welfare of the consumer. The cost of the transportation is not included.~~

Amend paragraph "g" as follows:

g. The consumer and provider shall complete and sign Form 470-3372, HCBS Consumer-Directed Attendant Care Agreement, ~~when consumer-directed attendant care is part of the consumer's case plan or individual comprehensive plan. A copy of the completed agreement shall be provided to the service worker or case manager prior to the initiation of services attached to the service plan which is signed by the service worker prior to the initiation of services, and kept in the consumer's and department's records.~~

Adopt the following new paragraphs "h," "i," "j," "k," and "l."

h. If the consumer has a guardian, the care plan shall address how consumer-directed attendant care services will be monitored to ensure the consumer's needs are being adequately met.

i. If the consumer has a guardian, the guardian shall sign the claim form in place of the consumer, indicating that the service has been provided as presented on the claim.

j. The frequency or intensity of services shall be indicated in the service plan.

k. Consumer-directed attendant care services may not be simultaneously reimbursed with any other HCBS waiver services.

l. Consumer-directed attendant care services may be provided to a recipient of in-home health-related care services, but not at the same time.

ITEM 8. Amend subrule 78.38(8) as follows:

Amend paragraph "a," subparagraphs (9) and (12), as follows:

(9) ~~Employment support Assistance needed to go to or return from a place of employment. Assistance while the consumer is on the job site and the cost of transportation for the consumer are not included in consumer-directed attendant care services.~~

(12) ~~Transportation essential to the health and welfare of the consumer Assisting or accompanying a consumer in using transportation essential to the health and welfare of the consumer. The cost of the transportation is not included.~~

Amend paragraph "g" as follows:

g. The consumer and provider shall complete and sign Form 470-3372, HCBS Consumer-Directed Attendant Care Agreement, ~~when consumer-directed attendant care is part of the consumer's case plan or individual comprehensive plan. A copy of the completed agreement shall be provided to the service worker or case manager prior to the initiation of services attached to the service plan which is signed by the service worker prior to the initiation of services, and kept in the consumer's and department's records.~~

Adopt the following new paragraphs "h," "i," "j," "k," and "l."

h. If the consumer has a guardian, the care plan shall address how consumer-directed attendant care services will be monitored to ensure the consumer's needs are being adequately met.

i. If the consumer has a guardian, the guardian shall sign the claim form in place of the consumer, indicating that the service has been provided as presented on the claim.

j. The frequency or intensity of services shall be indicated in the service plan.

k. Consumer-directed attendant care services may not be simultaneously reimbursed with any other HCBS waiver services.

l. Consumer-directed attendant care services may be provided to a recipient of in-home health-related care services, but not at the same time.

ITEM 9. Amend rule 441—78.41(249A) as follows:

Amend subrule 78.41(7), paragraph "h," subparagraph (2), as follows:

(2) A maximum of 40 units are available per week for 16 weeks (640 units).

Amend subrule 78.41(8), paragraph "a," subparagraphs (9) and (12), as follows:

(9) ~~Employment support Assistance needed to go to or return from a place of employment. Assistance while the~~

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consumer is on the job site and the cost of transportation for the consumer are not included in consumer-directed attendant care services.

(12) ~~Transportation essential to the health and welfare of the consumer~~ *Assisting or accompanying a consumer in using transportation essential to the health and welfare of the consumer. The cost of the transportation is not included.*

Further amend subrule 78.41(8), paragraph "g," as follows:

g. The consumer and provider shall complete and sign Form 470-3372, HCBS Consumer-Directed Attendant Care Agreement, ~~when consumer-directed attendant care is part of the consumer's case plan or individual comprehensive plan.~~ A copy of the completed agreement shall be ~~provided to the service worker or case manager prior to the initiation of services attached to the service plan which is signed by the service worker prior to the initiation of services, and kept in the consumer's and department's records.~~

Further amend subrule 78.41(8) by adopting the following new paragraphs "h," "i," "j," "k," and "l."

h. If the consumer has a guardian, the care plan shall address how consumer-directed attendant care services will be monitored to ensure the consumer's needs are being adequately met.

i. If the consumer has a guardian, the guardian shall sign the claim form in place of the consumer, indicating that the service has been provided as presented on the claim.

j. The frequency or intensity of services shall be indicated in the service plan.

k. Consumer-directed attendant care services may not be simultaneously reimbursed with any other HCBS waiver services.

l. Consumer-directed attendant care services may be provided to a recipient of in-home health-related care services, but not at the same time.

ITEM 10. Amend rule 441—78.43(249A) as follows:

Amend subrule 78.43(4), paragraph "g," subparagraph (2), as follows:

(2) A maximum of five units per week are available ~~for a maximum of 16 weeks (80 units).~~

Amend subrule 78.43(13), paragraph "a," subparagraphs (9) and (12), as follows:

(9) ~~Employment support~~ *Assistance needed to go to or return from a place of employment. Assistance while the consumer is on the job site and the cost of transportation for the consumer are not included in consumer-directed attendant care services.*

(12) ~~Transportation essential to the health and welfare of the consumer~~ *Assisting or accompanying a consumer in using transportation essential to the health and welfare of the consumer. The cost of the transportation is not included.*

Further amend subrule 78.43(13), paragraph "g," as follows:

g. The consumer and provider shall complete and sign Form 470-3372, HCBS Consumer-Directed Attendant Care Agreement, ~~when consumer-directed attendant care is part of the consumer's case plan or individual comprehensive plan.~~ A copy of the completed agreement shall be ~~provided to the service worker or case manager prior to the initiation of services attached to the service plan which is signed by the service worker prior to the initiation of services, and kept in the consumer's and department's records.~~

Further amend subrule 78.43(13) by adopting the following new paragraphs "h," "i," "j," "k," and "l."

h. If the consumer has a guardian, the care plan shall address how consumer-directed attendant care services will be monitored to ensure the consumer's needs are being adequately met.

i. If the consumer has a guardian, the guardian shall sign the claim form in place of the consumer, indicating that the service has been provided as presented on the claim.

j. The frequency or intensity of services shall be indicated in the service plan.

k. Consumer-directed attendant care services may not be simultaneously reimbursed with any other HCBS waiver services.

l. Consumer-directed attendant care services may be provided to a recipient of in-home health-related care services, but not at the same time.

ITEM 11. Amend subrule 79.1(2), Basis of reimbursement provider categories of "HCBS AIDS/HIV adult day care waiver service providers," "HCBS brain injury respite care—facility care—foster group care waiver service providers," "HCBS elderly adult day care and transportation waiver service providers," "HCBS ill and handicapped adult day care and respite care—out-of-home—foster group care waiver service providers," and "HCBS MR respite care—facility care—foster group care and supported employment—initial instructional activities on job waiver service providers," as follows:

<u>Provider category</u>	<u>Basis of reimbursement</u>	<u>Upper limit</u>
HCBS AIDS/HIV waiver service providers, including: 7. Adult day care	Prospective reimbursement for P.O.S. providers. Fee schedule for others.	P.O.S. contract rate or veterans Veterans administration contract rate or \$20 per half day, \$40 per full day, or \$60 per extended day if no P.O.S. or veterans administration contract.
HCBS brain injury waiver service providers, including: 2. Respite care providers, including: Facility care: Foster group care	Prospective reimbursement. See 441—185.106(234)	P.O.S. contract Rehabilitative treatment and supportive services rate

## HUMAN SERVICES DEPARTMENT[441](cont'd)

HCBS elderly waiver service providers, including:			Foster group care	Prospective reimbursement. See 441—185.106(234)	<del>P.O.S. contract</del> Rehabilitative treatment and supportive services rate	
1. Adult day care	Prospective reimbursement for P.O.S. providers. Fee schedule for others.	<del>P.O.S. contract rate or veterans</del> Veterans administration contract rate or \$20 per half day, \$40 per full day, or \$60 per extended day if no P.O.S. veterans administration contract.	HCBS MR waiver service providers, including:	2. Respite care providers, including: Facility care:	Prospective reimbursement. See 441—185.106(234)	<del>P.O.S. contract</del> Rehabilitative treatment and supportive services rate
11. Transportation providers	Fee schedule	State per mile rate for regional transit providers, or <del>P.O.S. rate for P.O.S. providers,</del> or rate established by area agency on aging. <del>Reimbursement will be at the lowest cost service rate consistent with the consumer's needs.</del>	3. Supported employment	b. Initial instructional activities on the job	Retrospectively limited prospective rates. See 79.1(15)	\$15.46 per hour. Maximum of 40 units per week, limit 16 weeks, 640 units
HCBS ill and handicapped waiver service providers, including:			ITEM 12. Amend subrule 83.2(2), paragraph "a," as follows:	a. <del>The county social worker shall perform an assessment of the person's needs and determine the availability and appropriateness of services. The consumer shall have a service plan approved by the department which is developed by the county social worker as identified by the county of residence. This service plan must be completed prior to services provision and annually thereafter.</del>	The social worker shall establish the interdisciplinary team for the consumer and, with the team, identify the consumer's need for service based on the consumer's needs and desires as well as the availability and appropriateness of services using the following criteria:	
3. Adult day care	Prospective reimbursement for P.O.S. providers. Fee schedule for others.	<del>P.O.S. contract rate or veterans</del> Veterans administration contract rate or \$20 per half day, \$40 per full day, or \$60 per extended day if no P.O.S. or veterans administration contract.	(1) This assessment service plan shall be based, in part, on information in the completed Home- and Community-Based Services Assessment or Reassessment, Form SS-1644 470-0659. Form SS-1644 470-0659 is completed annually, or more frequently upon request or when there are changes in the client's condition.	(2) <del>Case</del> Service plans for persons aged 20 or under shall be developed or reviewed after the child's individual education plan and EPSDT plan, if applicable, are developed so as not to replace or duplicate services covered by those plans.	(3) Those <del>case</del> service plans for persons aged 20 or under which include <i>home health</i> , <i>homemaker</i> , <i>nursing</i> , or <i>respite services beyond intermittent</i> shall not be approved until a home health agency has made a request to cover the <del>client's</del> consumer's service needs through EPSDT and the plan is approved (signed and dated) by the human services area administrator.	
4. Respite care providers, including: Out-of-home:			Further amend subrule 83.2(2) by rescinding paragraph "b" and adopting the following <u>new</u> paragraph "b" in lieu thereof:	b. The total monthly cost of the ill and handicapped waiver services shall not exceed the established aggregate monthly cost for level of care as follows:		

HUMAN SERVICES DEPARTMENT[441](cont'd)

<u>Skilled level of care</u>	<u>Nursing level of care</u>	<u>ICF/MR</u>
\$2,480	\$852	\$3,019

ITEM 13. Amend rule 441—83.3(249A) as follows:  
Amend subrule 83.3(2), paragraph “b,” by adopting the following **new** subparagraph (3).

(3) Once a payment slot is assigned, written notice shall be given to the applicant, and the payment slot shall be held for 180 days to arrange services unless the person has been determined ineligible for the program. If services are not initiated within 180 days of the written notice to the applicant, the slot reverts for use by the next applicant on the waiting list, if applicable. The applicant must reapply for a new slot.

Amend subrule 83.3(3) by adopting the following **new** paragraph “e.”

e. A consumer may be enrolled in only one waiver program at a time. Costs for waiver services are not reimbursable while the consumer is in a medical institution (hospital or nursing facility) or residential facility. Services may not be simultaneously reimbursed for the same time period as Medicaid or other Medicaid waiver services.

ITEM 14. Amend subrule 83.22(2) by rescinding paragraph “b” and inserting the following **new** paragraph “b” in lieu thereof:

b. The total monthly cost of the elderly waiver services shall not exceed the established monthly cost of the level of care. Aggregate monthly costs are limited as follows:

<u>Skilled level of care</u>	<u>Nursing level of care</u>
\$2,480	\$852

ITEM 15. Amend subrule 83.42(2) by rescinding paragraph “b” and adopting the following **new** paragraph “b” in lieu thereof:

b. The total monthly cost of the AIDS/HIV waiver services shall not exceed the established aggregate monthly cost for level of care. The monthly cost of AIDS/HIV waiver services cannot exceed the established limit of \$1650.

ITEM 16. Amend rule 441—83.61(249A) as follows:  
Amend subrule 83.61(1) by rescinding paragraph “a” and adopting the following **new** paragraph “a” in lieu thereof:  
a. Have a primary diagnosis of mental retardation which shall be updated based on the following time lines:

Age	Initial application to HCBS MR waiver program	Recertification for persons with an IQ range of 54 or below, moderate range of MR or below	Recertification for persons with an IQ range of 55 or above, diagnosis of mild or unspecified range of MR
0 through 17 years	Psychological documentation within three years of the application date substantiating a diagnosis of mental retardation or mental disability equivalent to mental retardation	After the initial psychological evaluation which listed the consumer in this range, substantiate a diagnosis of mental retardation or a diagnosis of mental disability equivalent to mental retardation every six years and when a significant change occurs	After the initial psychological evaluation which listed the consumer in this range, substantiate a diagnosis of mental retardation or mental disability equivalent to mental retardation every three years and when a significant change occurs
18 through 21 years	<ul style="list-style-type: none"> <li>• Psychological documentation substantiating diagnosis of mental retardation or a diagnosis of mental disability equivalent to mental retardation within three years prior to age 18, or</li> <li>• Diagnosis of mental retardation or mental disability equivalent to mental retardation made before age 18 and current psychological documentation substantiating a diagnosis of mental retardation or a diagnosis of mental disability equivalent to mental retardation</li> </ul>	Psychological documentation substantiating a diagnosis of mental retardation or a diagnosis of mental disability equivalent to mental retardation every ten years and whenever a significant change occurs	Psychological documentation substantiating a diagnosis of mental retardation or a diagnosis of mental disability equivalent to mental retardation every five years and whenever a significant change occurs

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Age	Initial application to HCBS MR waiver program	Recertification for persons with an IQ range of 54 or below, moderate range of MR or below	Recertification for persons with an IQ range of 55 or above, diagnosis of mild or unspecified range of MR
22 years and above	Diagnosis made before age 18 and current psychological documentation substantiating a diagnosis of mental retardation or a diagnosis of mental disability equivalent to mental retardation, if the last testing date was (1) more than five years ago for consumers with an IQ range of 55 or above or with a diagnosis of mild mental retardation, or (2) more than ten years ago for consumers with an IQ range of 54 or below or with a diagnosis of moderate MR or below	Psychological documentation substantiating a diagnosis of mental retardation or a diagnosis of mental disability equivalent to mental retardation every ten years and whenever a significant change occurs	Psychological documentation substantiating a diagnosis of mental retardation or a diagnosis of mental disability equivalent to mental retardation every five years and whenever a significant change occurs

Further amend subrule **83.61(1)** as follows:

Amend paragraph "e" as follows:

e. Have service needs that can be met by this waiver program. At a minimum, an adult must receive one unit of either consumer-directed attendant care, supported community living, respite, or supported employment service per ~~month~~ *calendar quarter*. Children shall, at a minimum, receive one unit of either consumer-directed attendant care, respite service or supported community living service per ~~month~~ *calendar quarter* under this program.

Amend subrule **83.61(2)**, paragraph "d," as follows:

d. Services shall not exceed the number of maximum units established for each service. ~~except as follows:~~

(1) ~~Requests to exceed unit maximums shall be granted only for the respite service unit maximum.~~

(2) ~~Requests to exceed respite unit maximums require special review by the administrator of the division of medical services' designee for children and state cases, or the county board of supervisors' designee for adults and, based on a written determination, may be reduced or denied as not cost-effective.~~

Amend subrule **83.61(4)**, paragraph "a," subparagraph (4), as follows:

(4) Once assigned, *written notice shall be given to the applicant, and the payment slot shall be held for the applicant for 180 days to arrange services unless the person has been determined ineligible for the program. If the slot has not been used in 180 days, it reverts to the county services are not initiated within 180 days of the date on the county department's written notice to the applicant, the slot reverts for use by the next applicant on the waiting list, if applicable.* The applicant must reapply for a new slot.

Further amend subrule **83.61(4)**, paragraph "b," subparagraph (2), as follows:

(2) Persons who do not fall within the available slots shall have their application rejected, but their names shall be maintained on the waiting list. As slots become available, persons shall be selected from the waiting list to maintain the number of approved persons on the program based on their order on the waiting list. The county central point of coordination administrator for adults and the division of medical services for children and ~~state cases~~ *adults with state case status* shall contact the county department when a slot becomes available. ~~The county department shall contact the applicant regarding the availability of a slot. If services are not initiated within 180 days of the date on the county de-~~

*partment's written notice to the consumer, the slot reverts for use by the next applicant on the waiting list, if applicable.*

ITEM 17. Amend subrule **83.82(1)**, paragraph "h," as follows:

h. At a minimum, receive ~~case management services a waiver service each quarter, and use at least one unit of respite or supported community living services each quarter under this program.~~

ITEM 18. Amend subrule **83.87(4)** as follows:

**83.87(4)** Case file. The Medicaid case manager must ensure that the consumer case file contains the consumer's ICP, ~~the department's, or and, if the county is voluntarily participating, the county's final approval of service costs and the following completed forms:~~

a. Eligibility for Medicaid Waiver, Form ~~RS-1238 470-0563.~~

b. Home- and Community-Based Service Report, Form ~~SS-1645 470-0660.~~

c. Medicaid Home- and Community-Based Payment Agreement, Form ~~MA-2171 470-0379.~~

d. *Consumer Data Entry, Form 470-3280.*

[Filed 2/10/99, effective 5/1/99]

[Published 3/10/99]

EDITOR'S NOTE: For replacement pages for IAC, see IAC Supplement 3/10/99.

**ARC 8726A**

## HUMAN SERVICES DEPARTMENT[441]

**Adopted and Filed**

Pursuant to the authority of Iowa Code section 514I.5(8) and 1998 Iowa Acts, chapter 1196, section 14, the Department of Human Services hereby amends Chapter 86, "Healthy and Well Kids in Iowa (HAWK-I) Program," appearing in the Iowa Administrative Code.

Rules implementing the HAWK-I program were adopted by the HAWK-I Board and were published in the Iowa Administrative Bulletin on January 13, 1999, as **ARC 8615A** to be effective January 1, 1999. These rules were noticed as

## HUMAN SERVICES DEPARTMENT[441](cont'd)

**ARC 8450A** in the November 4, 1998, Iowa Administrative Bulletin.

Subrules 86.15(7) and 86.15(8) of those rules established the appeal process for health plans. Subrule 86.15(7) established procedures which must be followed by the health plans and subrule 86.15(8) provided that an enrollee shall exhaust the established grievance procedure of the participating health plan before appealing the issue to the Department in accordance with 441—Chapter 7.

Public comments were received on those subrules from client advocates and from health plans. Client advocates felt that enrollees should be able to appeal directly to the Department and wanted clarification of which issues can be appealed. They asked that expedited time frames be established for emergency medical conditions. Health plans felt that there should be no further appeal to the Department on service and medical necessity issues and wanted the 30-day time frame for resolution of appeals changed to 60 days.

The Department reviewed both points of view and believes that the HAWK-I program is to operate as a private insurance program, rather than a governmental entitlement program, and that there should be no appeal of coverage issues to the Department. The time limit for appeals should be extended to 60 days.

Since these were substantive changes from the rules that were published under Notice of Intended Action as **ARC 8450A** in the November 4, 1998, Iowa Administrative Bulletin, the Department revised these subrules in a separate rule making using the emergency authority set forth in 1998 Iowa Acts, chapter 1196, section 14, and also placed this rule making under Notice of Intended Action to obtain public comments. See below.

The Department has also revised subrule 86.15(7) to clarify what may be appealed, to require the health plan to establish time frames appropriate to the situations for emergency medical conditions, and to require the decision on the appeal be made by a physician or clinical peer not previously involved in the case. Other changes are made throughout the rules to reflect changes in terminology.

These amendments were previously Adopted and Filed Emergency and published in the January 13, 1999, Iowa Administrative Bulletin as **ARC 8617A**. Notice of Intended Action to solicit comments on that submission was published in the January 13, 1999, Iowa Administrative Bulletin as **ARC 8616A**.

These amendments are identical to those published under Notice of Intended Action.

The HAWK-I Board adopted these amendments February 15, 1999.

These amendments are intended to implement 1998 Iowa Acts, chapter 1196.

These amendments shall become effective May 1, 1999, at which time the Adopted and Filed Emergency amendments are hereby rescinded.

The following amendments are adopted.

ITEM 1. Amend rule **441—86.1(77GA, ch1196)** by deleting the definition of "Grievance."

ITEM 2. Amend rule **441—86.15(77GA, ch1196)** as follows:

Amend subrule **86.15(6)**, paragraph "c," subparagraph (1), as follows:

(1) A current member handbook that fully explains the services available, how and when to obtain them, and special factors applicable to the HAWK-I enrollees. At a minimum the handbook shall include covered services, network providers, exclusions, emergency services procedures, 24-hour

toll-free number for certification of services, daytime number to call for assistance, ~~grievance~~ *appeal* procedures, *enrollee rights and responsibilities*, and definitions of terms.

Amend subrule 86.15(7) as follows:

**86.15(7) Conflict management system Appeal process.** The participating health plan shall have a written procedure by which enrollees may ~~express grievances, complaints, concerns, or recommendations, either individually or as a class appeal issues concerning the health care services provided through providers contracted with the plan~~ and which:

a. Is approved by the department prior to use.  
b. Acknowledges receipt of a ~~grievance~~ *the appeal* to the ~~grievant enrollee~~.

c. ~~Sets time frames for resolution including emergency procedures which are appropriate to the nature of the grievance and which require that all grievances be resolved within 30 days.~~ *Establishes time frames which ensure that appeals be resolved within 60 days, except for appeals which involve emergency medical conditions, which shall be resolved within time frames appropriate to the situations.*

d. Ensures the participation of persons with authority to ~~require~~ *take* corrective action.

e. ~~Includes at least one level of appeal.~~ *Ensures that the decision be made by a physician or clinical peer not previously involved in the case.*

f. Ensures the confidentiality of the ~~grievant enrollee~~.

g. Ensures issuance of a ~~departmentally approved notice of written decision to the enrollee for each adverse action.~~ *These notices appeal which shall contain the enrollee's appeal rights and shall contain an adequate explanation of the action taken and the reason for the decision.*

h. Maintains a log of the ~~grievances and appeals~~ which is made available *to the department at the department's its* request.

i. Ensures that the participating health plan's written ~~grievance appeal~~ procedures be provided to each newly covered enrollee.

j. Requires that the participating health plan make quarterly reports to the department summarizing ~~grievances appeals~~ and resolutions.

Rescind and reserve subrule **86.15(8)**.

Amend subrule **86.15(9)**, paragraph "b," subparagraphs (2) and (6), as follows:

(2) Information regarding the plan's ~~conflict management system appeals process~~.

(6) Time-specific reports which define activity for child health care, ~~grievances appeals~~, and other designated activities which may, at the department's discretion, vary among plans, depending on the services covered and other differences.

[Filed 2/17/99, effective 5/1/99]

[Published 3/10/99]

EDITOR'S NOTE: For replacement pages for IAC, see IAC Supplement 3/10/99.

**ARC 8724A****HUMAN SERVICES  
DEPARTMENT[441]****Adopted and Filed**

Pursuant to the authority of Iowa Code section 234.6, the Department of Human Services hereby amends Chapter 170, "Child Day Care Services," appearing in the Iowa Administrative Code.

The Council on Human Services adopted this amendment February 10, 1999. Notice of Intended Action regarding this amendment was published in the Iowa Administrative Bulletin on December 16, 1998, as **ARC 8543A**.

This amendment revises policy governing the prioritization of persons on waiting lists for state child care assistance to reflect the exact legislative language as set forth in 1998 Iowa Acts, chapter 1218, section 12, subsection 4. This revision is being made in response to the Administrative Rules Review Committee. Currently there are no waiting lists for state child care assistance.

This amendment is identical to that published under Notice of Intended Action.

This amendment is intended to implement Iowa Code section 234.6 and 1998 Iowa Acts, chapter 1218, section 12, subsection 4.

This amendment shall become effective May 1, 1999.

The following amendment is adopted.

Amend subrule **170.2(3)**, paragraph "a," as follows:

a. Families with an income at or below 100 percent of the federal poverty guidelines and in which the parents level whose members are employed at least 28 hours per week, or are and parents with a family income at or below 100 percent of the federal poverty level who are under the age of 21 and are participating in an educational program leading to a high school diploma or equivalent.

[Filed 2/10/99, effective 5/1/99]

[Published 3/10/99]

EDITOR'S NOTE: For replacement pages for IAC, see IAC Supplement 3/10/99.

**ARC 8741A****NATURAL RESOURCE  
COMMISSION[571]****Adopted and Filed**

Pursuant to the authority of Iowa Code subsection 455A.5(6), the Natural Resource Commission hereby amends Chapter 15, "General License Regulations," Iowa Administrative Code.

These amendments provide for a specific licensing process for the Department to issue free lifetime fishing licenses to persons who have severe mental or physical disabilities and correct Iowa Code references in Items 1 and 3.

Notice of Intended Action was published in the Iowa Administrative Bulletin on December 2, 1998, as **ARC 8528A**. No comments were received during the comment period or

at the public hearing. There are no changes from the Notice of Intended Action.

These amendments are intended to implement Iowa Code section 483A.24(9).

These amendments will become effective April 14, 1999. The following amendments are adopted.

ITEM 1. Amend subrule 15.7(1) as follows:

**15.7(1) Purpose.** Pursuant to Iowa Code subsection 483A.24(17) (14), the department of natural resources will issue a free annual combination hunting and fishing license to low-income persons who meet the age status or permanently disabled status as defined.

ITEM 2. Amend 571—Chapter 15 by adopting the following new rule and renumbering existing rules **15.8(483A)** through **15.11(483A)** as **15.9(483A)** through **15.12(483A)**:

**571—15.8(483A) Free lifetime fishing license for persons who have severe physical or mental disabilities.**

**15.8(1) Purpose.** Pursuant to Iowa Code subsection 483A.24(9), the department of natural resources will issue a free lifetime fishing license to Iowa residents 16 or more years of age who have severe mental or physical disabilities who meet the definitions of "Severe mental disability" and "Severe physical disability" in 15.8(2).

**15.8(2) Definitions.** For the purposes of this rule, the following definitions apply:

"Severe mental disability" means a person who has severe, chronic conditions in all of the following areas which:

1. Are attributable to a mental impairment or combination of mental and physical impairments;
2. Are likely to continue indefinitely;
3. Result in substantial functional limitations in three or more of the following areas of major life activities: self-care, receptive and expressive language, learning, mobility, self-direction, capacity for independent living, or economic self-sufficiency; and

4. Reflect the person's need for a combination and sequence of services which are of lifelong or an extended duration and are individually planned and coordinated.

"Severe physical disability" means a disability that limits or impairs the person's ability to walk under any of the following circumstances:

1. The person cannot walk 200 feet without stopping to rest.

2. The person cannot walk without the use of, or assistance from, a brace, cane, crutch, another person, prosthetic device, wheelchair, or other assistive device.

3. The person is restricted by lung disease to such an extent that the person's forced expiratory volume for one second, when measured by spirometry, is less than one liter, or the arterial oxygen tension is less than 60 mm/hg on room air at rest.

4. The person must use portable oxygen.

5. The person has a cardiac condition to the extent that the person's functional limitations are classified in severity as Class 3 or Class 4 according to standards set by the American Heart Association.

- Class 3—Persons with cardiac disease resulting in marked limitation of physical activity. The person is comfortable at rest, but less than ordinary activity causes fatigue, palpitation, dyspnea, or anginal pain.

- Class 4—Persons with cardiac disease resulting in inability to carry on any physical activity without discomfort. Symptoms of heart failure or the anginal syndrome may be

## NATURAL RESOURCE COMMISSION[571](cont'd)

present even at rest. If any physical activity is undertaken, discomfort is increased.

6. The person is severely limited in the person's ability to walk due to an arthritic, neurological, or orthopedic condition.

**15.8(3) Procedure.** Each person shall apply to the department of natural resources for a license as follows:

a. Application shall be made on a form provided by the department and shall include the name, address, home telephone number, height, weight, eye and hair color, date of birth, and gender of the applicant.

b. The application shall be signed and certified by the applicant's attending physician and, based upon the criteria listed in this rule, declare that the applicant has a severe mental or physical disability.

ITEM 3. Amend renumbered subrule 15.11(3) as follows:

**15.11(3) Regulations apply to military personnel.** With the exception of the license requirement exemption set forth in Iowa Code section 483A.24(9)(6), all hunting and fishing regulations shall apply to active duty military personnel.

[Filed 2/19/99, effective 4/14/99]  
[Published 3/10/99]

EDITOR'S NOTE: For replacement pages for IAC, see IAC Supplement 3/10/99.

**ARC 8750A****NATURAL RESOURCE  
COMMISSION[571]****Adopted and Filed**

Pursuant to the authority of 1998 Iowa Acts, chapter 1219, section 10, the Natural Resource Commission hereby adopts amendments to Chapter 29, "Local Recreation Infrastructure Grants Program," Iowa Administrative Code.

These rules provide for the granting of funds to cities, counties, organizations and associations for the restoration or construction of recreational complexes and facilities. The amendments consolidate the existing eight criteria under which applications are evaluated and scored into six criteria. Additionally, the amendments clarify that unsuccessful applications will be returned to applicants only when requested.

Notice of Intended Action was published December 30, 1998, as **ARC 8599A**. A public hearing was held on January 19, 1999, with no written or oral comments received on the amendments. There are no changes from the Notice of Intended Action.

These amendments are intended to implement Iowa Code section 8.57(5c) and 1998 Iowa Acts, chapter 1219, section 10.

These amendments will become effective April 14, 1999. The following amendments are adopted.

ITEM 1. Amend subrule 29.7(4) as follows:

**29.7(4) Application rating system.** The committee will apply a numerical rating system to each grant application which is considered for fund assistance. The criteria, with a weight factor for each, shall include the following:

a. Public demand or need—weight factor of 2.

- b. Quality of site or project—weight factor of 3.
  - c. Urgency of proposed project—weight factor of 2.
  - d. Multiple benefits provided, *including economic benefits*—weight factor of 2 3.
  - e. ~~Relationship to statewide plans/priorities—weight factor of 1.~~
  - f. Conformance with local/regional *and statewide* plans—weight factor of 2.
  - g. ~~Economic benefits to local economies—weight factor of 1.~~
  - h. f. Geographic distribution—weight factor of 1.
- Each criterion shall be given a score from 1 to 10, which is then multiplied by the weight factor.

ITEM 2. Amend rule 571—29.9(8) as follows:

**571—29.9(8) Applications not approved for funding.** Applications which have been considered but not approved for immediate funding or placed on the reserve list shall be returned to the applicants *if requested*.

ITEM 3. Amend **571—Chapter 29**, implementation sentence, as follows:

These rules are intended to implement Iowa Code section 8.57(5c) and 1998 Iowa Acts, chapter 1219, section 10.

ITEM 4. Amend **571—Chapter 29**, parenthetical implementation statutes, by adding "77GA, ch1219".

[Filed 2/19/99, effective 4/14/99]  
[Published 3/10/99]

EDITOR'S NOTE: For replacement pages for IAC, see IAC Supplement 3/10/99.

**ARC 8745A****NATURAL RESOURCE  
COMMISSION[571]****Adopted and Filed**

Pursuant to the authority of Iowa Code subsection 455A.5(6), the Natural Resource Commission hereby amends Chapter 39, "Boating Passenger Capacity," Iowa Administrative Code.

These amendments consist strictly of wording changes requested by the United States Coast Guard. These changes will not alter the original intent of the rules.

Notice of Intended Action was published in the Iowa Administrative Bulletin on December 2, 1998, as **ARC 8532A**. No comments were received during the comment period or at the public hearing. There are no changes from the Notice of Intended Action.

These amendments are intended to implement Iowa Code section 462A.3.

These amendments will become effective April 14, 1999. The following amendments are adopted.

ITEM 1. Amend rule 571—39.1(462A) as follows:

**571—39.1(462A) U.S. Coast Guard assigned capacity rating.** In the registration of vessels for which the a U.S. Coast Guard ~~has assigned a capacity rating in whole persons to that vessel, has been assigned~~ as evidenced by an official a U.S. Coast Guard capacity plate affixed to the vessel, that capacity shall be recognized as the registration capacity.

NATURAL RESOURCE COMMISSION[571](cont'd)

ITEM 2. Amend rule 571—39.2(462A) as follows:

**571—39.2(462A) Vessels assigned a capacity rating by the manufacturer.** In the registration of vessels for which an official U.S. Coast Guard capacity rating in whole persons has not been assigned but a plate has been affixed to the vessel containing capacity information, in whole persons, furnished by the boating industry association, national marine manufacturer association or any similar organization, that capacity shall be recognized as the registration capacity.

[Filed 2/19/99, effective 4/14/99]  
 [Published 3/10/99]

EDITOR'S NOTE: For replacement pages for IAC, see IAC Supplement 3/10/99.

**ARC 8742A**

**NATURAL RESOURCE COMMISSION[571]**

**Adopted and Filed**

Pursuant to the authority of Iowa Code subsection 455A.5(6), the Natural Resource Commission hereby amends Chapter 94, "Nonresident Deer Hunting," Iowa Administrative Code.

These amendments increase the number of nonresident deer permits, restrict the number of bow licenses to be issued, and increase the nonresident license fee as required by legislation passed by the 1998 General Assembly.

Notice of Intended Action was published in the Iowa Administrative Bulletin on December 2, 1998, as **ARC 8530A**. No public comments were received during the public comment period or at the public hearing. The final adopted amendments are unchanged from the Notice of Intended Action.

These amendments are intended to implement Iowa Code sections 481A.38, 483A.1 and 483A.8.

These amendments will become effective April 14, 1999. The following amendments are adopted.

ITEM 1. Amend rule 571—94.1(483A), introductory paragraph, as follows:

**571—94.1(483A) Licenses.** Every hunter must have in possession a valid deer license and ~~a valid habitat stamp~~ *proof that the hunter has paid the current year's wildlife habitat fee* when hunting, possessing, or transporting deer. No person, while hunting deer, shall carry or have in possession any license or transportation tag issued to another person. No person shall obtain more than one nonresident deer hunting license.

ITEM 2. Amend rule 571—94.6(483A) as follows:

**571—94.6(483A) License quotas.** A limited number of deer licenses will be issued in zones as follows:

**94.6(1) Zone license quotas.** Nonresident license quotas are as follows:

	Any Sex		Antlerless
	All Methods	Bow	
a. Zone 1.	200	240	84
b. Zone 2.	200	240	84
c. Zone 3.	500	600	210

d. Zone 4.	1000	1200	420
e. Zone 5.	1250	1500	525
f. Zone 6.	650	780	273
g. Zone 7.	300	360	126
h. Zone 8.	200	240	84
i. Zone 9.	500	600	210
j. Zone 10.	200	240	84
<i>Total</i>	<i>6000</i>	<i>2100</i>	<i>1500 statewide</i>

**94.6(2) Quota applicability.** The license quota issued for each zone will be the quota for all bow, regular gun and special muzzleloader licenses combined. No more than 5,000 6,000 any sex licenses will be issued for all methods of take combined, for the entire state. *Of the 6,000 licenses, no more than 35 percent in any zone can be bow licenses. A maximum of 1,500 antlerless-only licenses, regardless of weapon, will be issued for the entire state.*

ITEM 3. Amend rule 571—94.8(483A) as follows:

**571—94.8(483A) Application procedures.** All applications for nonresident deer hunting licenses shall be made on forms provided by the department of natural resources and returned to the department of natural resources office in Des Moines, Iowa. No one shall submit more than one application. Applications for nonresident deer hunting licenses must be accompanied by the appropriate license fee. The nonresident license fee shall be ~~\$110~~ *\$150.50*. Party applications with no more than four individuals will be accepted. Applications received in the natural resources office in Des Moines, Iowa, by 4:30 p.m. on the second Friday in June will be processed. If applications received are in excess of the license quota for any hunting zone, a drawing will be conducted to determine which applicants shall receive licenses. If licenses are still available in any zone, licenses will be issued as applications are received until quotas are filled or the last Friday in September, whichever occurs first. Any incomplete or improperly completed application or any application not meeting the above conditions will not be considered as a valid application.

The department may develop media/telecommunication options that would allow for additional methods of obtaining a deer license. Methods and deadlines may be determined by the department as a part of the alternative methods developed.

[Filed 2/19/99, effective 4/14/99]  
 [Published 3/10/99]

EDITOR'S NOTE: For replacement pages for IAC, see IAC Supplement 3/10/99.

**ARC 8772A**

**PHARMACY EXAMINERS BOARD[657]**

**Adopted and Filed**

Pursuant to the authority of Iowa Code sections 135C.33, 147.76, and 155A.13, the Board of Pharmacy Examiners hereby amends Chapter 6, "General Pharmacy Licenses," Chapter 7, "Hospital Pharmacy Licenses," and Chapter 19,

## PHARMACY EXAMINERS BOARD[657](cont'd)

"Nonresident Pharmacy Licenses," Iowa Administrative Code.

The amendments direct that pharmacies, before hiring anyone to provide in-home patient care services, complete a criminal history and adult abuse record check pursuant to Iowa Code section 135C.33.

Notice of Intended Action was published in the October 21, 1998, Iowa Administrative Bulletin as ARC 8413A. References to 1998 Iowa Acts, House File 2275, which amended Iowa Code section 135C.33 have been deleted.

The amendments were approved during the February 2, 1999, meeting of the Board of Pharmacy Examiners and will become effective on April 14, 1999.

These amendments are intended to implement Iowa Code sections 135C.33, 155A.13, and 155A.13A.

The following amendments are adopted.

ITEM 1. Adopt the following new subrule 6.2(4):

**6.2(4) Personnel histories.** Pursuant to the requirements of Iowa Code section 135C.33, the provisions of this subrule shall apply to any pharmacy employing any person to provide patient care services in a patient's home. For the purposes of this subrule, "employed by the pharmacy" shall include any individual who is paid, either by the pharmacy or by any other entity such as a corporate entity, a temporary agency, or an independent contractor, to provide treatment or services to any patient in the patient's home. Specifically excluded from the requirements of this subrule are individuals such as delivery persons or couriers who do not enter the patient's home for the purpose of instructing the patient or the patient's caregiver in the use or maintenance of the equipment, device, or medication being delivered, or who do not enter the patient's home for the purpose of setting up or servicing the equipment, device, or medication used to treat the patient in the patient's home.

a. The pharmacy shall ask the following question of each person seeking employment in a position which will provide in-home services: "Do you have a record of founded child or dependent adult abuse or have you ever been convicted of a crime, in this state or any other state?" The applicant shall also be informed that a criminal history and dependent adult abuse record check will be conducted. The applicant shall indicate, by signed acknowledgment, that the applicant has been informed that such record checks will be conducted.

b. Prior to the employment of any person to provide in-home services, the pharmacy shall submit a form specified by the department of public safety to the department of public safety and receive the results of a criminal history check and dependent adult abuse record check. The pharmacy may submit a form specified by the department of human services to the department of human services to request a child abuse history check.

c. A person who has a criminal record, founded dependent adult abuse report, or founded child abuse report shall not be employed by a pharmacy to provide in-home services unless the department of human services has evaluated the crime or founded abuse report and concluded that the crime or founded abuse does not merit prohibition from such employment.

d. The pharmacy shall keep copies of all record checks and evaluations.

ITEM 2. Adopt the following new subrule 7.6(6):

**7.6(6) Personnel histories.** Pursuant to the requirements of Iowa Code section 135C.33, the provisions of this subrule shall apply to any pharmacy employing any person to pro-

vide patient care services in a patient's home. For the purposes of this subrule, "employed by the pharmacy" shall include any individual who is paid, either by the pharmacy or by any other entity such as a corporate entity, a temporary agency, or an independent contractor, to provide treatment or services to any patient in the patient's home. Specifically excluded from the requirements of this subrule are individuals such as delivery persons or couriers who do not enter the patient's home for the purpose of instructing the patient or the patient's caregiver in the use or maintenance of the equipment, device, or medication being delivered, or who do not enter the patient's home for the purpose of setting up or servicing the equipment, device, or medication used to treat the patient in the patient's home.

a. The pharmacy shall ask the following question of each person seeking employment in a position which will provide in-home services: "Do you have a record of founded child or dependent adult abuse or have you ever been convicted of a crime, in this state or any other state?" The applicant shall also be informed that a criminal history and dependent adult abuse record check will be conducted. The applicant shall indicate, by signed acknowledgment, that the applicant has been informed that such record checks will be conducted.

b. Prior to the employment of any person to provide in-home services, the pharmacy shall submit a form specified by the department of public safety to the department of public safety and receive the results of a criminal history check and dependent adult abuse record check. The pharmacy may submit a form specified by the department of human services to the department of human services to request a child abuse history check.

c. A person who has a criminal record, founded dependent adult abuse report, or founded child abuse report shall not be employed by a pharmacy to provide in-home services unless the department of human services has evaluated the crime or founded abuse report and concluded that the crime or founded abuse does not merit prohibition from such employment.

d. The pharmacy shall keep copies of all record checks and evaluations.

ITEM 3. Adopt the following new rule 657—19.5(135C,155A):

**657—19.5(135C,155A) Personnel histories.** Pursuant to the requirements of Iowa Code section 135C.33, the provisions of this rule shall apply to any pharmacy employing any person to provide patient care services in a patient's home within the state of Iowa. For the purposes of this rule, "employed by the pharmacy" shall include any individual who is paid, either by the pharmacy or by any other entity such as a corporate entity, a temporary agency, or an independent contractor, to provide treatment or services to any patient in the patient's home in Iowa. Specifically excluded from the requirements of this rule are individuals such as delivery persons or couriers who do not enter the patient's home for the purpose of instructing the patient or the patient's caregiver in the use or maintenance of the equipment, device, or medication being delivered, or who do not enter the patient's home for the purpose of setting up or servicing the equipment, device, or medication used to treat the patient in the patient's home.

**19.5(1) Applicants questioned, informed.** The pharmacy shall ask the following question of each person seeking employment in a position which will provide in-home services in Iowa: "Do you have a record of founded child or depen-

## PHARMACY EXAMINERS BOARD[657](cont'd)

dent adult abuse or have you ever been convicted of a crime, in this state or any other state?" The applicant shall also be informed that a criminal history and dependent adult abuse record check will be conducted. The applicant shall indicate, by signed acknowledgment, that the applicant has been informed that such record checks will be conducted.

**19.5(2)** Procedures and forms. Prior to the employment of any person to provide in-home services in Iowa, the pharmacy shall submit a form specified by the department of public safety to the department of public safety and receive the results of a criminal history check and dependent adult abuse record check. The pharmacy may submit a form specified by the department of human services to the department of human services to request a child abuse history check.

**19.5(3)** Employment prohibition—exception. A person who has a criminal record, founded dependent adult abuse report, or founded child abuse report shall not be employed by a pharmacy to provide in-home services in Iowa unless the department of human services has evaluated the crime or founded abuse report and concluded that the crime or founded abuse does not merit prohibition from such employment.

**19.5(4)** Records. The pharmacy shall keep copies of all record checks and evaluations.

[Filed 2/22/99, effective 4/14/99]

[Published 3/10/99]

EDITOR'S NOTE: For replacement pages for IAC, see IAC Supplement 3/10/99.

**ARC 8771A****PHARMACY EXAMINERS  
BOARD[657]****Adopted and Filed**

Pursuant to the authority of Iowa Code sections 147.76 and 155A.6, the Board of Pharmacy Examiners hereby amends Chapter 6, "General Pharmacy Licenses," Iowa Administrative Code.

The amendment clarifies that persons authorized to be in the pharmacy in the temporary absence of the pharmacist may perform certain technical and nontechnical functions. The amendment also removes the statement directing that the pharmacy department is closed during the temporary absence of the pharmacist because this statement creates a conflict with the remaining provisions of the rule.

Notice of Intended Action was published in the October 21, 1998, Iowa Administrative Bulletin as **ARC 8412A**. The adopted amendment is identical to that published under Notice.

The amendment was approved during the February 2, 1999, meeting of the Board of Pharmacy Examiners.

This amendment will become effective on April 14, 1999.

This amendment is intended to implement Iowa Code sections 155A.6 and 155A.33.

The following amendment is adopted.

Amend subrule 6.6(2) as follows:

**6.6(2)** In the temporary absence of the pharmacist, only the pharmacist in charge may designate persons who may be present in the prescription department to perform *technical and nontechnical functions designated by the pharmacist in charge*. Activities identified in subrule 6.6(3) may not be

performed during such temporary absence of the pharmacist. A temporary absence is an absence of short duration not to exceed two hours, during which time the prescription department is closed.

[Filed 2/22/99, effective 4/14/99]

[Published 3/10/99]

EDITOR'S NOTE: For replacement pages for IAC, see IAC Supplement 3/10/99.

**ARC 8773A****PHARMACY EXAMINERS  
BOARD[657]****Adopted and Filed**

Pursuant to the authority of Iowa Code sections 124.301, 126.17, and 147.76, the Board of Pharmacy Examiners hereby amends Chapter 15, "Correctional Facility Pharmacy Licenses," Iowa Administrative Code.

The amendment corrects an erroneous reference to a rule which was previously moved from Chapter 8 to Chapter 20.

Notice of Intended Action was published in the October 21, 1998, Iowa Administrative Bulletin as **ARC 8415A**. The adopted amendment is identical to that published under Notice.

The amendment was approved during the February 2, 1999, meeting of the Board of Pharmacy Examiners.

This amendment will become effective on April 14, 1999.

This amendment is intended to implement Iowa Code sections 124.301, 126.9, and 126.10.

The following amendment is adopted.

Amend rule **657—15.9(124,126,155A)**, numbered paragraph "1," as follows:

1. Prepackaging and bulk compounding of drugs in compliance with the provisions of rules 657—8.3(126) and ~~8.4(126)~~ **657—20.11(126)**;

[Filed 2/22/99, effective 4/14/99]

[Published 3/10/99]

EDITOR'S NOTE: For replacement pages for IAC, see IAC Supplement 3/10/99.

**ARC 8774A****PHARMACY EXAMINERS  
BOARD[657]****Adopted and Filed**

Pursuant to the authority of Iowa Code sections 147.76, 155A.6, and 272C.4, the Board of Pharmacy Examiners hereby amends Chapter 22, "Pharmacy Technicians," Iowa Administrative Code.

The amendments clarify provisions regarding the delegation of technical functions to pharmacy technicians and define unethical conduct or practice as those terms relate to pharmacy technician activities in a pharmacy, providing that violations of the unethical conduct or practice provisions may be grounds for disciplinary action against the pharmacy technician's registration.

## PHARMACY EXAMINERS BOARD[657](cont'd)

Notice of Intended Action was published in the October 21, 1998, Iowa Administrative Bulletin as **ARC 8416A**. The adopted amendments are identical to those published under Notice.

The amendments were approved during the February 2, 1999, meeting of the Board of Pharmacy Examiners.

These amendments will become effective on April 14, 1999.

These amendments are intended to implement Iowa Code sections 147.55, 155A.6, 155A.23, 155A.33, and 272C.4.

The following amendments are adopted.

ITEM 1. Amend rule 657—22.13(155A) as follows:

**657—22.13(155A) Delegation of technical functions.** A pharmacist may delegate technical dispensing functions to a pharmacy technician, but only if the pharmacist is on site when delegated functions are performed, *except as provided in 657—subrule 6.6(2)*. The pharmacist shall provide the final verification for the accuracy, validity, completeness, and appropriateness of the patient's prescription prior to the delivery of the prescription to the patient or the patient's representative.

ITEM 2. Adopt new rule 657—22.21(147,155A) as follows:

**657—22.21(147,155A) Unethical conduct or practice.** Violation by a pharmacy technician of any of the provisions of this rule shall constitute unethical conduct or practice and may be grounds for disciplinary action as provided in 657—22.18(155A).

**22.21(1) Misrepresentative deeds.** A pharmacy technician shall not make any statement tending to deceive, misrepresent or mislead anyone, or be a party to or an accessory to any fraudulent or deceitful practice or transaction in pharmacy or in the operation or conduct of a pharmacy.

**22.21(2) Confidentiality.** In the absence of express consent from the patient or order or direction of a court, except where the best interests of the patient require, a pharmacy technician shall not divulge or reveal to any person other than the patient or the patient's authorized representative, the prescriber or other licensed practitioner then caring for the patient, a licensed pharmacist, or a person duly authorized by law to receive such information, the contents of any prescription or the therapeutic effect thereof or the nature of professional pharmaceutical services rendered to a patient; the nature, extent, or degree of illness suffered by any patient; or any medical information furnished by the prescriber.

**22.21(3) Discrimination.** It is unethical to unlawfully discriminate between patients or groups of patients for reasons of religion, race, creed, color, sex, age, national origin, or disease state when providing pharmaceutical services.

**22.21(4) Unethical conduct or behavior.** A pharmacy technician shall not exhibit unethical behavior in connection with the technician's pharmacy employment. Unethical behavior shall include, but is not limited to, the following acts: verbal abuse, coercion, intimidation, harassment, sexual advances, threats, degradation of character, indecent or obscene conduct, and theft.

This rule is intended to implement Iowa Code sections 147.55, 155A.6, and 155A.23.

[Filed 2/22/99, effective 4/14/99]

[Published 3/10/99]

EDITOR'S NOTE: For replacement pages for IAC, see IAC Supplement 3/10/99.

**ARC 8775A**

**PHARMACY EXAMINERS  
BOARD[657]**

**Adopted and Filed**

Pursuant to the authority of Iowa Code section 252J.8, the Board of Pharmacy Examiners hereby amends Chapter 25, "Child Support Noncompliance," Iowa Administrative Code.

The amendments modify the definition of "license" to include pharmacist-intern and pharmacy technician registrations, amend the requirements for reinstatement of a revoked registration to include a pharmacy technician registration, and amend the requirements for reinstatement of a suspended pharmacist license to include evidence of successful completion of required continuing education.

Notice of Intended Action was published in the October 21, 1998, Iowa Administrative Bulletin as **ARC 8417A**. The adopted amendments are identical to those published under Notice.

The amendments were approved during the February 2, 1999, meeting of the Board of Pharmacy Examiners.

These amendments will become effective on April 14, 1999.

These amendments are intended to implement Iowa Code chapter 252J.

The following amendments are adopted.

ITEM 1. Amend rule **657—25.1(252J)**, definitions of "Act" and "License," as follows:

"Act" means ~~1995 Iowa Acts, chapter 115, sections 1 to 9~~ *Iowa Code chapter 252J*.

"License" means a license to practice pharmacy, a registration to practice as a pharmacist-intern, *a registration to practice as a pharmacy technician*, or a registration to possess, prescribe, dispense, administer, distribute, or otherwise handle controlled substances under Iowa Code chapter 124.

ITEM 2. Amend subrule 25.3(5) as follows:

**25.3(5)** Reinstatement following license suspension or revocation. A licensee shall pay all board fees required for license renewal or license reinstatement, *and all continuing education requirements shall be met*, before a license will be reinstated after the board has suspended a license pursuant to the Act. A licensee whose license to practice pharmacy has been revoked shall complete the examination components as indicated in 657—2.10(155A) and shall pay all required examination fees pursuant to 657—2.2(147). A licensee whose registration to practice as a pharmacist-intern *or as a pharmacy technician* or whose registration to handle controlled substances under Iowa Code chapter 124 has been revoked shall complete application and pay all board fees required for new registration.

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**ARC 8776A****PHARMACY EXAMINERS  
BOARD[657]****Adopted and Filed**

Pursuant to the authority of Iowa Code section 272C.3, the Board of Pharmacy Examiners hereby adopts Chapter 31, "Student Loan Default or Noncompliance with Agreement for Payment of Obligation," Iowa Administrative Code.

The chapter provides for the denial of a license renewal or a new license or for the suspension or revocation of a license upon receipt by the Board of a certificate of noncompliance from the College Student Aid Commission certifying that the named licensee is not in compliance with the terms of an agreement for payment of a student loan obligation. The rules also define requirements for reinstatement subsequent to such license suspension or revocation and provide for sharing of licensee information with the College Student Aid Commission for the purpose of identifying individuals subject to enforcement under the Act. For purposes of these rules, "license" means "license, registration, or permit."

Notice of Intended Action was published in the October 21, 1998, Iowa Administrative Bulletin as **ARC 8418A**. References to 1998 Iowa Acts, chapter 1081, have been changed to the appropriate 1999 Iowa Code sections.

The new chapter was approved during the February 2, 1999, meeting of the Board of Pharmacy Examiners and will become effective on April 14, 1999.

These rules are intended to implement Iowa Code sections 261.121 to 261.127.

The following amendment is adopted.

Adopt the following **new** chapter:

**CHAPTER 31****STUDENT LOAN DEFAULT OR NONCOMPLIANCE  
WITH AGREEMENT FOR  
PAYMENT OF OBLIGATION**

**657—31.1(261) Definitions.** For the purpose of this chapter, the following definitions shall apply:

"Act" means Iowa Code sections 261.121 to 261.127.

"Board" means the Iowa board of pharmacy examiners.

"Certificate" means a document known as a certificate of noncompliance from the college student aid commission certifying that the named licensee is not in compliance with the terms of an agreement for payment of a student loan obligation.

"Commission" means the college student aid commission.

"Denial notice" means a board notification denying an application for the issuance or renewal of a license as required by the Act.

"License" means a license to practice pharmacy, a registration to practice as a pharmacist-intern, a registration to practice as a pharmacy technician, or a registration to possess, prescribe, dispense, administer, distribute, or otherwise handle controlled substances under Iowa Code chapter 124.

"Licensee" means an individual to whom a license has been issued or who is seeking the issuance of a license.

"Revocation or suspension notice" means a board notification suspending a license for an indefinite or specified period of time or a notification revoking a license as required by the Act.

"Withdrawal certificate" means a document known as a withdrawal of a certificate of noncompliance provided by the commission certifying that the certificate is withdrawn and that the board may proceed with issuance, reinstatement, or renewal of a license.

**657—31.2(261) Issuance or renewal of a license—denial.** The board shall deny the issuance or renewal of a license upon receipt of a certificate from the commission according to the procedures set forth in Iowa Code sections 261.121 to 261.127.

**31.2(1) Service of denial notice.** Notice shall be served upon the licensee by restricted certified mail, return receipt requested, or by personal service in accordance with the Iowa Rules of Civil Procedure. Alternatively, the licensee may accept service personally or through authorized counsel.

**31.2(2) Effective date of denial.** The effective date of the denial of issuance or renewal of a license, as specified in the notice, shall be 60 days following service of the notice upon the licensee.

**31.2(3) Preparation and service of denial notice.** The executive secretary/director of the board is authorized to prepare and serve the notice upon the licensee.

**31.2(4) Licensee responsible to inform board.** Licensees shall keep the board informed of all court actions and all commission actions taken under or in connection with the Act and shall provide the board copies, within seven days of filing or issuance, of all applications filed with the district court pursuant to Iowa Code section 261.127, all court orders entered in such actions, and any withdrawal certificates issued by the commission.

**31.2(5) Reinstatement following license denial.** All board fees required for application, license renewal, or license reinstatement shall be paid by licensees, and all continuing education requirements shall be met, before a license will be issued, renewed, or reinstated after the board has denied the issuance or renewal of a license pursuant to the Act.

**31.2(6) Effect of filing in district court.** In the event a licensee timely files a district court action following service of a board notice pursuant to Iowa Code sections 261.126 and 261.127, the board shall continue with the intended action described in the notice upon the receipt of a court order lifting the stay, dismissing the action, or otherwise directing the board to proceed. For purposes of determining the effective date of the denial of the issuance or renewal of a license, the board shall count the number of days before the action was filed and the number of days after the action was disposed by the court.

**31.2(7) Final notification.** The board shall notify the licensee in writing through regular first-class mail, or such other means as the board deems appropriate in the circumstances, within ten days of the effective date of the denial of the issuance or renewal of a license and shall similarly notify the licensee when the license is issued or renewed following the board's receipt of a withdrawal certificate.

**657—31.3(261) Suspension or revocation of a license.** The board shall suspend or revoke a license upon receipt of a certificate from the commission according to the procedures set forth in the Act. This rule shall apply in addition to the procedures set forth in the Act.

**31.3(1) Service of revocation or suspension notice.** Notice shall be served upon the licensee by restricted certified mail, return receipt requested, or by personal service in accordance with the Iowa Rules of Civil Procedure. Alterna-

## PHARMACY EXAMINERS BOARD[657](cont'd)

tively, the licensee may accept service personally or through authorized counsel.

**31.3(2)** Effective date of revocation or suspension. The effective date of the revocation or suspension of a license, as specified in the notice, shall be 60 days following service of the notice upon the licensee.

**31.3(3)** Preparation and service of revocation or suspension notice. The executive secretary/director of the board is authorized to prepare and serve the notice upon the licensee and is directed to notify the licensee that the license will be suspended unless the license is already suspended on other grounds. In the event that the license is on suspension, the executive secretary/director shall notify the licensee of the board's intention to revoke the license.

**31.3(4)** Licensee responsible to inform board. Licensees shall keep the board informed of all court actions and all commission actions taken under or in connection with the Act and shall provide the board copies, within seven days of filing or issuance, of all applications filed with the district court pursuant to Iowa Code section 261.127, all court orders entered in such actions, and any withdrawal certificates issued by the commission.

**31.3(5)** Reinstatement following license suspension or revocation. All board fees required for license renewal or license reinstatement shall be paid by licensees, and all continuing education requirements shall be met, before a license will be renewed or reinstated after the board has suspended a license pursuant to the Act. A licensee whose license to practice pharmacy has been revoked shall complete the examination components as indicated in rule 657—2.10(155A) and shall pay all required examination fees pursuant to rule 657—2.2(147). A licensee whose registration to practice as a pharmacist-intern or as a pharmacy technician or whose registration to handle controlled substances under Iowa Code chapter 124 has been revoked shall complete application and pay all board fees required for new registration.

**31.3(6)** Effect of filing in district court. In the event a licensee timely files a district court action following service of a board notice pursuant to Iowa Code sections 261.126 and 261.127, the board shall continue with the intended action described in the notice upon the receipt of a court order lifting the stay, dismissing the action, or otherwise directing the board to proceed. For purposes of determining the effective date of the suspension or revocation of a license, the board shall count the number of days before the action was filed and the number of days after the action was disposed by the court.

**31.3(7)** Final notification. The board shall notify the licensee in writing through regular first-class mail, or such other means as the board deems appropriate in the circumstances, within ten days of the effective date of the suspension or revocation of a license and shall similarly notify the licensee when the license is reinstated following the board's receipt of a withdrawal certificate.

**657—31.4(17A,22,261) Share information.** Notwithstanding any statutory confidentiality provision, the board may share information with the commission through manual or automated means for the sole purpose of identifying applicants or licensees subject to enforcement under the Act.

These rules are intended to implement Iowa Code sections 261.121 to 261.127.

[Filed 2/22/99, effective 4/14/99]

[Published 3/10/99]

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ARC 8755A

## PROFESSIONAL LICENSURE DIVISION[645]

BOARD OF COSMETOLOGY  
ARTS AND SCIENCES EXAMINERS

### Adopted and Filed

Pursuant to the authority of Iowa Code section 157.14, the Board of Cosmetology Arts and Sciences Examiners hereby amends Chapter 60, "Licensure of Cosmetologists, Electrologists, Estheticians, Manicurists, Nail Technologists, and Instructors of Cosmetology Arts and Sciences," and Chapter 64, "Cosmetology Arts and Sciences Continuing Education," Iowa Administrative Code.

These amendments revise requirements for an instructor's license, continuing education for license renewal and standards for continuing education approval.

Notice of Intended Action was published in the Iowa Administrative Bulletin on December 2, 1998, as **ARC 8525A**. A public hearing was held on December 22, 1998, from 8:30 to 10:30 a.m. in the Third Floor Conference Room, Side 2, Lucas State Office Building. Favorable comments were received from three persons in attendance. The following revisions were made to the Notice after Board discussion:

In paragraph 60.10(1)"g," the words 'Notwithstanding paragraph "b,"' were added.

In subrule 64.1(1), the effective date for continuing education requirements was changed from April 1, 1999, to April 1, 2000.

In paragraph 64.1(1)"a," language was revised to simplify the requirements for licensees holding more than one license type.

The amendment to rule 64.5(272C) which required inactive licensees to make application prior to 30 days before the license renewal due date was deleted.

In rule 64.6(272C), numbered paragraph "6," one contact hour was changed from 60 minutes to 50 minutes.

In subrule 64.6(1), the words "commencing January 31, 2000" were deleted from the last sentence of the introductory paragraph.

These amendments were adopted by the Board of Cosmetology Arts and Sciences on February 2, 1999.

These amendments will become effective April 14, 1999. These amendments are intended to implement Iowa Code chapter 157.

The following amendments are adopted.

ITEM 1. Amend subrule 60.10(1) as follows:

**60.10(1)** An instructor in a licensed school of cosmetology arts and sciences shall:

a. Be a graduate of an accredited high school or the equivalent thereof.

b. Be licensed in the state of Iowa as a cosmetologist.

c. Have 1000 hours of instructor's training with curriculum contents to be determined by the board or two years' active practice in the field of cosmetology within six years prior to application proven by documentation.

d. Submit application and fees ~~with~~; certification of ~~completion of instructor's training~~ from school of cosmetology arts and sciences ~~training or affidavits of employment~~ or proof of ~~two years'~~ active practice in the field of cosmetology arts and sciences; ~~and proof of attendance at an advanced instructor's institute prescribed by the board, to the board~~

## PROFESSIONAL LICENSURE DIVISION[645](cont'd)

prior to the starting date of employment as an instructor by a school of cosmetology arts and sciences.

e. The department shall issue to the applicant a notice of registration which shall be displayed for public view. Such notice shall be valid for 12 months.

f. ~~Attend an instructor's institute prescribed by the cosmetology board of examiners and pass~~ Pass an instructor's and Iowa law examination within the first 12 months of employment to receive the original instructor's license.

g. ~~An~~ *Notwithstanding paragraph "b,"* an instructor teaching courses in electrology, esthetics and nail technology shall hold a current license in the practice and possess an instructor license to teach that practice or be a licensed cosmetology instructor who possesses the skill and knowledge required to instruct in that practice.

h. An instructor teaching courses in electrology shall have 60 hours of practical application experience, excluding school hours, in the area of electrolysis prior to application. The 60 hours must be documented by the employer.

ITEM 2. Rescind subrule 64.1(1) and adopt the following new subrule in lieu thereof:

64.1(1) With the continuing education compliance period beginning April 1, 2000, continuing education requirements are as follows:

a. For each cosmetology arts and sciences license held, the licensee shall complete during each license renewal period a minimum of eight hours of continuing education approved by the board, of which at least four hours shall be in the area of the prescribed practice discipline.

b. In addition to fulfilling the requirements of 64.1(1)"a," those persons holding an instructor's license must complete a minimum of eight hours of continuing education approved by the board in the area of teaching methodology.

c. Compliance with the requirement of continuing education is a prerequisite for license renewal in the next license period.

ITEM 3. Rescind rule 645—64.2(272C) and adopt the following new rule in lieu thereof:

645—64.2(272C) **Report of licensee.** Licensees shall submit a completed report form which documents the completion of continuing education requirements.

ITEM 4. Rescind and reserve rule 645—64.3(272C).

ITEM 5. Rescind rule 645—64.6(272C) and adopt the following new rule in lieu thereof:

645—64.6(272C) **Standards for approval.** Continuing education is that board-approved education which is obtained by a licensee in order to maintain, improve, or expand skills and knowledge obtained prior to initial licensure or to develop new and relevant skills and knowledge. A continuing education activity which meets all of the following criteria is appropriate for continuing education credit if it:

1. Constitutes an organized program of learning (including a workshop or symposium) which contributes directly to the professional competency of the licensee; and

2. Pertains to common subject matters which integrally relate to the practice of the professions; and

3. Is conducted by individuals who have special education, training and experience by reason of which said individuals should be considered experts concerning the subject matter of the program, and is accompanied by a paper, manual or outline which substantively pertains to the subject matter of the program and reflects program schedule, goals and

objectives. The board may request a curriculum vitae of presenters.

4. The instruction of product knowledge, methods and systems is allowed; however, no direct selling of products is allowed as part of a continuing education offering.

5. Fulfills stated program goals and objectives or both.

6. Provides proof of attendance to licensees in attendance including:

◦ Date, place, course title, presenter(s).

◦ Number of program contact hours. (One contact hour equals 50 minutes of continuing education credit.)

◦ Identification of practice specialty.

◦ Official signature of program sponsor.

64.6(1) Accreditation of sponsors. An applicant not previously accredited by the board, which desires accreditation as a sponsor of courses, programs, and other continuing education activities, including individually designed programs, shall apply for accreditation to the board stating its education history, subjects offered, total hours of instruction presented, and the names and qualifications of instructors. Activities of such an approved sponsor which are relevant to cosmetology arts and sciences shall be deemed automatically approved for continuing education credit. By January 31 of each year, all accredited sponsors shall report to the board in writing the education programs conducted during the preceding calendar year on a form approved by the board.

The board may at any time reevaluate an accredited sponsor. If after reevaluation the board finds there is basis for consideration or revocation of the accreditation of an accredited sponsor, the board shall give notice by ordinary mail to that sponsor of hearing on possible revocation at least 30 days prior to the hearing. The decision of the board after the hearing shall be final.

a. All approved, accredited sponsors shall issue a certificate of attendance to each licensee who attends a continuing education activity. The certificate shall include sponsor name and number; date of program; name of participant; total number of clock hours excluding introduction, breaks, and meals; program title and presenter; program site; practice specialty; and whether the program is approved for cosmetology.

b. All approved, accredited sponsors shall maintain a copy of the continuing education activity, a list of attendees, attendees' license numbers, and number of continuing education clock hours awarded for a minimum of three years from the date of the continuing education activity.

64.6(2) Prior to approval of activities. An applicant other than an accredited sponsor, which desires prior approval of a course, program or other continuing education activity, shall apply for approval to the board at least 60 days in advance of the commencement of the activity on a form provided by the board. The board shall approve or deny such application in writing. The application shall state the dates, subjects offered, total hours of instruction, names and qualifications of speakers and other pertinent information.

64.6(3) Review of programs. The board may monitor or review any continuing education program already approved by the board and, upon evidence of significant variation in the program presented from the program approved, may disapprove all or any part of the approved hours granted by the program.

64.6(4) Postapproval of activities. A licensee seeking credit for attendance and participation in an educational activity which was not otherwise approved shall submit to the board, within 30 days after completion of activity, a request for credit, including a brief résumé of the activity, its dates,

## PROFESSIONAL LICENSURE DIVISION[645](cont'd)

subjects, instructors, and their qualifications and the number of credit hours requested therefor. Within 60 days after the receipt of such application, the board shall advise the licensee in writing by ordinary mail whether the activity is approved and the number of hours allowed therefor. A licensee not complying with requirements of this subrule may be denied credit for such activity.

**64.6(5) Report of licensee.** The licensee shall maintain a record of verification of attendance for at least four years from date of completion of the continuing education program. Each licensee shall file, if requested, a certificate of attendance form signed by the educational institution or organization sponsoring the continuing education. The report shall be sent to the Board of Cosmetology Arts and Sciences Examiners, Department of Public Health, Lucas State Office Building, Des Moines, Iowa 50319-0075.

**64.6(6) Audit of continuing education reports.**

a. After each educational biennium the board will audit a percentage of the continuing education reports at random before the renewal licenses are issued to those being audited.

b. The licensee must make the following information available to the board for auditing purposes:

- (1) Date, place, course title, schedule, presenter(s).
- (2) Number of contact hours for program attended.
- (3) Official signature of sponsor indicating successful completion of course.

c. For auditing purposes the licensee must retain the above information for four years.

**64.6(7) Hearings regarding continuing education.** In the event of denial, in whole or part, of any application for approval of a continuing education program or credit for a continuing education activity, the applicant or licensee shall have the right to request a hearing. The request must be sent within 20 days after receipt of the notification of denial. The hearing shall be held within 90 days after receipt of the request for hearing. The hearing shall be conducted by the board. The final decision shall be rendered by the board.

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[Published 3/10/99]

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## ARC 8753A

### PROFESSIONAL LICENSURE DIVISION[645]

BOARD OF COSMETOLOGY ARTS  
AND SCIENCES EXAMINERS

#### Adopted and Filed

Pursuant to the authority of Iowa Code section 157.14, the Board of Cosmetology Arts and Sciences Examiners hereby gives Notice of Intended Action to amend Chapter 63, "Requirements for Salons and Schools of Cosmetology Arts and Sciences," Iowa Administrative Code.

These amendments revise requirements for salon and school sanitation procedures.

Notice of Intended Action was published in the Iowa Administrative Bulletin on December 30, 1998, as **ARC 8588A**. A public hearing was held on January 19, 1999, from 10 a.m. to 12 noon in the Fourth Floor Conference Room, Lucas State Office Building. No comments were re-

ceived. The following revisions were made to the Notice after Board discussion:

In paragraph 63.4(6)"b," "Latex or nonlatex" was changed to "Disposable".

In subrule 63.4(15), "coming into contact with blood or body fluids" was changed to "that would release blood or other potentially infectious materials in a liquid or semiliquid state if compressed".

In subrule 63.5(6), "rubber-latex" was changed to "disposable".

These amendments were adopted by the Board of Cosmetology Arts and Sciences on February 2, 1999.

These amendments will become effective April 14, 1999.

These amendments are intended to implement Iowa Code section 157.6.

The following amendments are adopted.

ITEM 1. Rescind subrules 63.4(4) through 63.4(13) and adopt the following **new** subrules in lieu thereof:

**63.4(4)** All licensees and students shall wash their hands with soap and water immediately before serving each patron.

**63.4(5)** Hair clippings shall not be allowed to accumulate and should be disposed of after each service.

**63.4(6)** The UNIVERSAL PRECAUTIONS are a set of guidelines which all students and licensees shall employ consistently with all clients to prevent exposure to blood-borne pathogens and the transmission of disease.

a. Place used needles, razor blades and other sharp instruments in a puncture-resistant container for disposal. Locate these containers as close to the use area as is practical.

b. Disposable gloves shall be worn to prevent exposure to blood, body fluids containing visible blood and other fluids to which universal precautions apply.

c. Immediately and thoroughly wash hands and other skin surfaces that are contaminated with blood, body fluids containing visible blood, or other body fluids to which universal precautions apply.

d. Licensees and students who have weeping dermatitis or draining lesions should refrain from all direct client care and from handling client-care equipment until the condition has cleared.

**63.4(7)** Definitions and terms for infection control practices:

a. Sterilization: a procedure that kills all microorganisms, including their spores.

b. Disinfection: a procedure that kills pathogenic microorganisms, but not necessarily their spores. Chemical germicides which are formulated as disinfectants are used on inanimate surfaces and should not be used on skin or tissue.

c. Sterilizer or sterilant: an agent intended to destroy all microorganisms—viruses, bacteria, fungi, and their spores on inanimate objects.

d. Disinfectant: an agent intended to destroy or irreversibly inactivate specific viruses, bacteria, or pathogenic fungi, but not necessarily their spores, on inanimate surfaces. Most disinfectants are not effective sterilants.

e. Antiseptic: a chemical germicide formulated to be used on skin or tissue. Antiseptics should not be used as disinfectants.

f. Germicide: a general term indicating an agent that kills pathogenic microorganisms.

g. Decontamination: a procedure that eliminates or reduces microbial contamination to a safe level with respect to transmission of infection. Sterilization and disinfection procedures are often used for decontamination.

## PROFESSIONAL LICENSURE DIVISION[645](cont'd)

h. Sanitization: a procedure that reduces the level of microbial contamination so that the item or surface is considered safe.

**63.4(8)** Classification of instruments and implements:

a. Critical: instruments and objects that are directly introduced into the bloodstream or into other normally sterile areas of the body.

b. Semicritical: instruments and objects that come in contact with intact mucous membranes and do not ordinarily penetrate body surfaces.

c. Noncritical: instruments and objects that do not ordinarily touch the client or those that contact only intact skin.

**63.4(9)** All instruments or implements classified as critical shall be sterilized following each use.

a. All liquid sterilants must be EPA-registered, hospital-grade, bactericidal, virucidal, fungicidal and tuberculocidal. They should be used strictly in accordance with manufacturers' instructions for mixing and immersion.

b. Moist heat (steam under pressure) shall be 250 degrees F (121 degrees C), or above, prevacuum cycle, 271 degrees F (132 degrees C).

c. Dry heat shall be 171 degrees C for 1 hour; 160 degrees C for 2 hours; 121 degrees C for 16 hours or longer.

d. All sterilized instruments shall be stored in an airtight container or a liquid sterilant until ready for use.

**63.4(10)** All instruments or implements classified as semicritical shall be disinfected following each use.

a. All liquid disinfectants must be EPA-registered, hospital-grade, bactericidal, virucidal, fungicidal and tuberculocidal. They should be used strictly in accordance with manufacturers' instructions for mixing and immersion.

b. Moist heat shall be at 75-100 degrees C used at a high activity level.

**63.4(11)** All instruments or implements classified as noncritical shall be disinfected following each use.

**63.4(12)** All disinfected semicritical and noncritical implements shall be stored in a disinfected, dry covered container until ready for use.

**63.4(13)** Each work station shall have:

a. A closed container for all contaminated implements and instruments.

b. A closed container for all disinfected implements and instruments.

c. A closed container containing a liquid disinfectant for contaminated implements.

**63.4(14)** Disinfectants and sterilants as described above shall be available for immediate use at all times in a salon or school of cosmetology arts and sciences that is in operation.

**63.4(15)** Any disposable material that would release blood or other potentially infectious materials in a liquid or semiliquid state if compressed, shall be placed in a red hazardous waste bag and disposed of in accordance with regulation for removal of hazardous waste.

**63.4(16)** Any disposable sharp objects that come in contact with blood or other body fluids shall be disposed of in a red sealable rigid container (punctureproof) that is clearly labeled for disposal of hazardous waste sharps.

**63.4(17)** Hazardous waste containers and bags shall be available for use at all times when services are being performed. Absence of containers shall be prima facie evidence of noncompliance.

**63.4(18)** Emery boards, cosmetic sponges, applicators and orangewood sticks must be discarded after each use or given to the client.

ITEM 2. Amend subrule 63.5(6) as follows:

**63.5(6)** Licensees and students shall wear ~~rubber-latex disposable~~ gloves while working on a client if blood, pus or weeping is present or likely to occur. Gloves shall be disposed of after single use.

ITEM 3. Rescind subrules **63.12(3)**, **63.12(4)**, **63.12(6)**, **63.12(8)**, and **63.12(9)** to **63.12(11)** and renumber **63.12(5)** and **63.12(7)** as **63.12(3)** and **63.12(4)**.

[Filed 2/19/99, effective 4/14/99]

[Published 3/10/99]

EDITOR'S NOTE: For replacement pages for IAC, see IAC Supplement 3/10/99.

**ARC 8725A**

## REVENUE AND FINANCE DEPARTMENT[701]

### Adopted and Filed

Pursuant to the authority of Iowa Code section 421.14, the Department of Revenue and Finance hereby adopts amendments to Chapter 71, "Assessment Practices and Equalization," Iowa Administrative Code.

Notice of Intended Action was published in IAB, Volume XXI, Number 7, on September 23, 1998, page 642, as **ARC 8342A**.

These amendments require condominiums that are rented like apartments for commercial purposes to be classified as commercial real estate and condominiums that are sold for individual ownership and occupancy to be classified as residential real estate. The present rules permit all condominiums that are being used for residential purposes to be classified as residential real estate regardless of the fact that they may be rented and thus used as a commercial venture.

A public hearing was held on the proposed amendments on December 4, 1998. Comments were received both for and against the amendments.

An economic impact statement was published in IAB, Volume XXI, Number 16, on January 27, 1999, page 1468.

Changes from the Notice include specification of an effective date and the addition of two sentences to subrules 71.1(4) and 71.1(5).

These amendments will become effective April 14, 1999, after filing with the Administrative Rules Coordinator and publication in the Iowa Administrative Bulletin.

These amendments are intended to implement Iowa Code chapter 441.

The following amendments are adopted.

Amend rule **701—71.1(404A,428,441)** as follows:

Amend the introductory paragraph as follows:

**701—71.1(404A,405,427A,428,441)** Classification of real estate.

Amend subrules 71.1(4) and 71.1(5) as follows:

**71.1(4)** Residential real estate. Residential real estate shall include all lands and buildings which are primarily used or intended for human habitation, including those buildings located on agricultural land. Buildings used primarily or intended for human habitation shall include the dwelling as well as structures and improvements used primarily as a part of, or in conjunction with, the dwelling. This includes but is not limited to garages, whether attached or detached, tennis courts, swimming pools, guest cottages, and storage sheds for household goods. Residential real estate

## REVENUE AND FINANCE DEPARTMENT[701](cont'd)

located on agricultural land shall include only buildings as defined in this subrule. Buildings for human habitation that are used as commercial ventures, including but not limited to hotels, motels, rest homes, *condominiums*, and structures containing three or more separate living quarters shall not be considered residential real estate. However, regardless of the number of separate living quarters, *condominiums not used as commercial ventures*, multiple housing cooperatives organized under Iowa Code chapter 499A, and land and buildings owned and operated by organizations that have received tax-exempt status under Section 501(c)(3) of the Internal Revenue Code, if the rental income from the property is not taxed as unrelated business income under Iowa Code section 422.33(1A), shall be considered residential real estate. *Effective January 1, 2000, property shall be classified as residential real estate if a majority of the condominiums are or will be used for residential purposes and have been sold, are available for sale, or are being rented, but the primary intent of the owner is to sell the units. For example, a building containing 25 condominiums of which 22 have been sold, are available for sale, or are being rented, but the primary intent of the owner is to sell the units, shall be classified as residential real estate. If more than one building is included in the horizontal property regime, the number of condominiums shall be combined to determine the majority use.*

**71.1(5)** Commercial real estate. Commercial real estate shall include all lands and improvements and structures located thereon which are primarily used or intended as a place of business where goods, wares, services, or merchandise is stored or offered for sale at wholesale or retail. Commercial realty shall also include hotels, motels, rest homes, *condominiums*, structures consisting of three or more separate living quarters and any other buildings for human habitation that are used as a commercial venture. Commercial real estate shall also include data processing equipment as defined in Iowa Code section 427A.1(1)"j," except data processing equipment used in the manufacturing process. However, regardless of the number of separate living quarters or any commercial use of the property, single- and two-family dwellings, *condominiums*, multiple housing cooperatives organized under Iowa Code chapter 499A, and land and buildings used primarily for human habitation and owned and operated by organizations that have received tax-exempt status under Section 501(c)(3) of the Internal Revenue Code, if the rental income from the property is not taxed as unrelated business income under Iowa Code section 422.33(1A), shall be classified as residential real estate, *as shall condominiums not used as commercial ventures. Effective January 1, 2000, property shall be classified as commercial real estate if a majority of the condominiums are being used as a business or used for residential purposes and not sold, not available for sale, or are rented and the primary intent of the owner is to continue renting rather than sell the units. For example, a building containing 25 condominiums of which 22 are being used as businesses or used for residential purposes and not sold, not available for sale, or are rented and the primary intent of the owner is to continue renting rather than sell the units, is to be classified as commercial real estate. If more than one building is included in the horizontal property regime, the number of condominiums shall be combined to determine the majority use.*

Amend the implementation clause as follows:

This rule is intended to implement Iowa Code section ~~404A.1 as amended by 1996 Iowa Acts, chapter 1204, and sections 405.1, 427A.1, 428.4, 441.21, and 441.22.~~

[Filed 2/12/99, effective 4/14/99]

[Published 3/10/99]

EDITOR'S NOTE: For replacement pages for IAC, see IAC Supplement 3/10/99.

**ARC 8721A****TRANSPORTATION  
DEPARTMENT[761]****Adopted and Filed**

Pursuant to the authority of Iowa Code sections 307.10 and 307.12, the Department of Transportation, on February 9, 1999, adopted Chapter 454, "Towing Wrecked or Disabled Vehicles," Iowa Administrative Code.

Notice of Intended Action for this new chapter was published in the December 30, 1998, Iowa Administrative Bulletin as **ARC 8586A**.

Iowa Code section 321.463 exempts vehicles designed to tow wrecked or disabled vehicles, while the vehicle is towing a disabled vehicle, from the maximum gross weight requirements. The intent of this law was for tow truck operators to transport wrecked or disabled vehicles during an emergency directly from the scene of the wrecking or disablement to any place of repair, storage or safekeeping. Some tow operators are taking advantage of the exemption to haul heavy disabled or wrecked vehicles from one repair facility to another or from one business location to another. This chapter clarifies the intent of this exemption.

These rules are identical to the ones published under Notice.

These rules are intended to implement Iowa Code section 421.463.

These rules will become effective April 14, 1999.

Rule-making action:

Adopt the following new chapter:

**CHAPTER 454****TOWING WRECKED OR DISABLED VEHICLES**

**761—454.1(321) Definitions.** For the purpose of Iowa Code section 321.463, the following definitions are established:

"Tow" means the transportation by a vehicle designed to tow wrecked or disabled vehicles directly from the scene of an accident, disablement, or impoundment to any place of repair, storage, or safekeeping.

1. The wrecked or disabled vehicle must be towed with all or some of its wheels on the roadway unless supported during movement by a dolly or other special device designed for use when a vehicle cannot roll on its own wheels.

2. Movement of wrecked or disabled vehicles on vans, flatbeds, carryalls, or other freight vehicles does not constitute towing under this rule.

"Vehicle designed to tow" means a vehicle that has been designed or materially altered to enable the transportation of a wrecked or disabled vehicle by lifting all or some of the wrecked or disabled vehicle off the roadway.

"Wrecked or disabled vehicle" means a vehicle upon a highway involved in an accident or having mechanical fail-

## TRANSPORTATION DEPARTMENT[761](cont'd)

ure, broken parts, or other defects, any of which prevent the vehicle from moving safely under its own power, or any vehicle impounded by the order of a police authority.

This rule is intended to implement Iowa Code section 321.463.

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EDITOR'S NOTE: For replacement pages for IAC, see IAC Supplement 3/10/99.

ARC 8720A

TRANSPORTATION  
DEPARTMENT[761]

**Adopted and Filed**

Pursuant to the authority of Iowa Code sections 307.10 and 307.12, the Department of Transportation, on February 9, 1999, adopted amendments to Chapter 520, "Regulations Applicable to Carriers," Iowa Administrative Code.

Notice of Intended Action for these amendments was published in the December 30, 1998, Iowa Administrative Bulletin as ARC 8587A.

Iowa Code section 321.449 requires the Department to adopt rules consistent with the Federal Motor Carrier Safety Regulations promulgated under United States Code, Title 49, and found in 49 Code of Federal Regulations (CFR), Parts 390 to 399. Iowa Code section 321.450 requires the Department to adopt rules consistent with the Federal Hazardous Materials Regulations promulgated under United States Code, Title 49, and found in 49 CFR, Parts 107, 171 to 173, 177, 178 and 180. To ensure the consistency required by statute, the Department annually adopts the specified parts of 49 CFR as adopted by the United States Department of Transportation.

Commercial vehicles transporting goods in interstate commerce are subject to the Federal Motor Carrier Safety Regulations on the effective dates specified in the Federal Register. Commercial vehicles transporting hazardous materials in interstate commerce or transporting certain hazardous materials intrastate are subject to the Federal Hazardous Materials Regulations on the effective dates specified in the Federal Register. The adoption of the federal regulations by the Department will extend the enforcement of the regulations to commercial vehicles operated intrastate unless exempted by statute.

Proposed federal regulations are published in the Federal Register to allow a period for public comment, and, after adoption, the final regulations are again published in the Federal Register. Each year a revised edition of 49 CFR is published incorporating all of the final regulations adopted during the year. Although revised editions of 49 CFR are usually dated October or November, the publication is not actually available in Iowa for several months after that date.

The amendments to the Federal Motor Carrier Safety Regulations and Federal Hazardous Materials Regulations that have become final and effective since the 1997 edition of the CFR are listed in the information below. The parts affected are followed by Federal Register (FR) citations.

Amendments to the Federal Motor Carrier Safety  
Regulations and Federal Hazardous Materials Regulations

Parts 107, 171, 172, 173, 175, 176, 177, 178, 179 and 180 (FR Volume 62, No. 190, Page 51554, 10-1-97)

This final rule corrects editorial errors, makes minor regulatory changes, and in response to requests for clarification improves the clarity of certain provisions to the Hazardous Materials Regulations. The intended effect of this rule making is to enhance the accuracy and reduce misunderstandings of the Hazardous Materials Regulations (HMR). The amendments contained in this rule are minor editorial changes and do not impose new requirements.

Part 171 (FR Volume 62, No. 237, Page 65188, 12-10-97)

This final rule allows the operator of a cargo tank to check the leakproofness of the discharge system including the hose by requiring the pressure in the system to reach at least equilibrium with the pressure inside the cargo tank prior to transfer.

Part 393 (FR Volume 63, No. 6, Page 1383, 1-9-98)

This final rule concerns glazing materials on windshields and windows. Also, as a result of this final rule, motor carriers operating under a March 6, 1995, waiver granted for the ADVANTAGE I-75 and Heavy Vehicle Electronic License Plate programs are no longer required to comply with the conditions of their waiver. (The waiver is no longer necessary because the regulations now allow for transponders mounted at the top of the windshield.)

Part 173 (FR Volume 63, No. 7, Page 1884, 1-12-98)

This final rule makes technical corrections.

Part 173 (FR Volume 63, No. 32, Page 8140, 2-18-98)

This final rule consists of technical amendments which clarify packaging requirements for hazardous materials transported for agricultural operations; corrects size requirements for identification number markings; and clarifies the provisions for use of nonspecification cargo tanks that apply to transportation of gasoline.

Part 393 (FR Volume 63, No. 32, Page 8330, 2-18-98)

The Federal Highway Administration (FHWA) and the Department of Housing and Urban Development (HUD) are amending the Federal Motor Carrier Safety Regulations and an interpretation on the Manufactured Home Construction and Safety Standards concerning the transportation of manufactured homes. FHWA and HUD are reducing the amount of tire overloading allowed on tires used to transport manufactured homes.

Part 172 (FR Volume 63, No. 62, Page 16070, 4-1-98)

This final rule makes improvements to the hazardous materials identification systems; clarifies when ID numbers must be displayed for certain types of hazardous materials; and responds to petitions for reconsideration and appeal. Other minor technical and editorial changes are made.

Part 393 (FR Volume 63, No. 85, Page 24454, 5-4-98)

FHWA is amending the Federal Motor Carrier Safety Regulations to require that air-braked truck tractors manufactured on or after March 1, 1997, and air-braked single-unit trucks, buses, trailers and converter dollies manufactured on or after March 1, 1998, be equipped with antilock brake systems (ABSs) that meet the requirements of the Federal Motor Vehicle Safety Standards (FMVSS). Also hydraulic-braked trucks and buses manufactured on or after March 1, 1999, are required to be equipped with ABSs that meet the requirements of the FMVSS. In addition, motor carriers are also required to maintain the ABSs on these vehicles. The rule making will improve the safety of commercial motor vehicles by reducing the incidence of accidents caused by jackknifing and other losses of directional stability and control during braking. Retrofitting is not a requirement for vehicles manufactured prior to the dates previously mentioned.

## TRANSPORTATION DEPARTMENT[761](cont'd)

Parts 390, 391, 392, 395, 396 and 397 (FR Volume 63, No. 117, Page 33254, 6-18-98)

This final rule removes, amends and redesignates certain provisions concerning general applicability and definitions; accident record-keeping requirements; qualifications of drivers; driving of commercial motor vehicles; hours of service of drivers; inspection, repair and maintenance; and the transportation of hazardous materials.

Parts 171, 172, 173, 175, 177, 178 and 180 (FR Volume 63, No. 132, Page 37454, 7-10-98)

The intended effect of this final rule making is to update, clarify or provide relief from certain regulatory requirements. Several of the changes include revising hazardous materials shipping names and allowing provisions for portable tanks to be loaded and unloaded without being removed from the transport vehicle.

Parts 172, 173 and 177 (FR Volume 63, No. 175, Page 48566, 9-10-98)

This final rule removes the regulations for the "Radiation Protection Program." This action was necessary to address difficulties and complexities concerning implementation and compliance.

Hazardous materials transition dates are deleted in Item 1 because they appear in the Code of Federal Regulations.

1998 Iowa Acts, chapter 1178, section 5, eliminates the exemption for motor vehicles registered for a maximum gross weight of five tons or less from the requirements of placarding and of carrying hazardous materials shipping papers if the hazardous materials which are transported are clearly labeled. Item 2 rescinds the definitions of "Clearly labeled" and "Requirements of placarding and of carrying hazardous materials shipping papers." Item 3 rescinds this exemption in 761—Chapter 520.

1997 Iowa Acts, chapter 108, section 27, extends an exemption for medically unqualified drivers transporting hazardous materials from federal motor carrier safety regulations. This preemployment date exemption for hazardous materials drivers mirrors the date for drivers of nonhazardous materials. Item 4 deletes the hazardous materials driver rule and Item 5 combines the language for both types of drivers under one rule.

These amendments are identical to the ones published under Notice.

These amendments are intended to implement Iowa Code chapter 321.

These amendments will become effective April 14, 1999. Rule-making actions:

ITEM 1. Amend subrule 520.1(1), paragraphs "a" and "b," as follows:

a. Motor carrier safety regulations. The Iowa department of transportation adopts the Federal Motor Carrier Safety Regulations, 49 CFR Parts 390-399 (October 1, 1997 1998).

b. Hazardous materials regulations. The Iowa department of transportation adopts the Federal Hazardous Materials Regulations, 49 CFR Parts 107, 171-173, 177, 178, and 180 (October 1, 1997 1998). ~~The regulations in the October 1, 1990, edition of Title 49 CFR shall remain in full force and effect in accordance with the transition provisions of 49 CFR Section 171.14 (December 31, 1991).~~

ITEM 2. Amend rule 761—520.2(321) by rescinding the definitions of "Clearly labeled" and "Requirements of placarding and of carrying hazardous materials shipping papers."

ITEM 3. Rescind and reserve subrule 520.4(2).

ITEM 4. Rescind rule 761—520.7(321).

ITEM 5. Amend rule 761—520.8(321) as follows:

~~761—520.8(321)~~ 761—520.7(321) **Driver's statement.** A "driver" as used in Iowa Code section 321.449, unnumbered paragraph 5, and Iowa Code section 321.450, unnumbered paragraph 2, shall carry at all times a notarized statement of employment. The statement shall include the following:

1. The driver's name, address and social security number;
2. The name, address and telephone number of the driver's pre-July 29, 1996, employer;
3. A statement, signed by the pre-July 29, 1996, employer or the employer's authorized representative, that the driver was employed to operate a commercial vehicle only in Iowa; and
4. A statement showing the driver's physical or medical condition existed prior to July 29, 1996.

This rule is intended to implement Iowa Code ~~section sections~~ 321.449 and 321.450.

[Filed 2/10/99, effective 4/14/99]

[Published 3/10/99]

EDITOR'S NOTE: For replacement pages for IAC, see IAC Supplement 3/10/99.

## ARC 8730A

### TRANSPORTATION DEPARTMENT[761]

#### Adopted and Filed

Pursuant to the authority of Iowa Code sections 307.10 and 307.12, the Department of Transportation, on February 17, 1999, adopted an amendment to Chapter 620, "OWI and Implied Consent," Iowa Administrative Code.

Notice of Intended Action for this amendment was published in the January 13, 1999, Iowa Administrative Bulletin as **ARC 8600A**.

This chapter is being amended to adopt new subrule 620.4(5), which allows hearings to be reopened for OWI revocations. The new subrule provides a procedure for petitioning the Department to reopen a hearing and for appealing a denial of a petition to reopen.

Written comments were received from the Iowa State Bar Association, the Iowa Civil Liberties Union, and two individual attorneys. Oral presentations from the Iowa State Bar Association and the Iowa Civil Liberties Union were heard on February 4, 1999. After considering the written and oral comments received, the Department has rewritten the new subrule. The new language simply provides a procedure for reopening hearings. The new language is substantially the same as former subrule 620.4(4), which was rescinded effective March 18, 1998.

This amendment is intended to implement Iowa Code chapter 321J and Iowa Code section 17A.16.

This amendment will become effective April 14, 1999. Rule-making action:

Amend rule 761—620.4(321J) by adopting new subrule 620.4(5) as follows:

**620.4(5)** Petition to reopen a hearing.

a. A petition to reopen a hearing pursuant to Iowa Code section 17A.16 shall be submitted in writing to the director

## TRANSPORTATION DEPARTMENT[761](cont'd)

of the office of driver services at the address in 761—620.2(321J). If a petition is based on a court order, a copy of the court order shall be submitted with the petition. If a petition is based on new evidence, the petitioner shall submit a concise statement of the new evidence and the reason(s) for the unavailability of the evidence at the original hearing.

b. A petition to reopen a hearing may be submitted at any time even if a hearing to contest the revocation was not originally requested or held.

c. A person may appeal a denial of the petition to reopen. The appeal shall be deemed timely if it is delivered to

the director of the office of driver services at the address in 761—620.2(321J) or properly addressed and postmarked within 20 days after issuance of the decision denying the petition to reopen.

[Filed 2/17/99, effective 4/14/99]

[Published 3/10/99]

EDITOR'S NOTE: For replacement pages for IAC, see IAC Supplement 3/10/99.

\*SUMMARY OF DECISIONS  
THE SUPREME COURT OF IOWA  
FILED FEBRUARY 17, 1999

*Note:* Copies of these opinions may be obtained from the Supreme Court Clerk, State Capitol Building, Des Moines, IA, 50319, for a fee of 40 cents per page.

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**No. 98-1423. IOWA SUPREME CT. BD. OF PROF'L ETHICS & CONDUCT v. WANЕК.**

On review of the report of the Grievance Commission. **LICENSE SUSPENDED.** Considered en banc. Opinion by Neuman, J.

(13 pages \$5.20)

Acting on questionable—if not plainly invalid—notice by ordinary mail, Iowa lawyer Jerrold Wanek secured \$1.1 million judgments against the New York Times, the Chicago Tribune, and Investor's Business Daily of Los Angeles. The judgments stemmed from sanctions imposed against the corporations in a discovery dispute. Wanek tied up the Tribune's and IBD's bank accounts before the process was brought to a halt by the U.S. Bankruptcy Court sitting in Des Moines. The judgments were ultimately vacated and Wanek was referred to the Iowa Supreme Court Board of Professional Ethics and Conduct. The board charged Wanek with violating disciplinary rules against misrepresenting facts to the federal court and asserting unwarranted legal positions. The grievance commission only found that Wanek engaged in conduct prejudicial to the administration of justice and determined he should be privately admonished. We granted the board's request for discretionary appeal. **OPINION HOLDS:** We are convinced Wanek crossed the line dividing zealous advocacy from unethical practice. While Wanek's initial actions may have been guided by debatable assumptions, as circumstances changed, he should have backed off. He recklessly disregarded important mailings returned from IBD and the New York Times as undeliverable. He callously discounted lawyers' claims that the documents were not received in time to respond by the bar dates. He utterly failed to reply to IBD's inquiry concerning a discovery dispute about which it previously had no notice. And he doggedly pursued execution against that corporation, knowing it was oblivious to the judgment or its antecedents and, more importantly, knowing by then that the judgment he secured was totally out of proportion to the actual damages attributable to the IBD records. In addition, Wanek's failure to set the record straight at crucial stages misled the bankruptcy court. We cannot overlook the fact that obvious mistakes over misaddressed mail ended up involving the out-of-state corporations in six months of litigation in Iowa at a cost of nearly \$100,000. We are justifiably dismayed to think the lawyers involved here—from the advocates to the grievance commissioners—may have lost their idealism about how professionals might handle things with less nonsense and more civility. We are satisfied by a convincing preponderance of the evidence that Jerrold Wanek violated disciplinary rules by misrepresenting material facts to the court, engaging in conduct prejudicial to the administration of justice, and improperly advancing an unwarranted claim on behalf of a client. We suspend Wanek's license to practice law in this state indefinitely with no possibility of reinstatement for two months. Costs are assessed to Wanek.

**No. 98-1951. IOWA SUPREME CT. BD. OF PROF'L ETHICS & CONDUCT v. PLUMB.**

On review of the report of the Grievance Commission. **LICENSE SUSPENDED.** Considered by Harris, P.J., and Larson, Carter, Neuman, and Ternus, JJ. Opinion by Larson, J. (7 pages \$2.80)

The Iowa Supreme Court Board of Professional Ethics and Conduct charged West Des Moines attorney Van Plumb with multiple violations of the Iowa Code of Professional Responsibility in connection with his representation of two separate clients. Following a hearing, the grievance commission found several of the violations were established and recommended we suspend Plumb's license for a minimum of one month. **OPINION HOLDS:** Plumb's failure to even commence two clients' legal matters, to return their property, and to deposit funds in a trust account merit disciplinary action. In addition, we consider Plumb's two prior public reprimands for similar instances of neglect. We suspend Plumb's license indefinitely with no possibility of reinstatement for two months. Costs are assessed to Plumb.

**No. 97-739. KRAUSE v. KRAUSE.**

Appeal from the Iowa District Court for Buena Vista County, John P. Duffy, Judge. **REVERSED AND REMANDED.** Considered by McGiverin, C.J., and Lavorato, Snell, Ternus, and Cady, JJ. Opinion by McGiverin, C.J. (14 pages \$5.60)

Debra Krause and her husband, Paul, were involved in a one-motor vehicle accident. The vehicle was insured by a policy issued by IMT Insurance Company. Under the policy language known as a "family member exclusion," Paul was an uninsured motorist in regard to a claim by Debra against him for personal injuries arising from the accident. The declarations page of the policy lists uninsured motorist (UM) coverage as \$100,000 for each person and \$300,000 for each accident. An endorsement to the policy, however, reduces or "steps down" the amount of UM coverage to an amount "that does not exceed the limit specified in the financial responsibility law of Iowa." Debra filed a petition in district court against Paul, and a default judgment was entered in Debra's favor. Thereafter, IMT intervened asserting the amount of UM coverage benefits available to Debra was reduced from \$100,000 to \$20,000. Sustaining Debra's summary judgment motion and overruling IMT's summary judgment motion, the district court concluded that the step-down language in the UM coverage endorsement was ambiguous and unenforceable. IMT appeals. **OPINION HOLDS:** I. We conclude that the district court incorrectly determined that the language of the UM coverage endorsement is ambiguous. The policy clearly reduces the amount of UM coverage available when the family member exclusion is triggered to the limit specified in the financial responsibility law of Iowa, or from \$100,000 to \$20,000 for injuries to one person. The fact that the policy does not refer to the specific code section or monetary amount does not render the endorsement ambiguous. II. Because the language of the UM endorsement is not ambiguous, Debra and Paul would have no valid reasonable expectation of \$100,000 UM coverage when the family member exclusion is triggered. We thus conclude as a matter of law that Debra has failed to show that the reasonable expectations doctrine is applicable. We reverse the district court judgment and remand for entry of judgment in favor of IMT consistent with this opinion.

**No. 98-921. IN RE GUARDIANSHIP OF T.H.**

Appeal from the Iowa District Court for Pottawattamie County, Gordon C. Abel, Judge. **REVERSED AND REMANDED.** Considered by Harris, P.J., and Larson, Carter, Neuman, and Ternus, JJ. Opinion by Harris, J. (6 pages \$2.40)

Beverly Miller and David Higginbotham have two children, Taletha and Tyler. They permanently moved to Colorado in 1991. Both Miller and Higginbotham have family ties in Iowa and Taletha and Tyler annually returned during summers to spend time with family. In 1990, at a time when Miller and Higginbotham were separated, juvenile proceedings were instituted in Colorado. The Colorado court ultimately transferred legal and physical custody to Miller, expressly retaining jurisdiction. In 1996, Higginbotham obtained a temporary restraining order against Miller in Colorado and listed himself, Taletha and Tyler as plaintiffs. The Colorado court made its restraining order permanent but later it removed the children from the terms of the order. In 1997 the Rutledges, Higginbotham's relatives, filed an application in Iowa seeking temporary and permanent guardianship. The court appointed them guardians for Taletha and Tyler. The matter is before us on Miller's appeal challenging Iowa's jurisdiction to appoint the guardians. **OPINION HOLDS:** The case turns on the federal parental kidnapping prevention act of 1980 [PKPA]. The Iowa guardianship proceeding challenged here qualifies as a "custody determination" under the PKPA. This custody determination is obviously confronted by the one entered in Colorado in 1990. Before Iowa courts have jurisdiction under the PKPA to modify the Colorado order, Colorado must no longer have jurisdiction or have declined to exercise jurisdiction to modify its orders. We find Colorado continues to assert jurisdiction over Taletha and Tyler. Although the Rutledges argue the Colorado court did not have jurisdiction to enter a restraining order naming the children as parties, it is not our role, in resolving PKPA disputes, to settle challenges to the authority of a sister state's courts to issue orders. The Rutledges' petition should have been dismissed.

**No. 97-954. STATE v. RICHMOND.**

On review from the Iowa Court of Appeals. Appeal from the Iowa District Court for Linn County, Van D. Zimmer, Judge. **DECISION OF COURT OF APPEALS AND DISTRICT COURT JUDGMENT AFFIRMED.** Considered by Harris, P.J., and Larson, Carter, Neuman, and Ternus, JJ. Opinion by Harris, J. (5 pages \$2.00)

John Richmond and Robyn Krell had an intimate relationship. Shortly after Krell ended it, Richmond appeared at her residence with a knife and forced her to have sex. Afterwards, Richmond called an Episcopalian priest, Fr. Dick Osing, about the incident. Osing is also a part-time unlicensed marriage and family counselor. Richmond met with Osing later that same day at Osing's church. As a result of the attack, Richmond was charged with second-degree sexual abuse. At trial, the district court concluded Richmond's conversation with Osing was not privileged and allowed Osing to testify, relating what Richmond had told him about the assault. Following his conviction, Richmond appealed. The court of appeals majority found that, although the conversation was privileged, the challenged evidence was merely cumulative and not prejudicial.

**No. 97-954. STATE v. RICHMOND. (continued)**

We granted Richmond's application for further review. **OPINION HOLDS:** We do not reach the question of prejudice, but find the admissions were not privileged. The record strongly supports the trial court's finding that Richmond did not consult Osing in his priestly capacity, thus the priest-penitent privilege fails. Richmond cannot prevail on his claim that the conversation was protected by the counselor-client privilege because Osing was not a certified professional. We affirm Richmond's conviction.

**No. 97-1929. STATE v. MILLER.**

Appeal from the Iowa District Court for Polk County, Glenn E. Pille, Judge. **AFFIRMED.** Considered by Harris, P.J., and Larson, Carter, Neuman, and Ternus, JJ. Opinion by Neuman, J. (6 pages \$2.40)

While a prisoner at the women's reformatory, Monzelle Miller extensively corresponded with and called a number of men she "met" through advertisements in "singles" newspapers. Her letters soon progressed to mutual expressions of affection, long-term commitment, and promises of explicit sexual gratification. Among the many promises of devotion upon her release were requests for cash and personal items. The men responded with certified checks, money orders and catalog purchases billed to their personal credit cards. Each man believed Miller needed financial assistance and regarded his help as an investment in their future. After Miller was released from prison she failed to follow through on her promises to join any of her correspondents. The State charged Miller with three counts of second-degree theft by deception in violation of Iowa Code section 714.1(3) (1995). In its instructions the court described the factual premise for the State's charge this way: "Defendant did misrepresent her financial needs *and/or romantic intentions* to [named victims]." A jury found Miller guilty as charged. On appeal, Miller contends that criminal culpability cannot rest on deceit regarding "romantic intentions." **OPINION HOLDS:** Although the Model Penal Code, from which Iowa patterned its theft-by-deception statute, specifically exempts from its definition of deceit "falsity as to matters having no pecuniary significance," Iowa Code section 702.9, defining deception contains no such caveat. We deem it significant that our legislature elected not to incorporate the "pecuniary significance" exception. Additionally, Miller has not been prosecuted for merely breaking promises of romantic intention, but for deliberately using her false promises as a vehicle for parting her victims from their money. Miller clearly had no intent to follow through on her promises, and her misrepresentations of "romantic intention" were motivated solely by her desire to make her victims more vulnerable to misrepresentations of a financial sort. We believe the challenged jury instruction enjoys substantial support in the law and in this record.

**No. 97-505. ANDERSON v. UNIVERSITY OF IOWA HOSPS. & CLINICS.**

Appeal from the Iowa District Court for Johnson County, Larry J. Conmey, Judge. **AFFIRMED IN PART; REVERSED IN PART; REMANDED FOR FURTHER PROCEEDINGS.** Considered by McGiverin, C.J., and Carter, Lavorato, Snell, and Cady, JJ. Per curiam. (12 pages \$4.80)

Plaintiffs filed a petition against the University of Iowa Hospitals and Clinics and two of its employees requesting declaratory and injunctive relief as well as compensatory and punitive damages for defendants' alleged creation of false medical records regarding Darlene Anderson's treatment and condition. Defendants moved to dismiss the action, claiming (1) plaintiffs had no valid claim for injunctive relief because they were trying to obtain redress for prior wrongful acts, (2) no valid claim existed for declaratory relief because a justiciable controversy did not exist, and (3) plaintiffs failed to exhaust their administrative remedies pursuant to the Iowa Tort Claims Act. The district court ruled for defendants. Plaintiffs appeal. **OPINION HOLDS:** I. Because Iowa Code section 669.16 (1993) prohibits suits against a state agency for claims as defined by section 669.2(3), we find subject matter jurisdiction was lacking as to the hospital and dismissal was appropriate. We conclude jurisdiction is also lacking to consider the claims against the employees because plaintiffs failed to file their claims with the State Appeal Board prior to bringing suit in district court. We therefore affirm the district court's dismissal of those claims. II. We find that plaintiffs have met the minimal showing necessary to avoid dismissal under Iowa Rule of Civil Procedure 104(b) with regard to their claims for injunctive and declaratory relief. Therefore, we remand those claims to the district court for further proceedings.

**No. 97-1624. STATE v. KOTLERS.**

Appeal from the Iowa District Court for Story County, Thomas R. Hronek, District Associate Judge. **AFFIRMED.** Considered by McGiverin, C.J., and Harris, Carter, Snell, and Ternus, JJ. Opinion by Snell, J. Dissent by Carter, J. (8 pages \$3.20)

On July 26, 1995, the defendant, Norbert Kotlers, was convicted of operating while intoxicated (OWI). Because he had previously been convicted of OWI in 1978 and 1979, the court directed the Iowa Department of Transportation (DOT) to revoke Kotlers' driver's license for a six-year period pursuant to Iowa Code section 321J.4(3)(a) (1995). On June 24, 1997, the DOT (apparently mistakenly) notified Kotlers that his license revocation would end on that date. On June 26, 1997, Kotlers filed an application for restoration of his eligibility for a motor vehicle license pursuant to section 321J.4(3)(b). On July 30, 1997, the district court denied the application on the basis of the legislative repeal, effective July 1, 1997, of the early restoration provisions contained in section 321J.4(3)(b). Kotlers moved twice for the district court to reconsider pursuant to Iowa Rule of Civil Procedure 179(b) asserting the repeal was inapplicable to him and raising equal protection and ex post facto challenges to the application of the repeal. The district court denied the requests. Kotlers appealed. **OPINION HOLDS:** I. By the time of the hearing and ruling, the repeal of the early restoration provisions had already become effective and Kotlers

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had no right to restoration because the two-year period for such restoration had not expired before the repeal and he had not established the statutory conditions for such restoration before the repeal. The district court was correct in its ruling. II. We reject Kotlers' equal protection claims that legislative changes in Iowa Code sections 321J.2(4)(a) and 321.12(4) (Supp. 1997), directing that OWI convictions more than twelve years old should not be considered in determining whether an offense is a second or subsequent offense for conviction or revocation purposes, creates an unconstitutional treatment of classes of individuals and that the repeal of section 321J.4(3)(b) constitutes similar treatment. III. These legislative changes do not constitute additional punishment. Accordingly, there are no ex post facto violations. The district court decision is affirmed. **DISSENT ASSERTS:** Although I agree that Kotlers' constitutional challenges should be rejected, I believe that his statutory claim is valid for the reasons expressed in my dissents in *Iowa Department of Transportation v. Iowa District Court for Scott County*, N.W.2d \_\_\_, (Iowa 1998), and *Iowa Department of Transportation v. Iowa District Court for Buchanan County*, \_\_\_ N.W.2d \_\_\_, \_\_\_ (Iowa 1998).

**No. 97-2184. KOTLERS v. IOWA DEP'T OF TRANSP.**

Appeal from the Iowa District Court for Story County, William J. Pattinson, Judge. **AFFIRMED ON MOTION TO DISMISS; REMANDED FOR DISMISSAL ON OTHER GROUNDS DECIDING THE MERITS OF THE PETITION.** Considered by McGiverin, C.J., and Harris, Carter, Snell, and Ternus, JJ. Opinion by Snell, J. (5 pages \$2.00)

On July 26, 1995, Norbert Kotlers was convicted of operating while intoxicated (OWI). Because he had been convicted previously of OWI in 1978 and 1979, the court directed the Iowa Department of Transportation (DOT) to revoke Kotlers' driver's license for a six-year period pursuant to Iowa Code section 321J.4(3)(a) (1995). The DOT did not formally implement the court order by a revocation notice until August 18, 1997. After Kotlers paid civil victim reparation penalties on June 24, 1997, the DOT, apparently mistakenly, notified Kotlers that his revocation would end on that date. Kotlers filed a petition for judicial review challenging the subsequent revocation notice. The DOT filed a motion to dismiss asserting its action was merely a ministerial act that carried out the district court order to revoke Kotlers' driver's license and was not "agency action" subject to judicial review. The district court denied the motion. We granted the DOT permission to take an interlocutory appeal. **OPINION HOLDS:** I. The notice by the DOT of the revocation of Kotlers' driver's license constituted "agency action" from which a petition for judicial review to the district court would lie under the provisions of Iowa Code chapter 17A. The district court correctly denied the DOT's motion to dismiss. The ruling is affirmed. II. In *State v. Kotlers*, \_\_\_ N.W.2d \_\_\_ (Iowa 1999), we rejected Kotlers' claims for relief from the procedures effecting the six-year revocation of his driver's license presented in his petition for judicial review. In light of that ruling, we find there are no substantive issues remaining for the district court to decide. Therefore, we remand to the district court for entry of an order dismissing Kotlers' petition.

**No. 96-2132. VINCENT v. FOUR M PAPER CORP.**

Appeal from the Iowa District Court for Lee County, John G. Linn, Judge. **AFFIRMED.** Considered by Carter, P.J., and Lavorato, Neuman, Snell, and Cady, JJ. Opinion by Snell, J. (15 pages \$6.00)

Plaintiff Rusty Vincent began working at Consolidated Packaging Corporation (CPC), a paper mill in Fort Madison, in 1974. By 1981 he had been promoted to the position of machine tender, the highest paying production job at the mill. During a subsequent layoff, Vincent suffered a ruptured brain aneurysm, resulting in an intra-cranial hemorrhage. He underwent successful surgery to relieve the hemorrhage and repair the damage to his brain. CPC's director of human resources changed Vincent's status from laid-off to medical leave to enable him to receive weekly medical benefit payments. In early December 1993, Four M Paper Corporation (Four M) announced its intent to purchase the assets of CPC. On December 10, 1993, Vincent visited the mill with a medical release from his doctor and declared himself available to work. However, the doctor rescinded the release after learning of the dangers of Vincent's machine tender job. A subsequent contract between Four M and the workers' union provided CPC employees on medical leave would be given first consideration for new hire positions upon showing Four M an unrestricted medical release, and that such employees would be given seniority based on their first day of work. After Vincent obtained an unrestricted medical release, Four M hired him as a member of the labor pool, because his position as machine tender had been filled. Vincent's new position paid less than the machine tender position. In addition, his seniority status was below that of most other Four M employees despite his nearly twenty years of working at the mill. After receiving a right-to-sue letter from the Iowa Civil Rights Commission, Vincent filed a petition in district court against Four M alleging discrimination in employment based on a disability in violation of the Iowa Civil Rights Act (ICRA). Following a bench trial, the court entered judgment in favor of Four M. Vincent appeals. He contends the district court erred in concluding he was not disabled or regarded as disabled by Four M. He also argues that Four M's policy requiring a medical release or that the employee be 100% healed before he or she may resume work is a per se violation of the ICRA. **OPINION HOLDS:** I. We find substantial evidence supports the district court's conclusion that Vincent was not disabled within the meaning of the ICRA because he was not substantially limited in the major life activity of working. The number and types of jobs from which Vincent was disqualified because of his impairment was fairly limited, and he failed to present substantial evidence that his injury precluded him from performing a class of jobs or a broad range of jobs in various classes. Moreover, Vincent's condition, although serious, was only temporary and not expected to have a long-term impact on his work capabilities. II. Vincent also failed to prove his perceived disability claim because he could not show Four M failed to make the employment decision based on an individualized assessment of his condition, and instead based its decision on myths, fears or stereotypes. The district court therefore properly concluded that Vincent failed to prove that Four M regarded him as having a disability. III. We also conclude Vincent's claim regarding Four M's 100% healed policy must be deemed waived because it was raised for the first time on appeal. We affirm.

**No. 98-527. IN RE MARRIAGE OF DENLY.**

Appeal from the Iowa District Court for Van Buren County, Robert Bates, Judge. **APPEAL DISMISSED.** Considered by McGiverin, C.J., and Lavorato, Snell, Ternus, and Cady, JJ. Opinion by Snell, J. (9 pages \$3.60)

The respondent has appealed from a temporary custody order entered in the parties' dissolution action. **OPINION HOLDS:** I. A temporary custody order is not a final order appealable as a matter of right, but is an interlocutory order from which permission to appeal must be obtained from this court. Accordingly, we overrule *In re Marriage of Swanson*, 586 N.W.2d 527, 528 (Iowa App. 1998), which holds to the contrary. We also disavow statements in *In re Marriage of Campbell*, 451 N.W.2d 192, 195 (Iowa App. 1989), and *In re Marriage of Springer*, 538 N.W.2d 897, 900-01 (Iowa App. 1995), which indicate all temporary orders entered pursuant to Iowa Code section 598.11 (1997) are final judgments for purposes of appeal. II. We deny permission for an interlocutory appeal because the district court's decision on the temporary custody issue does not materially affect the final decision and would not better serve the interests of justice. Our denial of permission for an interlocutory appeal necessitates dismissal of the appeal and we need not consider its merits.

**No. 97-498. THAVENET v. DAVIS.**

On review from the Iowa Court of Appeals. Appeal from the Iowa District Court for Johnson County, L. Vern Robinson, Judge. **DECISION OF COURT OF APPEALS VACATED; JUDGMENT OF THE DISTRICT COURT REVERSED; REMANDED FOR NEW TRIAL.** Considered en banc. Opinion by Snell, J. Dissent by Carter, J. (12 pages \$4.80)

Dwayne Thavenet was driving east on ice-covered Interstate 80 when a truck driven by William Davis, traveling westbound, crossed the median and struck his car. A semi truck in the right lane had jackknifed; Davis veered left to avoid the semi that braked in front of him and crossed the median where he collided with Thavenet's car. Thavenet and his family sued Davis. The court of appeals affirmed a jury verdict in Davis's favor. We granted further review. **OPINION HOLDS:** I. At trial, the Thavenets proposed to introduce portions of a deposition of Davis's expert witness. Davis responded that other testimony from the deposition would be offered, including testimony that the cause of the accident was a sudden emergency. The Thavenets objected arguing the expert was outside his area of expertise when he used the term sudden emergency, but the trial court ruled it would permit the reading of the entire deposition. Being concerned that prejudice would result, the Thavenets did not offer the deposition testimony. They now claim their decision was a necessary consequence of the court's erroneous ruling and contend they should be permitted to object to the answers to their own questions put to the expert at the deposition, citing Iowa Rules of Civil Procedure 158(d) and (e). Under these rules we find the Thavenets are not, by offering the deposition testimony of the expert taken by them, foreclosed at trial from objecting to inadmissible questions and answers. We also find the challenged portions of the expert's testimony were inadmissible and when the objections to them were not sustained the Thavenets were thus presented with a Hobson's choice of offering the expert's deposition testimony that included inadmissible opinion evidence or not offering any of the deposition testimony.

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This choice prevented the Thavenets from having the opportunity to have the jury consider admissible evidence in support of their case and having a fair trial. This legal error requires a reversal and new trial. II. We also comment on the Thavenets' argument that the legal excuse and sudden emergency instructions were flawed because they did not explicitly state that the person claiming the legal excuse must prove the emergency was not of his own making. We conclude that whereas the Thavenets' argument has some merit puristically, it does not reach the level of constituting reversible legal error. Any error was cured because the other instructions properly advised the jury as to the legal principles involved. However, on retrial the point raised by the Thavenets should be recognized and instructions given that properly state the law and eliminate the problem. **DISSENT ASSERTS:** Although I agree that the court of appeals wrongly concluded that the Thavenets could not object to Davis's counsel reading into evidence certain answers from the expert's deposition, the challenged ruling did not result in an improper admission of evidence. No portion of the expert's deposition was offered in evidence, so the challenged ruling was of no legal consequence. Because the Thavenets fail to assert in their written argument how they were prejudiced by the district court's evidentiary ruling, they have waived any claim of prejudice. If we were to consider it, any potential for prejudice is far too speculative to warrant a reversal.

**No. 97-1140. MORTENSEN v. HERITAGE MUT. INS. CO.**

Appeal from the Iowa District Court for Story County, Dale E. Ruigh, Judge. **AFFIRMED.** Considered by Larson, P.J., and Lavorato, Neuman, Snell, and Cady, JJ. Opinion by Cady, J. (9 pages \$3.60)

Scott Mortensen was riding his bicycle when he was struck by a vehicle operated by an uninsured driver. Mortensen owned two insurance policies containing uninsured motorist coverage. His policy issued by Milwaukee Guardian Insurance limited uninsured coverage to \$100,000 for each insured person. The policy issued by Heritage Mutual Insurance Company limited coverage to \$20,000 for each insured person. Neither policy explicitly permitted or prohibited the stacking of policies. Mortensen requested the full amount of the coverage from each insurance company. The insurers agreed Mortensen's damages exceeded \$120,000, but claimed Iowa Code section 516A.2 (1997) prevented stacking of coverage in the absence of a specific provision in the policy permitting stacking. The insurance companies only paid Mortensen \$100,000. Mortensen commenced an action arguing section 516A.2 should be interpreted to permit stacking unless the policies contain antistacking provisions. On the parties' joint motion for adjudication of law points, the district court determined Mortensen was not entitled to collect the additional \$20,000 of coverage because it held section 516A.2 prohibited such stacking. Mortensen appeals. **OPINION HOLDS:** I. In order to give effect to the entirety of section 516A.2, the statutory language permitting recovery under the policy with the highest limit applies in the absence of stacking language in the contract. Thus, when the contract is silent regarding the stacking of uninsured benefits, the insured is entitled to recover up to the highest policy limit, with no stacking of coverage. II. The insurers' other insurance clauses do not permit stacking. The total of all applicable limits, \$120,000, only becomes relevant to determine the insurance companies' proportionate share of the liability. We affirm the district court.

**No. 98-308. CALLENDER v. SKILES.**

Appeal from the Iowa District Court for Scott County, David J. Sohr, Judge. **REVERSED AND REMANDED.** Considered en banc. Opinion by Cady, J. Dissent by Harris, J. (20 pages \$8.00)

Rebecca and Rick Skiles are married. In 1994, they separated for a period of time, during which Rebecca began an intimate sexual relationship with Charles Callender. Rebecca and Charles eventually ended their relationship and she and Rick reconciled. Rebecca later gave birth to a child conceived during the separation. After the child's birth, Charles filed an application to establish paternity, custody, visitation, and child support. Blood testing revealed a 99.98% probability Charles was the biological father. The district court determined Charles had no standing to bring a paternity claim and dismissed the application. Charles appeals and claims he is entitled to litigate his claim as an "interested person" under Iowa Code section 600B.8 (1997), or the "established father" under section 600B.41A(3). If not, he asserts the statute deprives him of due process and equal protection under the federal and state constitutions. **OPINION HOLDS:** I. Iowa Code section 252A.3(4) deems Rick to be Samantha's father by virtue of his marriage to Rebecca. Because blood tests do not establish paternity without a court order, Charles does not become the established father by virtue of the tests that have been taken in this case. Charles, therefore, is not authorized under section 600B.41A(3) to commence an action to overcome paternity. II. Chapter 600B does not contemplate that a putative father be included within the persons entitled to bring an action to establish paternity. Instead, it specifically declares that the person sought to be declared the father be named in the action as a defendant. Charles is not an "interested person" under section 600B.8. III. Section 600B.7 does not give Charles a general equitable right to bring this action. We do not recognize any separate equitable parenting principles which would give a person outside a marriage the right to establish paternity and conclude our legislature has not provided him any legal relief. IV. We are convinced our legislature did not intend for its laws of paternity and support to be used by a putative father to challenge the established or presumed paternity of children born into a marriage. Our legislature has not provided Charles with standing to assert his claim. V. We find Charles has a liberty interest in challenging paternity and that therefore section 600B.41A is unconstitutional under our state constitution to the extent it denies him standing to overcome paternity. Despite the presence of an existing family, the rights of a putative father cannot be denied without an opportunity for a hearing. Although we recognize a right for Charles to petition the court to challenge paternity in this case, we also recognize this right can be lost by waiver, which may be the threshold question to consider before addressing paternity. If the challenge is not a serious and timely expression of a meaningful desire to establish parenting responsibility, it may be lost. While we allow a biological father standing to challenge paternity, this is not determinative of the ultimate issue of whether the father will have a relationship with his child. We only hold our statute must provide a procedural mechanism for claims to be brought. We leave the substantive claim of parenting for further determination under the similar standards governing the challenge of an established father, including the best interest of the child. Accordingly, we remand this case for determination of whether Charles has standing under the test we have outlined. **DISSENT ASSERTS:** A "liberty interest" should not arise to one who conceives a child by

**No. 98-308. CALLENDER v. SKILES. (continued)**

a married woman who was—and remains—married. Society has traditionally considered a child born to a married couple to be the legitimate child of both. It is unwise to set up a court process in order to undo a recognized family structure. The process authorized by the majority will include many false ones where a husband-and-wife relationship will be outrageously disturbed in defending against such a suit. A biological claim should not alone justify unwrapping a parent-child relationship established within a family.

**No. 97-346. ARMSTRONG-RINGSTED COMMUNITY SCH. DIST. v. LAKELAND AREA EDUC. AGENCY.**

Appeal from the Iowa District Court for Emmet County, Frank B. Nelson, Judge. **AFFIRMED.** Considered by Harris, P.J., and Larson, Carter, Neuman, and Ternus, JJ. Opinion by Carter, J. (6 pages \$2.40)

Plaintiffs, who are petitioners residing in the Armstrong-Ringsted Community School District (petitioners), appeal from a district court's judgment upholding the Lakeland Area Education Association's (AEA) dismissal of their petition for reorganization of the Lincoln Central and Armstrong-Ringsted School Districts. Petitioners argue that the district court erred in affirming the AEA's action because their petition complied with all statutory requirements under Iowa Code chapter 275 (1995) and was consistent with the AEA's reorganization plan. Petitioners also contend that the AEA was unduly influenced by a petition for reorganization between the Lincoln Central and Estherville School Districts, which, petitioners allege, was improperly granted while judicial review of this case was pending. **OPINION HOLDS:** Both Armstrong-Ringsted's superintendent and the AEA's administrator agreed that the proposed merger between Armstrong-Ringsted and Lincoln Central would meet the criteria contained in the AEA's reorganization plan. We conclude, however, that there is no requirement that every plan submitted to an AEA must be approved because that would eliminate its authority to dismiss petitions. Here, two major disincentives to approval of that plan were (1) the fact that, because of a whole-grade sharing plan between the Lincoln Central district and the Estherville district, 202 of the Lincoln Central district's 223 students attended school in Estherville; and (2) the large number of objectors seeking to opt out of the proposed Lincoln Central merger with Armstrong-Ringsted based upon geographical proximity to other contiguous school districts. Either of these circumstances were legally sufficient reasons for upholding the AEA's rejection of the proposed merger. We also conclude that the AEA could not be expected to close its eyes to the alternative merger plan, which it believed offered greater educational advantages. Finally, we reject the petitioners' attempt to predicate reversal of the AEA's denial of their petition on the AEA's subsequent action in approving the proposed merger while this judicial review was still pending. We affirm.

**No. 97-1582. PRUDENTIAL INS. CO. v. MARTINSON.**

Appeal from the Iowa District Court for Winneshiek County, James L. Beeghly, Judge. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.** Considered by Harris, P.J., and Larson, Carter, Neuman, and Ternus, JJ. Opinion by Carter, J. (5 pages \$2.00)

Stephen Martinson was driving a truck owned by his employer when his vehicle was struck by a semitrailer that had failed to obey a traffic signal. Stephen's guardian, Kathleen Martinson, brought suit against Prudential Insurance Company, their family automobile insurer. The Martinsons alleged the liability insurance covering the owner and driver of the semitrailer was inadequate to provide them full recovery for the damages sustained. Dismissing the action, the district court concluded that the underinsured motorist coverage and medical payment coverage in the Prudential policy did not apply pursuant to a nonowned car exclusion. The Martinsons appeal. **OPINION HOLDS:** I. We hold that, even if the exclusion to underinsured motorist coverage relied on by Prudential could be upheld under a correct interpretation of the policy, that exclusion may not be given effect because to do so would deny coverage mandated by Iowa Code chapter 516A. II. Prudential's argument that the truck driven by Stephen was not a car as defined in the policy must fail because the insuring clause of the underinsured motorist coverage clearly confers coverage under that part "when an insured (whether or not occupying a car) is struck by an underinsured motor vehicle." However, with respect to the medical payment section of the policy, neither of the vehicles involved in the accident that produced Stephen's injuries were a "car" as defined in the policy. Therefore, we affirm the district court's declaratory judgment with respect to the medical payments coverage, reverse the judgment relating to the underinsured motorist coverage, and remand the case.

**No. 97-971. WILSON v. IBP, INC.**

Appeal from the Iowa District Court for Pottawattamie County, James M. Richardson, Judge. **AFFIRMED.** Considered en banc. Opinion by Larson, J. (9 pages \$3.60)

A jury awarded Wilson \$4000 in compensatory damages and \$15 million in punitive damages in a defamation action against IBP and Diane Arndt. The district court ordered a new trial unless Wilson accepted \$100,000 in punitive damages. Wilson declined and filed an appeal. In *Wilson v. IBP, Inc.*, 558 N.W.2d 132 (Iowa 1996) (*Wilson I*) we affirmed the \$4000 in compensatory damages but modified the punitive damage award by ordering a new trial or a remittitur of all punitive damages in excess of \$2 million. On remand, Wilson accepted the remittitur, and the district court entered judgment. IBP now appeals, challenging when interest began to accrue on the punitive damage award. **OPINION HOLDS:** Allowing interest in this case from the date of the verdict is consistent with Iowa Code section 625.21 (1997) and our earlier cases, yet it recognizes the opposing policy considerations underlying this issue. When the jury returned its verdict awarding Wilson punitive damages, he acquired a "claim of right" that entitled him to interest. He acquired this claim of right because at that point the discretion of the trier of fact had been exercised in favor of punitive damages. The district court properly awarded interest from the date of the verdict.

**No. 97-1268. MERCY HOSP. MED. CTR. v. COUNTY OF MARION, IOWA.**

Appeal from the Iowa District Court for Polk County, Larry Eisenhauer, Judge. **REVERSED AND REMANDED.** Considered by Harris, P.J., and Larson, Carter, Neuman, and Ternus, JJ. Opinion by Larson, J. (8 pages \$3.20)

Marion County appeals from the district court's finding that it must bear some of the costs of emergency medical care given to an Iowa Department of Corrections (DOC) inmate who had escaped from work release in O'Brien County and was injured in a traffic accident in Marion County. **OPINION HOLDS:** At the time of the inmate's accident, he was still in the legal custody of the DOC. Even if he was deemed to have been arrested at the accident scene, he was not a county prisoner under Iowa Code section 356.5 (1995) because the requirement of custody in the sheriff was lacking as a matter of law. Although the trooper testified the inmate would have been taken to the Marion County jail had it not been for his injuries, the fact is he was not taken to that jail nor to a facility in lieu of jail at the direction of the sheriff. The sheriff exercised no control over him. The county is not liable for the inmate's medical costs because he was not in the custody of the sheriff and did not meet the definition of a prisoner under section 356.5(2). We reverse and remand for dismissal of the plaintiff's petition.

**No. 96-2296. STATE v. HARRIS.**

On review from the Iowa Court of Appeals. Appeal from the Iowa District Court for Polk County, Arthur E. Gamble, Judge. **DECISION OF COURT OF APPEALS AND JUDGMENT OF DISTRICT COURT AFFIRMED.** Considered by McGiverin, C.J., and Harris, Carter, Snell, and Ternus, JJ. Opinion by Carter, J. Special concurrence by Ternus, J. (10 pages \$4.00)

Defendant appeals from his conviction for first-degree murder. **OPINION HOLDS:** I. Only if the facts are not disputed and not susceptible of different inferences may the question of whether a witness is an accomplice be determined as a matter of law. The district court correctly refused to instruct the jury that witnesses Walker and Palmer were accomplices as a matter of law. II. The district court refused defendant's request for interrogatories regarding whether Walker and Palmer were accomplices. Iowa Rule of Criminal Procedure 21(2) does not require the submission of interrogatories in all instances in which the conditions described in the rule exist. Additionally, defendant is unable to establish any prejudice based on the court's failure to submit the requested interrogatories because the jury was properly instructed regarding the necessary corroboration of accomplice testimony. Furthermore, the record allows an adequate review of the issues in the absence of the requested interrogatories. III. Testimony of a police officer about a photograph of defendant taken approximately seven weeks prior to the alleged murder showing defendant to be in possession of a Smith & Wesson model 422 pistol was properly admitted. The alleged accomplices testified that defendant had used a gun of this general description, and the bullets retrieved from the murder victim were from a gun of this type. The testimony was properly allowed as corroborative evidence of the accomplices' testimony. IV. Detectives made a good-faith effort to contact defendant's parents before obtaining a waiver of his right to counsel as a condition of interrogating him. We reject defendant's argument that his statements should have been suppressed. V. There was ample evidence to support the conviction. Any suggestion that his conviction was the result of ineffective assistance of trial counsel cannot be

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determined on the existing trial record, and such claims, if they exist, must be asserted by application for postconviction relief. **SPECIAL CONCURRENCE ASSERTS:** I concur specially to state my disagreement with the majority's interpretation of rule 21(2). I think this rule requires the court to submit a special interrogatory requested by the defendant when the interrogatory is directed to whether a witness is an accomplice. I would hold the trial court erred in refusing to give the defendant's requested interrogatory on whether Walker and Palmer were accomplices.

**No. 97-2124. J.A.H. v. WADLE & ASSOCIATES, P.C.**

Appeal from the Iowa District Court for Polk County, Scott D. Rosenberg, Judge. **AFFIRMED AND REMANDED.** Considered by McGiverin, C.J., Lavorato, Neuman, Snell, and Cady, JJ. Opinion by Lavorato, J.  
(17 pages \$6.80)

In 1995 the district court dissolved the marriage of Robert and Silvia, and granted primary physical custody of their minor child, James, to Robert. Thereafter, Robert filed the present action on behalf of James against Silvia's mental health care providers, Anita Jordan and Wadle & Associates, P.C., for loss of parental consortium. The petition alleged, among other things, Jordan, a mental health therapist, through her negligent treatment of Silvia caused Silvia to develop false memories which rendered Silvia unable to care for James, caused Silvia to become estranged from James, and diminished Silvia's affection for him. The district court ultimately granted the defendants' summary judgment motion, ruling that the defendants did not owe "a legal duty to third parties who are not patients." Robert appeals. **OPINION HOLDS:** I. Based on public policy considerations, we hold as a matter of law there is no duty running from the therapist to nonpatient family members. The duty runs to the patient alone. However, we limit our holding to the facts of this case. For example, we express no opinion on a mental health care provider's duty to protect an identifiable potential victim from a dangerous patient. II. We also conclude for public policy reasons that the child has no viable cause of action against the defendants even though his claim for loss of consortium is an independent one based on the defendants' duty to his mother. III. Although the conclusions we reach make moot Robert's further contentions concerning Silvia's claim of confidentiality regarding her medical records, if we were to reach those contentions, we would uphold the district court's ruling on them. Accordingly, we affirm the district court's summary judgment ruling.

**No. 97-798. IN RE MARRIAGE OF CARR.**

Appeal from the Iowa District Court for Polk County, Robert J. Blink, Judge. **AFFIRMED.** Considered by McGiverin, C.J., and Lavorato, Snell, Ternus, and Cady, JJ. Opinion by Lavorato, J. (7 pages \$2.80)

Lex Parr and Laura Carr are the parents of four children. Lex is obligated to pay child support. Laura assigned the child support due her from Lex to the State for public assistance she received. The Child Support Recovery Unit (CSRU) obtained an order for mandatory income withholding, requiring Lex's

**No. 97-798. IN RE MARRIAGE OF CARR. (continued)**

employer to deduct a portion of Lex's weekly income, and an additional \$23,206 lump sum payment of delinquent child support. Lex and his employer settled a workers' compensation claim for \$7500. Lex sought a determination in district court of the amount of the child support lien on the settlement. The district court deducted from the total settlement \$4012.33 for payment of Lex's attorney fees, costs, and a Title XIX claim, and ordered the remaining \$3487.67 to be paid to the CSRU. We granted Lex's application to certify appeal. **OPINION HOLDS:** We reject Lex's argument that the court should have first deducted the costs, attorney fees, and the Title XIX claim from the \$7500 and then divided the balance equally between the CSRU and him. Based on our interpretation of Iowa Code section 627.13 (1997), we find that the entire amount of Lex's workers' compensation benefits are to be considered "disposable earnings," garnishable for child support subject to the 50% limitation imposed by 15 U.S.C. § 1673(b). Thus, we agree with the CSRU that it should have received one-half of the total award. We must nevertheless affirm the district court's award of a lesser amount since the CSRU did not appeal.

**No. 97-83. IOWA TEL. ASS'N v. CITY OF HAWARDEN.**

(On rehearing)

Appeal from the Iowa District Court for Sioux County, Michael S. Walsh, Judge. **AFFIRMED ON APPEAL AND ON CROSS-APPEAL.** Considered en banc. Opinion by Ternus, J. (20 pages \$8.00)

On October 18, 1994, voters in the City of Hawarden approved a measure allowing the City to establish a municipal cable communications system as a city utility. Thereafter, the city council adopted an ordinance to establish such a utility. The Iowa Telephone Association (ITA) filed this action seeking a declaratory judgment that (1) Iowa Code section 23A.2 (1995) prohibits a municipal utility from competing with private industry in the offering of telephone services, and (2) Iowa Code section 384.81 prohibits a municipality from operating any city utility other than as defined in Iowa Code section 362.2(6), and that section 362.2(6) does not include a telephone system within the definition of a city utility. The district court denied the City's motion to dismiss in which it claimed ITA's exclusive remedy was quo warranto. On the parties' cross-motions for summary judgment, the district court held that any state law inhibiting the City's ability to offer land-line telephone service was preempted by 47 U.S.C. § 253, the general preemption provision of the Telecommunications Act of 1996. The court granted the City's motion for summary judgment and dismissed the case. ITA appealed the court's summary judgment ruling. The City cross-appealed challenging the denial of its motion for summary judgment and its motion to dismiss. The City also filed a motion to dismiss the appeal as moot. We originally filed an opinion partially reversing the district court's ruling on summary judgment. We granted the City's petition for rehearing to consider the City's alternative argument raised in the district court regarding 47 U.S.C. § 541(b)(3)(B). **OPINION HOLDS:** I. We reject the City's contention that this appeal is moot due to the 1997 amendments to Iowa Code chapter 476. The amendments simply dealt with the jurisdiction of the utilities board and did not address whether cities have the power to provide local telephone services. II. Even if quo warranto is available to ITA, we find that remedy is not exclusive and ITA could seek declaratory relief. The district court therefore properly denied

**No. 97-83. IOWA TEL. ASS'N v. CITY OF HAWARDEN.**  
(On rehearing) (continued)

the City's motion to dismiss. III. We find § 253(a) does not preempt state laws prohibiting municipalities from offering local telephone services. IV. Section 541(b)(3)(B) applies to city utilities operating cable systems and prevents a state from prohibiting such a utility from also offering telephone service. We reject ITA's claim that applying § 541(b)(3)(B) violates the Tenth Amendment to the United States Constitution. Accordingly, we need not consider ITA's contention that state law prohibits a municipal utility from operating a telephone system. V. Although the district court erred in its interpretation of § 253(a), its grant of summary judgment to the City was, nonetheless, appropriate based upon our interpretation of § 541(b)(3)(B). Therefore, we affirm.

**No. 98-282. STATE v. AUGUST.**

Appeal from the Iowa District Court for Scott County, John A. Nahra, Judge. **AFFIRMED.** Considered by McGiverin, C.J., and Lavorato, Snell, Ternus, and Cady, JJ. Opinion by Ternus, J. (11 pages \$4.40)

Jon Michael August pled guilty to three forcible felonies and was given two consecutive, indeterminate twenty-five year sentences and one concurrent, indeterminate ten-year sentence. He is not eligible for parole and must serve one hundred percent of the consecutive sentences, subject to a possible reduction for good conduct time not to exceed fifteen percent of his sentences. He claims the consecutive sentences constitute cruel and unusual punishment in violation of the Eighth Amendment and the trial court abused its discretion in imposing consecutive sentences. **OPINION HOLDS:** I. We will employ the following test in considering August's Eighth Amendment challenge. We will compare the sentences imposed upon August with the gravity of his crimes, viewed objectively. Only if the sentences appear grossly disproportionate will we then move to a consideration of the three-prong *Solem* test. II. We conclude that the length of August's sentences does not violate the Eighth Amendment. There is nothing cruel and unusual about punishing a person committing two crimes more severely than a person committing only one crime, which is the effect of consecutive sentencing. Moreover, the fact that August will have to serve his entire sentence without the possibility of parole does not alter our conclusion. III. August claims the trial court abused its discretion in sentencing him to consecutive sentences because it failed to adequately consider that he suffered from depression at the time of the offenses, and was less culpable than the other defendants because he was not as actively involved in the crimes and has expressed remorse. We conclude the trial court considered these circumstances and properly exercised its sentencing discretion.

**No. 97-0426. UNITED STATES CELLULAR CORP. v. BOARD OF ADJUSTMENT.**

Appeal from the Iowa District Court for Polk County, Robert J. Blink, Judge. **AFFIRMED.** Considered by Harris, P.J., and Larson, Carter, Neuman, and Ternus, JJ. Opinion by Ternus, J. (17 pages \$6.80)

United States Cellular Corporation applied for a special use permit for construction of a communications tower in the City of Des Moines. The Board

No. 97-0426. UNITED STATES CELLULAR CORP. v. BOARD OF ADJUSTMENT. (continued)

of Adjustment for the City held a public hearing to address the company's application. The Board voted unanimously to deny the application based on the zoning commission staff's recommendation. U.S. Cellular then filed a petition for writ of certiorari in the district court challenging the Board's action and asking that the court direct the Board to issue the requested permit. The district court held that the Board acted illegally in rejecting the application. The court concluded that the Board could not justify its action on the basis of an ordinance that had not been adopted when the Board made its decision. The court also found the two reasons given in the Board's written denial were inadequate to sustain the Board's action. The district court directed the Board to issue a special use permit. The Board appeals. **OPINION HOLDS:** I. We express no opinion on whether the Board may properly apply an ordinance, not yet enacted, in considering an application for a special permit because the Board did not appeal from this portion of the district court's ruling. II. We will apply the zoning law as it exists at the time of our decision, unless the applicant has a vested right or the Board acts in bad faith. In these latter instances, we will apply the zoning law in effect at the time of the Board's hearing. III. We find there is substantial evidence to support the district court's finding that the Board acted in bad faith and/or with malice in denying the application. Accordingly, we will apply the ordinance in effect at the time of the hearing in determining whether the remedy ordered by the district court—issuance of a permit—is proper. IV. The district court's decision to reverse rather than remand was within its authority. V. The Board argues that a remand is necessary because the district court failed to specifically determine whether the proposed tower met the requirements of the former ordinance. The district court's conclusion that U.S. Cellular was entitled to a special permit was only warranted if U.S. Cellular's application complied with the governing ordinance. The Board did not request a more specific ruling on this issue in its posttrial motion. Therefore, we presume the district court found the facts necessary to support its decision and find no grounds for reversal based on the district court's failure to specifically state that the proposed use complied with the requirements of the ordinance. VI. The Board claims U.S. Cellular failed to produce any evidence that the design and location of the proposed tower is in conformity with the standards of the Comprehensive Plan, and with recognized principles of civic design, land use planning, and landscape architecture. The ordinance does not require evidence of how the proposed use measures up against the Comprehensive Plan and relevant principles, and we decline to read such a requirement into the ordinance. Additionally, the Board has demonstrated no flaw in the district court's presumed finding that the proposed use conformed to these standards and principles. We affirm.

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