



Serving the Iowa Legislature

IOWA LEGISLATIVE INTERIM CALENDAR AND BRIEFING

August 14, 2014 2014 Interim No. 5

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Iowa Legislative Interim Calendar and Briefing is published by the Legal Services Division of the Legislative Services Agency (LSA). For additional information, contact: LSA at (515) 281-3566.

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Tuesday, September 9, 2014

Administrative Rules Review Committee

9:00 a.m., Room 116, Statehouse

Thursday, September 11, 2014

Cannabidiol Implementation Study Committee

10:00 a.m., Room 116, Statehouse

AGENDAS

INFORMATION REGARDING SCHEDULED MEETINGS

Administrative Rules Review Committee

Chairperson: Senator Wally Horn

Vice Chairperson: Representative Dawn Pettengill

Location: Room 116, Statehouse

Date & Time: Tuesday, September 9, 2014, 9:00 a.m.

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

Agenda: Published in the Iowa Administrative Bulletin:

<https://www.legis.iowa.gov/iowaLaw/AdminCode/bulletinSupplementListing.aspx>

Internet Page: <https://www.legis.iowa.gov/committees/committee?endYear=2014&groupID=705>

Cannabidiol Implementation Study Committee

Temporary Co-chairperson: Senator Joe Bolkcom

Temporary Co-chairperson: Representative Walt Rogers

Location: Room 116, Statehouse

Date & Time: Thursday, September 11, 2014, 10:00 a.m.

LSA Contacts: Rachele Hjelmaas, Legal Services, (515) 281-8127; Patty Funaro, Legal Services (515) 281-3040.

Tentative Agenda: Consider testimony from the Department of Public Health, Department of Transportation, and the University of Iowa College of Medicine, and a panel of consumer advocates, concerning implementation of the recent medical cannabidiol legislation (2014 Iowa Acts, ch 1125 (SF 2360)). Receive public comment.

Internet Page: <https://www.legis.iowa.gov/committees/committee?groupID=21380>

ADMINISTRATIVE RULES REVIEW COMMITTEE

August 5, 2014

Chairperson: Senator Wally Horn

Vice Chairperson: Representative Dawn Pettengill

EMERGENCY RULE FILING REVIEWS. Iowa Code §17A.4(3), (2013 Iowa Acts, ch 114 (HF 586)), provides that an agency can adopt a rule without notice only with specific statutory authority or with prior approval by the Administrative Rules Review Committee (ARRC). Under this procedure, the committee reviews requests by agencies to adopt rules filed emergency without notice at its monthly meeting or at special meetings if necessary.

The committee considered two rulings:

- **Iowa Finance Authority**—Military Service Member Home Ownership Assistance Program, Chapter 27. EMERGENCY FILING APPROVED BY COMMITTEE.
- **Economic Development Authority**—STEM internship program, new Chapter 110. EMERGENCY FILING DECLINED BY COMMITTEE.

EDUCATIONAL EXAMINERS BOARD, Substitute Authorization—Elementary Classroom, 07/23/14 IAB, ARC 1552C, NOTICE.

Background. This rulemaking expands the authority of the board's substitute authorization for substitute teachers to include the elementary classroom. Currently, the substitute authorization is only available for secondary classrooms. A substitute authorization provides an individual limited authority to act as a substitute teacher in a classroom for no more than 5 consecutive days and no more than 10 days in a 30-day period in one job assignment for a regularly assigned teacher who is absent. To obtain the substitute authorization, an applicant must hold a bachelor's degree. The applicant must also pass a background check and complete a minimum of 15 hours of coursework in classroom management, strategies for learning, diversity, and ethics.

Commentary. Committee members questioned the need for this rulemaking, asking whether there is a shortage of elementary substitutes and suggesting the rulemaking could have a negative effect on wage levels for substitutes. A board representative explained that the board has heard from school superintendents that finding qualified elementary substitutes has become more difficult of late. The representative also stated that Iowa's current limitations on elementary substitutes are unique across the nation. Public comment was heard from a representative of the Iowa State Education Association expressing concern about the impact on student learning if elementary students are taught by noncertified substitutes for significant periods of time over the course of a school year.

Action. No action taken.

EDUCATION DEPARTMENT, School Bus Driver's Authorization—Physical Fitness, 07/09/14 IAB, ARC 1528C, NOTICE.

Background. This rulemaking conforms state standards on pupil transportation for school districts and accredited nonpublic schools to a new federal regulation by providing that an applicant for a school bus driver's authorization undergo a biennial physical examination by a certified medical examiner who is listed on the National Registry of Certified Medical Examiners. Previously, the examination only needed to be conducted by a licensed physician or other medical professional.

Commentary. Committee members expressed concern that the training process necessary for a medical professional to obtain listing on the registry is lengthy, expensive, and burdensome. Members also questioned what would happen if an applicant cannot readily find a registered medical professional. A department representative explained that compliance with this federal regulation is mandatory and that truck drivers are already subject to a similar requirement. He noted that registered medical professionals are listed on the registry, and there are 31 medical professionals registered in Des Moines alone. He also explained that the examination does not check for mental health issues, as those are not covered by the federal or state standards at issue.

Action. No action taken.

TRANSPORTATION DEPARTMENT, Driver Education—Parent Teaching, 07/09/14 IAB, ARC 1526C, NOTICE.

Background. Iowa Code §321.178A was enacted in 2013; it allows a "teaching parent" to instruct a student in a driver education course approved by the department.

Commentary. Department representatives noted that the participating student must be under the custody and control of the teaching parent (parent, guardian, or custodian with a clean driving record). On completion of the training the teaching parent must deliver specified documentation to the department; this includes copies of tests, a log of class

(Administrative Rules Review Committee continued from Page 3)

room and driving hours (40 hours), and the name of the approved course used to provide the instruction.

These approved courses must come from vendors approved by the department. The department has requested responses to a request for information (RFI) from interested vendors; four responses have been received. Courses vary between the use of online content and textbooks. These courses must be commensurate with those offered in the school system.

The process culminates with the final driving test conducted by the department.

Action. No action taken.

Next Meeting. The next committee meeting will be held in Statehouse Room 116, on **Tuesday, September 9, 2014**, beginning at 9:00 a.m.

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

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

Internet Page: <https://www.legis.iowa.gov/committees/committee?endYear=2014&groupID=705>

LEGAL UPDATES

Purpose. A legal update briefing is intended to inform legislators, legislative staff, and other persons interested in legislative affairs of recent court decisions, Attorney General opinions, regulatory actions, and other occurrences of a legal nature that may be pertinent to the General Assembly's consideration of a topic. As with other written work of the nonpartisan Legislative Services Agency, although this briefing may identify issues for consideration by the General Assembly, nothing contained in it should be interpreted as advocating a particular course of action.

LEGAL UPDATE—SEXUAL EXPLOITATION BY SCHOOL EMPLOYEE

Filed by the Iowa Supreme Court

April 11, 2014

State v. Nicoletto

No. 12-1862

845 N.W.2d 421 (Iowa 2014)

http://www.iowacourts.gov/About_the_Courts/Supreme_Court/Supreme_Court_Opinions/Recent_Opinions/20140411/12-1862.pdf

Background Facts and Prior Proceedings. The defendant, Patrick Nicoletto, was under contract with the Davis County Community School District to be an assistant high school girls' basketball coach. As a condition of payment for his coaching services, the terms of his contracts for school years 2007-2008 and 2008-2009 required Nicoletto to obtain a teaching certificate with a coaching endorsement or a coaching authorization. The defendant, who was not a licensed teacher, obtained a coaching authorization (for which an applicant must successfully complete four semester credit hours or 40 contact hours in courses relating to knowledge and understanding of the human body, children and youth, and medical and safety problems in relation to physical activity; and relating to the techniques and theory of coaching interscholastic athletics).

During Nicoletto's first season as an assistant basketball coach, a 16-year-old junior on the varsity team began exchanging text messages with Nicoletto. Initially basketball-related, the messages became "flirty and sexual" in nature. Sometime during 2008, the two began engaging in sexual intercourse every week or two at Nicoletto's home. The relationship continued during the summer and fall of 2008. During the fall semester, the school principal, concerned about the possible relationship, contacted both Nicoletto and the student. The student denied that she was in a relationship with Nicoletto, and Nicoletto ended the relationship in mid-September. However, by January or February 2009, the two engaged in intimacy once again.

Nicoletto was prosecuted for and found guilty of the crime of sexual exploitation by a school employee in violation of Iowa Code §709.15(3)(a) and (5)(a). He was sentenced by the district court to five years imprisonment plus a 10-year special sentence under Iowa Code §903B.2. Nicoletto timely filed an appeal.

Issue. Whether a person holding a coaching authorization is a school employee and therefore subject to prosecution under Iowa Code §709.15.

(Legal Update—Sexual Exploitation by School Employee continued from Page 4)

Arguments and Analysis. The state claimed Nicoletto was an “other licensed professional;” that his coaching authorization functioned as a license, giving him the exclusive authority to act as a coach; and that coaching activities are within the scope of “educational assistance to students” required in the definition of “practitioner.” Nicoletto argued that he was not a licensed professional employed by a school district and pointed to other provisions in the Iowa Code that separately list licensed school employees and coaches or holders of coaching authorizations; that a coaching authorization is not an exclusive authorization to coach, as a person may coach on a volunteer basis without meeting the requirements of Iowa Code chapter 272; and that unlike practitioners, coaches do not generally provide educational assistance to students.

The Court noted that in interpreting a criminal statute, the statutory provisions are to be strictly construed, with doubts resolved in favor of the accused. The Court stated that a person who holds a coaching authorization does not fall within the ordinary meaning of the term “licensed professional.” The Court considered the relevant definitions provided in the Iowa Code as well as the ordinary dictionary meaning of words in concluding that these definitions do not support the argument that a person holding a coaching authorization should be considered a licensed professional under Iowa Code §272.1(7).

Iowa Code §709.15 prohibits sexual exploitation by a “school employee,” a term defined in that provision to mean a “practitioner” as defined in Iowa Code §272.1. Iowa Code §272.1(7) defines “practitioner” to mean “an administrator, teacher, or other licensed professional, including an individual who holds a statement of professional recognition, who provides educational assistance to students.” Iowa Code §272.1(5) defines “license” to mean “the authority that is given to allow a person to legally serve as a practitioner, a school, an institution, or a course of study to legally offer professional development programs, other than those programs offered by practitioner preparation schools, institutions, courses of study, or area education agencies. A license is the exclusive authority to perform these functions.”

The Court also noted that the Iowa Administrative Code (281 IAC 36.1) defines “coach” to include individuals who act on a voluntary basis on behalf of a school or school district, and therefore a coaching authorization cannot be regarded the exclusive authority to coach, or to meet the definition of “license” under Iowa Code chapter 272. The Court supported this conclusion by referring to Iowa Code provisions that distinguish between licenses and authorizations, and those that distinguish between license holders and authorization holders as mandatory reporters of child and sexual abuse.

The Court also noted that the General Assembly has not established a licensing regime for coaches, but has done so for other persons involved in athletics such as athletic trainers. The Court noted that when Iowa Code §709.15 was enacted in 1991, it applied only to counselors and therapists; in 2003, the provision was expanded to include school employees. Bills introduced during the 2003 Legislative Session that would have included coaches or those holding coaching authorizations in the definition of “school employee” for purposes of Iowa Code §709.15 failed to pass. The Court stated that it cannot add to the statute what the General Assembly refused to pass and asserted that if changes to the law are desirable, it is up to the Legislature to enact such changes.

Holding. The Court held that, although a coach who holds a teaching or other professional license is clearly subject to the sexual exploitation statute, a person who holds merely a coaching authorization without a professional license within the meaning of Iowa Code §272.1(7) does not fall under the sexual exploitation statute. The Court reversed the jury’s verdict and remanded the case to the district court to dismiss the charges against Nicoletto.

Dissenting Opinion by Justice Waterman joined by Justice Mansfield. Justice Waterman stated that he would have affirmed Nicoletto’s conviction. He invited the General Assembly to amend Iowa Code §709.15 to close what he describes as a new loophole in a law the General Assembly enacted in order to criminalize the exploitation of students by school employees in a power relationship over their victims. Justice Waterman’s dissent noted that Nicoletto at the time of his conduct was 30 years old, had a college degree, and a decade of coaching experience. The dissent further argued that “professional” is used to distinguish between paid employees and volunteers or amateurs, and found unpersuasive the majority’s effort to distinguish between “coaching authorization” and “license.”

Legislative Action. 2014 Iowa Acts, chapter 1114, House File 2474, effective May 23, 2014, amended the definition of “school employee” in Iowa Code §709.15 to include persons issued a coaching authorization under Iowa Code §272.31(1).

LSA Contact: Kathy Hanlon, Legal Services, (515) 281-3847.

LEGAL UPDATE—DISQUALIFICATION FROM HOLDING PUBLIC OFFICE—INFAMOUS CRIMES

Filed by the Iowa Supreme Court

April 15, 2014

Chiodo v. The Section 43.24 Panel and Bisignano

No. 14-0553,

846 N.W.2d 845 (Iowa 2014)

http://www.iowacourts.gov/About_the_Courts/Supreme_Court/Supreme_Court_Opinions/Recent_Opinions/20140415/14-0553.pdf

Factual Background. On December 9, 2013, former State Senator Anthony Bisignano was convicted of operating while intoxicated (OWI), second offense. The district court sentenced Bisignano to incarceration for a term of not more than two years. The district court, however, suspended all but seven days of the incarceration and placed Bisignano on probation for the remainder of the sentenced term. On March 11, 2014, Bisignano filed an affidavit of candidacy with the Secretary of State for the Iowa Senate seat for District 17, located entirely within the City of Des Moines in Polk County. Former State Representative Ned Chiodo and Iowa Assistant Attorney General Nathan Blake also filed affidavits of candidacy for the Democratic nomination for the seat.

Procedural Background. On March 13, 2014, Chiodo filed an objection to Bisignano's candidacy under the claim that Bisignano was disqualified from holding public office based upon Bisignano's December 9, 2013, conviction. The Section 43.24(3) Panel, consisting of the Secretary of State, the Auditor of State, and the Attorney General, held a hearing related to the objection on March 19, 2014, and issued a denial of the objection on March 21, 2014. Chiodo subsequently filed for judicial review. The district court affirmed the panel's decision on April 2, 2014. Chiodo filed a notice to appeal the district court's ruling, and the Iowa Supreme Court (Court) granted an expedited review.

Issue. Whether the crime of OWI, second offense, constitutes an infamous crime under Article II, Section 5, of the Iowa Constitution.

Disposition. Three separate opinions were offered in this case with Chief Justice Cady writing for a three-justice plurality, Justices Mansfield and Waterman concurring specially, Justice Wiggins dissenting, and Justice Appel taking no part.

The plurality opinion and the special concurrence together hold that the crime OWI, second offense (an aggravated misdemeanor), does not constitute an infamous crime under Article II, Section 5, of the Iowa Constitution, that Bisignano is not disqualified from holding office as a result of the December 9, 2013, conviction, and that his name should be allowed to appear on the Democratic primary ballot.

Plurality Opinion by Chief Justice Cady. The plurality reached its opinion following a textual analysis of Article II, Section 5, of the Iowa Constitution, finding that such an analysis was lacking under the Court's precedents. The Court cited precedent in recognizing the requirement under Iowa Code §39.26 that a person must, among other requirements, be an eligible elector in order to qualify to hold public office. The Court did not include in its analysis the qualification requirements under Article III of the Iowa Constitution.

Article II, Section 5, of the Iowa Constitution disqualifies certain persons from the privileges of being an elector, including persons adjudged mentally incompetent to vote and persons convicted of any infamous crime. The plurality considered prior cases in which it held that an infamous crime included crimes punishable by imprisonment in a penitentiary. A conviction for OWI, second offense, as an aggravated misdemeanor, is a crime punishable by imprisonment.

The plurality, however, found that its own precedents—dating back to 1916—failed to engage in a textual analysis of Article II, Section 5, and felt obligated to engage in such an analysis in deciding this case. The plurality found that the language of Article II, Section 5, describing the disqualification of otherwise eligible electors was based upon the conviction of a person for a particular offense rather than upon the term of punishment associated with such a conviction. The plurality reasoned that Article II, Section 5, was created to serve a regulatory function to protect the democratic process, rather than as a punitive measure intended to expand criminal punishment. The plurality therefore overruled the Court's prior precedent that "infamy," under the Iowa Constitution, was based merely upon a sentence to imprisonment in a penitentiary.

Following its textual analysis, the plurality turned to statutory and historical analyses to construct a new understanding of Article II, Section 5. The plurality looked to Iowa Code §39.3(8) which, since 1994, has defined infamous crime to mean a felony under Iowa or federal law. The plurality held that the statutory definition could be informative to the Court's analysis, but that a statute could not add to or subtract from the qualification of voters that are contained within the Iowa Constitution. The plurality stopped short of declaring Iowa Code §39.3(8) unconstitutional.

(Legal Update—Disqualification from Holding Public Office—Infamous Crimes continued from Page 6)

In its historical analysis, the plurality considered language in the proposed 1844 Iowa Constitution, the 1846 Iowa Constitution, and an 1839 Iowa territorial statute, as well as certain constitutional developments in other states. The plurality held that if the drafters of the Iowa Constitution intended for Article II, Section 5, to impose the restriction on the basis of a felony conviction they would have used that term, which appears elsewhere in the Iowa Constitution. After asserting that Article II, Section 5, must serve a regulatory rather than a punitive function, the plurality held that any definition of infamous crime must be narrowly tailored to promote the compelling governmental interest of protecting the integrity of the electoral process. The plurality also concluded that any definition of “infamous crime” under the Iowa Constitution must only include a felony, stating that even misdemeanor crimes that directly compromise the electoral process could not be considered an infamous crime.

The plurality held that the crime of OWI, second offense, does not constitute an infamous crime under Article II, Section 5, of the Iowa Constitution, that Bisignano is not disqualified from holding office, and that his name should be allowed to appear on the Democratic primary ballot.

Special Concurrence by Justice Mansfield joined by Justice Waterman. Justices Mansfield and Waterman agreed with the plurality that Bisignano should not be disqualified from running for a seat in the Iowa Senate. The basis for Justice Mansfield’s special concurrence, however, is his agreement with the Section 43.24 Panel and the district court that “felonies and only felonies” are infamous crimes. Justice Mansfield’s resolution of the case depends upon the fact that Article II, Section 5, was repealed and reenacted in 2008. The 2008 amendment repealed and replaced the entire section, but the amendment only changed language in Article II, Section 5, that had disqualified potential electors if the person was an “idiot” or an “insane person” and replaced that language with a requirement that a person be disqualified as an elector if the person is “adjudged mentally incompetent to vote.”

Justice Mansfield stated that when the people of Iowa adopted the amendment in 2008 to repeal and replace Article II, Section 5, they in effect ratified prior interpretations by the Court, the General Assembly, and the public that an infamous crime constituted a felony and only a felony. He argued that because the 2008 amendment only changed prior language related to the mental capacity of individuals and did not address the then understood definition of an infamous crime, that the people of Iowa thereby ratified the previously understood interpretation of that language. Justice Mansfield’s special concurrence also criticized the plurality for unnecessarily introducing uncertainty into the electoral process, for inviting future voting rights litigation, and for engaging in “an odd mix of half-hearted originalism and excessive fealty to a court decision from Indiana.”

Dissent by Justice Wiggins. Justice Wiggins, in his dissent, stated that the Court should uphold its own precedent and continue to hold to a definition of infamous crime that would include any crime which is punishable by confinement in prison. Justice Wiggins opined that Bisignano should no longer be entitled to the rights of an eligible elector on the basis of Bisignano’s December 9 conviction. Justice Wiggins also noted the dangers of eliminating the Court’s own bright-line rule to instead pursue a factor analysis that would create uncertainty among potential electors and elections administrators alike. Justice Wiggins, however, agreed with the plurality in the belief that “the legislature cannot write a constitutional definition of ‘infamous crime’ by its enactment of Iowa Code §39.3(8).” Justice Wiggins further asserted that the plurality “should not use the legislature’s pronouncement in Iowa Code §39.3(8) to control [the Court’s] constitutional duty to interpret the Iowa Constitution.”

Implications. Based upon the varied opinions in this case, the Court appears divided on a number of issues that hold potential impacts for legislative action and how the Court will continue to analyze provisions of the Iowa Constitution. The plurality’s holding that the later enacted statutory definition of an “infamous crime” in Iowa Code §39.3(8) can be informative to the Court’s analysis of Article II, Section 5, is contrasted by the dissent’s assertion that such a fact is nothing less than an abrogation of the Court’s constitutional duty; the approach of the special concurrence, which grants Iowa Code §39.3(8) significance by means of a later constitutional amendment that maintains the “infamous crime” reference, is also a notable one. Indeed, under the special concurrence’s analysis it could be beneficial to repeal and replace entire sections or articles of the Iowa Constitution to crystalize current interpretations of such provisions. Under such an analysis, repealing and replacing an entire section or article, while perhaps being easier to read on a ballot, may have a broader impact than intended in contrast to the General Assembly only replacing or striking a word or phrase.

LSA Contact: Andrew Ward, Legal Services, (515) 725-2251.