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IOWA LEGISLATIVE INTERIM CALENDAR AND BRIEFING

November 29, 2018 2018 Interim No. 7

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Friday, November 30, 2018
Health Policy Oversight Committee
 10:00 a.m., Room 116

Wednesday, December 5, 2018
Small City Clean Water Standards Compliance Study Committee
 10:00 a.m., Room 103, Sup. Ct. Chamber

Friday, December 7, 2018
Administrative Rules Review Committee
 9:00 a.m., Room 116

Thursday, December 13, 2018
Revenue Estimating Conference
 1:00 p.m., Room 103, Sup. Ct. Chamber

Friday, December 14, 2018
Mental Health and Disability Services Funding Study Committee
 9:00 a.m., Room 103, Sup. Ct. Chamber

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.

AGENDAS

INFORMATION REGARDING SCHEDULED MEETINGS

Health Policy Oversight Committee

Co-chairperson: Senator Mark Costello

Co-chairperson: Representative David E. Heaton

Location: Room 116

Date & Time: Friday, November 30, 2018, 10:00 a.m.

LSA Contacts: Patricia A. Funaro, Legal Services, 515.281.3040; Hannah Beach, Legal Services, 515.725.4117

Agenda: To be announced.

Internet Site: <https://www.legis.iowa.gov/committees/committee?endYear=2018&groupID=24165>

Small City Clean Water Standards Compliance Study Committee

Co-chairperson: Senator Ken Rozenboom

Co-chairperson: Representative John H. Wills

Location: Room 103, Sup. Ct. Chamber

Date & Time: Wednesday, December 5, 2018, 10:00 a.m.

LSA Contacts: Douglas L. Adkisson, Legal Services, 515.281.3884; Joe Simpson, Legal Services, 515.725.2251

Agenda: To be announced.

Internet Site: <https://www.legis.iowa.gov/committees/committee?endYear=2018&groupID=31964>

Administrative Rules Review Committee

Chairperson: Senator Mark Chelgren

Vice Chairperson: Representative Dawn E. Pettengill

Location: Room 116

Date & Time: Friday, December 7, 2018, 9:00 a.m.

LSA Contacts: Jack R. Ewing, Legal Services, 515.281.6048; Amber Shanahan-Fricke, Legal Services, 515.725.7354

Agenda: To be announced.

Internet Site: <https://www.legis.iowa.gov/committees/committee?endYear=2018&groupID=705>

Revenue Estimating Conference

Location: Room 103, Sup. Ct. Chamber

Date & Time: Thursday, December 13, 2018, 1:00 p.m.

LSA Contacts: Holly M. Lyons, Fiscal Services, 515.281.7845; Jeff W. Robinson, Fiscal Services, 515.281.4614

Agenda: To be announced.

Internet Site: <https://www.legis.iowa.gov/committees/committee?endYear=2018&groupID=627>

Mental Health and Disability Services Funding Study Committee

Co-chairperson: Senator Jeff Edler

Co-chairperson: Representative Joel Fry

Location: Room 103, Sup. Ct. Chamber

Date & Time: Friday, December 14, 2018, 9:00 a.m.

LSA Contacts: Michael J. Duster, Legal Services, 515.281.4800; Hannah Beach, Legal Services, 515.725.4117; Patricia A. Funaro, Legal Services, 515.281.3040

Agenda: To be announced.

Internet Site: <https://www.legis.iowa.gov/committees/committee?endYear=2018&groupID=31963>

ADMINISTRATIVE RULES REVIEW COMMITTEE

Special Meeting

October 25, 2018

Chairperson: Senator Mark Chelgren

Vice Chairperson: Representative Dawn Pettengill

EMERGENCY RULE FILING REVIEWS. Iowa Code section 17A.4(3) 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. Under this procedure, the committee reviews requests by agencies to adopt rules filed without notice at its monthly meeting or at special meetings if necessary. The committee will approve such filings if the committee finds good cause that notice and public participation would be unnecessary, impracticable, or contrary to the public interest.

The committee considered one filing:

- Department of Administrative Services — Sexual Harassment. EMERGENCY FILING AUTHORIZED BY COMMITTEE.

DEPARTMENT OF ADMINISTRATIVE SERVICES, *Sexual harassment*, EMERGENCY RULEMAKING AUTHORIZATION.

Background. The department requested that the committee hold a special meeting to approve emergency rulemaking by the department to update its rules on sexual harassment. Updates include the definition of “sexual harassment,” a reference to a new executive branch sexual harassment policy, and procedures relating to submitting, investigating, and confidentiality of complaints regarding sexual harassment. The rulemaking also includes new language prohibiting retaliation against employees concerning sexual harassment or complaints thereof.

Commentary. Ms. Janet Phipps, Director, Department of Administrative Services, reviewed the rulemaking. In response to inquiries from committee members, she explained that the department’s rationale for seeking authorization for emergency rulemaking was to implement recommendations from the report on sexual harassment at the Iowa Finance Authority by the Weinhardt Law Firm quickly, particularly in regard to clarifying and removing conflicts from the department’s existing rules on this subject. She stated that the new rules would become effective later in the day if the committee votes to authorize emergency rulemaking. She explained that the new policies referenced in the rulemaking had not been published yet, but would be issued later in the day pending the committee’s vote. She explained that the policies will be included in a revised employee handbook provided to every state employee and in memos to department heads, elected officials, and managers, and also posted on the department’s Internet site.

In response to an inquiry about language in the rulemaking relating to employee training, Ms. Phipps explained that, while the proposed language states that employees “should” attend training, the department is still considering whether to make such training mandatory. She explained that employees already had to receive such training pursuant to an order of the governor and that the department’s training video is being revised. Committee members suggested that the department emulate the policy of the Iowa Senate, which makes such training mandatory.

In response to inquiries about the complaint process outlined in the rulemaking, Ms. Phipps explained that the language does not include a process for making a complaint outside of state government, but she hoped an employee would do so if they felt the need. Committee members urged her to include lan-

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guage allowing for such complaints, and she said she would take it under consideration. She explained that an employee can complain to any of the individuals described in the rulemaking. She explained that the rules and related policies do not include a specific timeline or a way of tracking progress toward completion of an investigation of a complaint, as it can vary how long an investigation might take. She stated that a complainant would be kept informed about the progress of an investigation. Committee members urged the department to include at least a tentative timeline for investigations in the rulemaking.

In response to inquiries about the meaning of language in the rulemaking requiring the director of the department to investigate a complaint “unless directed by the governor to be investigated by another agency or entity,” Ms. Phipps explained that in some instances it may not be appropriate for the department to carry out the investigation, such as a complaint originating from within the department. She explained that “entity” is not defined, but could include an entity such as the Weinhardt Law Firm. She expressed hope that the governor would trust the department to handle most complaints.

In response to an inquiry about the language in the rulemaking on release of confidential records if ordered by a court, Ms. Phipps explained that a subpoena would be considered such an order, and the department would comply with a subpoena or would need to attempt to quash it. Committee members urged her to investigate whether the language might limit the ability of county attorneys to subpoena records.

In response to inquiries about language in the rulemaking providing that an employee “may” be subject to discipline for failing to cooperate with an investigation, Ms. Phipps explained that the language should remain “may” rather than “shall” in order to allow for discretion to impose discipline in situations where a person chooses not to cooperate because they are accused of wrongdoing but believe themselves to be a victim. Committee members suggested that discipline should be mandatory for failure to cooperate with an investigation, and Ms. Phipps responded that generally it would be mandatory, but the language at issue is intended to give notice of possible discipline, rather than to make discipline mandatory. Committee members suggested distinguishing between victims and other employees in the rulemaking, and Ms. Phipps responded that some employees may not be victims but may not feel that they can cooperate based on the nature of their work environment.

In response to inquiries regarding the tracking of complaints by the department, Ms. Phipps explained that the department does not track the number of ongoing investigations relating to sexual harassment or the number of employees on paid administrative leave pending the outcome of such investigations. She further explained that she could not provide those numbers to the committee because all complaints received by the department go through a common intake process and are not tracked based on the type of complaint. Committee members urged the department to start tracking this information, particularly in light of recent reports in the media on sexual harassment in state government.

In response to inquiries on research conducted by the department prior to proposing the rulemaking, Ms. Phipps explained that the department had conducted a legal review of its policies and consulted sexual harassment policies from Utah, Colorado, and Minnesota. Committee members asked why the department had not taken an approach similar to Minnesota, and she explained that the department needed to comport with Iowa’s standards for drafting of rules.

In response to an inquiry on the definition of “sexual harassment” included in the rulemaking, Ms. Phipps explained that the definition comes from the Iowa Code, and the department did not want to change the statutory definition by rule. She further explained that retaliation was not included in the definition

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because it is a different concept defined elsewhere, and the threshold question of whether sexual harassment occurred must be answered before possible retaliation is addressed.

Mr. Matty Smith made a public comment on behalf of the Iowa Coalition Against Sexual Assault. He stated that the process of pursuing this rulemaking seemed rushed. He stated that he had heard from too many victims of sexual harassment who experienced ineffective responses and that it is important to get the rulemaking right. He stated that the language of the rulemaking is unclear and not good enough and that victims of sexual harassment deserve better. He urged the committee to engage in thoughtful dialogue on this subject and seek public input.

Mr. Daniel Zeno made a public comment on behalf of the American Civil Liberties Union. He stated that the issue of sexual harassment is important, and he is glad the department is working on it. He urged the committee to slow the rulemaking process down. He stated that current department rules on sexual harassment are inadequate, but the rulemaking is a step backward. He stated that the rulemaking lacks detail. He stated that the department's rules should clarify the definition of "sexual harassment" provided in the Iowa Code, not merely restate it.

Ms. Amy Campbell made a public comment on behalf of the League of Women Voters. She stated that she respected Ms. Phipps' work on the issue of sexual harassment, but also hoped for more transparency and public input. She stated that the use of double-barreled rulemaking did not provide for sufficient public input. She expressed concern that the new employee handbook reflecting the rulemaking might be distributed and then the rules might be revised again later, leading to confusion among employees. She also expressed concern that the policies referenced in the rulemaking had not yet been seen.

Some committee members expressed support for the rulemaking, stating that it provides more assistance for victims of sexual harassment than current rules and noting improved procedures for filing complaints, mandatory investigation of complaints, removal of conflicting and ambiguous language from current rules, and allowing employees to make complaints outside of the department as positive changes. They urged the department to continue to work to improve its rules on sexual harassment in the future. Other committee members expressed disappointment that the rulemaking did not include stronger enforcement mechanisms, better protections for witnesses of sexual harassment, or a timeline for investigation of complaints.

A motion to approve emergency rulemaking by the department passed unanimously on a 10-0 roll call vote.

Action. Emergency rulemaking authorized.

Next meeting. The next committee meeting was held in Room 103, Statehouse, on Tuesday, November 13, 2018, beginning at 9:00 a.m.

LSA Staff: Jack Ewing, LSA Counsel, 515.281.6048; Amber Shanahan-Fricke, Legal Services, 515.725.7354

Internet Site: www.legis.iowa.gov/committees/committee?endYear=2018&groupID=705

ADMINISTRATIVE RULES REVIEW COMMITTEE

November 13, 2018

Chairperson: Senator Mark Chelgren

Vice Chairperson: Representative Dawn Pettengill

ADMINISTRATIVE SERVICES DEPARTMENT, *Capitol Complex Operations, 10/24/18 IAB, ARC 4084C, NOTICE.*

Background. This rulemaking amends the department's rules regarding the Capitol complex. The amendments expand the prohibition on smoking in the Capitol complex to include prohibiting electronic cigarettes and products which employ a heating element, power source, electronic circuit, or other electronic, chemical, or mechanical means that can be used to produce vapor from a solution or other substance. The amendments also update the hours in which the Capitol building is open.

Commentary. Committee members noted that the use of tobacco-vaporizing products, or "vaping," was not included in Iowa Code chapter 142D, the Smokefree Air Act, or in Governor Branstad's Executive Order 68, which were cited in the rulemaking. Ms. Tami Weincek, representing the department, explained that the rulemaking updates the department's rules on smoking to align with current department practices as outlined in the department's employee handbook. Committee members stated that such a policy change should be made through legislation or a new executive order rather than by a rule based on a handbook. In response to further questions, Ms. Weincek explained that the employee handbook is not subject to approval by the General Assembly, as it is considered "policy," and that the handbook only applies to state employees, not the general public. Committee members stated that the handbook should not govern the general public, that the handbook should reflect the law, not vice versa, and that this rule change is not in keeping with the intent of the law.

In response to another question, Ms. Weincek explained that the change in hours for the Capitol building was made to align with the hours for the building set by the General Assembly for the legislative session.

Action. No action taken.

BOARD OF MEDICINE, *Licensure of Genetic Counselors, 10/24/18 IAB, ARC 4095C, NOTICE.*

Background. This rulemaking proposes new Iowa Administrative Code chapter 20, which establishes rules for licensure of genetic counselors.

Commentary. Ms. Jordan Esbrook appeared on behalf of the Board of Medicine, reviewed the rulemaking, and responded to questions from committee members. Ms. Esbrook began by stating that the rules are consistent with the rules regulating physicians and acupuncturists. Ms. Esbrook stated that the basis for the similar rules is that the enabling legislation, 2018 Iowa Acts, Senate File 2228, cites Iowa Code chapter 147 (General Provisions, Health Related Professions) and Iowa Code chapter 148 (Medicine and Surgery and Osteopathic Medicine and Surgery). Multiple committee members expressed concern that the rulemaking exceeded the scope of the legislation; committee members asserted that the rules, by being drafted in line with rules for acupuncturists and physicians, are not narrowly tailored for genetic counseling. Multiple committee members strongly suggested that the board return to the Committee with a rulemaking that better aligns with the legislation. Committee members expressed concern that the rulemaking requires applicants to fulfill requirements that only an acupuncturist or a physician would be able to fulfill, but a genetic counselor inherently would not be able to fulfill. Ms. Esbrook stated she was not aware that was an issue and stated it was not the intention; she stated she would take the concerns back to the board.

Committee members inquired about the need for applicants to report misdemeanors. Ms. Esbrook explained that was a normal requirement for medical-related licenses. Ms. Esbrook explained what the board would do with that information, including what the consequences would be.

Action taken. No action taken.

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Next meeting. The next committee meeting will be held in Room 116, Statehouse, on Friday, December 7, 2018, beginning at 9:00 a.m.

LSA Staff: Jack Ewing, Legal Services, 515.281.6048; Amber Shanahan-Fricke, Legal Services, 515.725.7354

Internet Site: www.legis.iowa.gov/committees/committee?endYear=2018&groupID=705

LEGAL UPDATE

Purpose. *Legal update briefings are prepared by the nonpartisan Legal Services Division of the Legislative Services Agency. A legal update briefing is intended to inform legislators, legislative staff, and other persons interested in legislative matters of recent court decisions, Attorney General Opinions, regulatory actions, federal actions, and other occurrences of a legal nature that may be pertinent to the General Assembly's consideration of a topic. Although a briefing may identify issues for consideration by the General Assembly, a briefing should not be interpreted as advocating any particular course of action.*

ELECTRONIC GAME DEVICES

Filed by the Iowa Supreme Court

October 12, 2018

Banilla Games, Inc., v. Iowa Department of Inspections and Appeals

No. 17-1300

www.iowacourts.gov/courtcases/3039/embed/SupremeCourtOpinion

Background and Procedure. Banilla Games, Inc. (Banilla), a manufacturer and seller of electronic game devices, filed a petition for declaratory order with the Department of Inspections and Appeals (DIA) seeking an order permitting Banilla to distribute certain games in Iowa without the requirement that the games be registered under Iowa Code section 99B.53.

There are two main categories of games that Banilla seeks to distribute in Iowa. One is a nudge game and the other is a hot swap game. Nudge-style games consist of three electronic reels featuring different icons that spin when a player pushes the play button and stop after a short time. Players then determine whether a potential winning combination of two or more icons is present and choose one of the wheels to move up or down (i.e., nudge) in order to complete the winning pattern. Hot swap-style games are similar in that after three spinning wheels stop, a player determines whether a potential winning combination of icons is present. However, unlike nudge games, there is one icon missing. As a result, a player must decide which icon to choose from a variety of icons in order to complete the winning pattern. In addition, for each type of game, the owner can configure the device to allow a certain payout percentage and the game chooses the screens that appear to players and dictates whether they can win a prize from a pool of game outcomes.

DIA denied the petition and determined that the games in question were required to be registered under Iowa Code section 99B.53. Iowa Code section 99B.53 provides that electrical or mechanical amusement devices are required to be registered if the game “awards a prize where the outcome is not primarily determined by skill or knowledge of the operator.” Upon judicial review, the district court affirmed the DIA decision and Banilla appealed. Banilla claimed the DIA erroneously interpreted Iowa Code chapter 99B (regulation of social and charitable gambling) and committed an unreasonable or arbitrary abuse of discretion in requiring the games to be registered, arguing that the registration requirements of Iowa Code section 99B.53 do not apply to its machines because the outcome of the devices is “primarily determined by skill or knowledge.”

Issue. Whether the electrical or mechanical games Banilla sought to distribute in Iowa were required to be registered pursuant to Iowa Code section 99B.53.

Holding. The Court held that DIA properly interpreted the relevant statutes in determining that the electrical or mechanical games Banilla sought to distribute in Iowa were required to be registered. As a

result, the Court further held that DIA's decision requiring Banilla to register the games in question did not prejudice the substantial rights of Banilla and was not an irrational, illogical, or wholly unjustifiable application of the law to the facts of this case.

Analysis. Iowa Code section 99B.53 provides that an electrical or mechanical amusement device "that awards a prize where the outcome is not primarily determined by skill or knowledge of the operator" must be registered with the state. In interpreting this Iowa Code section, the Court examined the meaning of the words "primarily," "outcome," and "knowledge."

The Court agreed with DIA and Banilla that "primarily" should be interpreted under a dominant-factor doctrine for measuring chance against skill and knowledge. Under this dominant-factor doctrine, the Court found that "primarily" requires the fact finder to determine whether skill, knowledge, or chance dominates the outcome. If chance dominates the outcome, the device must be registered.

Concerning the word "outcome," DIA and the district court interpreted the word to mean "actually winning a prize." Banilla argued, however, that in the context of the statute, the term means any number of results, including winning a prize, failing to win a prize, playing to win a predetermined prize, choosing to play a different game or to play the same game at a different increment, or some other result, including for the amusement of game play itself without regard to prize. While the Court agreed with Banilla that the plain meaning of the word does not require a prize, the Court found it clear from the context of the statute and Iowa Code chapter 99B that the purpose of these provisions is to differentiate between devices that must be registered and those which need not be registered, based on the prize or award to be won. The Court noted that interpreting "outcome" to mean results other than winning a prize as suggested by Banilla does not make sense in the context of the statute and does not further its legislative purpose. The Court concluded that DIA correctly determined that "outcome" meant whether a person wins a prize or fails to win a prize.

The word "knowledge" was interpreted by DIA to mean that a player of a game must be capable of controlling or directing the game's result, not just of informing the player's own decisions while playing. Banilla argued that "knowledge" includes the ability of payers to view the possible reward before deciding to play the game. The Court found it absurd that the legislature intended that if a person has knowledge of what prize the person may win before playing a game, the element of chance is eliminated from the game. The Court noted that the knowledge aspect of the statute refers to electrical or mechanical amusement devices that actually test a person's knowledge, such as trivia games. Accordingly, the Court agreed with DIA's interpretation of "knowledge" as meaning the type of knowledge that assists in a player's game play.

Having agreed with DIA's interpretation of Iowa Code section 99B.53, the Court then resolved the question of whether DIA properly applied the statute to the facts of this case in finding that the games were subject to registration. Banilla argued skill plays more of a role than chance because players must complete a skill task, either nudging or swapping, to play the game. However, the Court noted that because the maximum payout for each game played on a machine can be set at less than 100 percent, a player, even with perfect skill and knowledge, cannot win every time. The Court then concluded that there was "ample" support in the record to support DIA's findings that whether a player wins a game relies primarily more on chance than on skill or knowledge. As a result, the Court found that DIA properly determined Banilla was required to register their games pursuant to Iowa Code section 99B.53.

LSA Monitor: Ed Cook, Legal Services, 515.281.3994