
LEGAL UPDATE

Legal Services Division



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ADMINISTRATIVE RULES REVIEW COMMITTEE—JUNE 11, 2019

Purpose. *Legal updates are prepared by the nonpartisan Legal Services Division of the Legislative Services Agency. A legal update is intended to provide legislators, legislative staff, and other persons interested in legislative matters with summaries of recent meetings, 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 an update may identify issues for consideration by the General Assembly, it should not be interpreted as advocating any particular course of action.*

DEPARTMENT OF HUMAN SERVICES, HCBS Waiver Services—Consumer Choices Option, 5/8/19 IAB, ARC 4430C, ADOPTED.

Background. This rulemaking changes the monthly budget billing methodology for the financial management services (FMS) provider for the Consumer Choices Option (CCO) program available within certain waivers under Medicaid from a prepay method to a postpay method.

Commentary. In response to a question from committee members, Ms. Nancy Freudenberg, speaking on behalf of the department, explained that the rulemaking only affects a single credit union, the FMS provider, which the department has been working with to resolve concerns about the rulemaking including by putting some money in reserve for the provider.

Ms. Kim Fettkether made a public comment on behalf of Veridian Credit Union (VCU). She explained that VCU has worked with the department's Iowa Medicaid Enterprise (IME) to address VCU's concerns regarding IME's systems for the program and to ensure eligibility of those receiving payment through the program and that IME has set up an escrow account to mitigate VCU's financial risk as the FMS provider. She indicated that VCU's concern is that VCU may provide payment for services based on information from IME and then the services may later be determined to be ineligible for payment under the program. She further explained that IME has indicated that it is working on developing safeguards for such scenarios, but VCU does not know whether the safeguards will be in place before the rulemaking becomes effective, as IME has indicated that such system changes are not currently a priority. She stated that she is optimistic that VCU will be able to continue to make payments to providers under the program but will need to look into establishing processes based on the possibility that VCU will not receive payment from IME. She expressed VCU's desire to minimize any impact on providers paid by VCU, but stated that VCU must ensure that it receives payment from IME.

Committee members asked if the department considers implementation of the safeguards to be a priority and when they might be implemented. Ms. Jennifer Steenblock, speaking on behalf of the department, explained that implementation is a priority for the department, but she did not have a list of department priorities, so she could not speak to Ms. Fettkether's concerns. She confirmed that this issue only affects fee-for-service Medicaid members and not those covered by Managed Care Organizations (MCOs). Committee members expressed concern that the safeguards and the rulemaking might not become effective at the same time.

Committee members discussed whether the rulemaking should be delayed and again asked the department for a time frame for implementation of the safeguards. Ms. Freudenberg explained that the rulemaking will become effective July 1, 2019, and stated that the department could report back to the

committee within the week on whether the safeguards would be in place by July 1 and if not, what kind of payment guarantee the department could make to VCU regarding the small number of individuals affected by VCU's concerns. Ms. Fettkether noted that the department had indicated that post payment under the rulemaking would not be implemented until at least September 1 for technological reasons relating to IME's service codes. Ms. Freudenberg noted that payment for services lags at least a month under the department's payment process. She explained that this would give the department enough time to get the information the committee would need to make a decision on this matter. Committee members confirmed that the committee could not delay a rulemaking after it has gone into effect.

Action Taken. A motion for a session delay carried on a voice vote with eight members present. Additional review is scheduled for the July 9 committee meeting to determine the department's progress toward implementation of the safeguards.

HUMAN SERVICES DEPARTMENT, *Customized Wheelchairs, 5/22/19 IAB, ARC 4444C, NOTICE.*

Background. The proposed amendments provide a definition of a customized wheelchair for all Medicaid members and providers. These amendments also align Iowa's Medicaid definition of a customized wheelchair with a definition for the Medicare program provided by the Centers for Medicare and Medicaid Services.

Commentary. Ms. Nancy Freudenberg represented the department. Committee members inquired how this rulemaking is going to affect children on Medicaid who need specialized wheelchairs. In response, Ms. Freudenberg stated that if a person requests a specialized wheelchair, the department will scrutinize the definitions of standard wheelchair and customized wheelchair to determine which category the person's needs fall into and determine which add-ons a person needs. In response to an inquiry from committee members, Ms. Freudenberg stated that the department has always required and will continue to require prior authorization for customized wheelchairs.

Committee members expressed concern that an Iowa company was having difficulty receiving approval for add-ons for customized wheelchairs since MCOs began administering the program due to MCOs not having the computer capacity to process add-ons to customized wheelchairs for companies producing such products. Committee members expressed concern that the rulemaking could make the situation worse, rather than better. Committee members sought data on the number of persons who have customized wheelchairs in the Medicaid program. Committee members questioned whether MCOs will be able to handle this change.

Committee members stated that children of constituents are being denied wheelchairs because they have outgrown their wheelchair and outlived their life expectancy. Committee members stated they were hoping that this rulemaking would remedy that problem.

Action Taken. No action taken.

UTILITIES BOARD, *Electric Vehicle Charging Service, 5/8/19 IAB, ARC 4417C, NOTICE.*

Background. This rulemaking was initiated after truck stops challenged a tariff regulated by the board that prohibited certain electric utility customers from providing electric vehicle charging services at truck stops on a per-kilowatt-hour basis. The rulemaking states that the provision of electricity sold for the purpose of electric vehicle charging at a commercial or public electric vehicle charging station constitutes neither the furnishing of electricity to the public nor the resale of electric service. The rulemaking also states that a regulated electric utility cannot prohibit electric vehicle charging or restrict the method of sale of electric vehicle charging at a commercial or public electric vehicle charging station.

Commentary. Mr. Denny Puckett made a public comment on behalf of the Iowa Association of Electric Cooperatives (IAEC). He explained that IAEC supports the expansion of electric vehicle charging infrastructure so long as laws protecting utility service territory are followed, that the rulemaking makes clear that the owner of an electric charging station may bill customers in whatever manner they choose,

and that the rulemaking is unclear on the role of the local electric utility in such transactions. He stated that it is the local electric utility who should sell the electricity to the charging station owner. He expressed opposition to charging station owners being able to generate their own electricity or purchase electricity from elsewhere than the local electric utility.

Ms. Pam Mackey Taylor made a public comment on behalf of the Sierra Club. She expressed support for the rulemaking as written. She stated that it makes sense for electric charging stations to be able to charge customers by the kilowatt hour and agreed that electric charging stations are not utilities because they are not monopolies. She stated that it is important to support electric charging of vehicles and that electric charging stations should be able to generate their own power, whether by solar or wind energy.

Mr. Bob Rafferty made a public comment on behalf of Truckstops of Iowa and the Iowa 80 Truck Stop. He explained that some truck stops were planning to set up electric charging stations and discovered that the tariff for Alliant Energy prohibited them from charging customers by the kilowatt hour. He stated that it is the only workable business model for providing electric charging, and prohibiting it would be akin to prohibiting charging for gas and diesel by the gallon. He suggested that a small percentage of electric charging stations would generate their own power, and that would not happen for perhaps 10 years. He explained how this would represent a very minimal effect on utilities' overall market for electricity at that point, and the rulemaking should not be delayed due to that possibility. He urged that the rulemaking move forward to provide clarity for businesses looking to invest in electric charging stations.

Committee members asked if Alliant Energy is the only utility with a tariff that would limit electric charging stations, and Mr. Rafferty stated that he thought so, but was not sure. Committee members asked if an electric charging station that does not generate enough power on its own must buy electricity from its local utility or if it can shop around for other sources. Mr. Cecil Wright, speaking on behalf of the board, explained that under current law, another entity cannot sell electricity in an electric utility's territory, but the rulemaking does not address the question of whether an electric charging station can generate its own electricity, a situation which he said was perhaps 10 years away. Mr. Rafferty said it would not be practical for an electric charging station to generate its own electricity today due to technological limitations.

Action Taken. No action taken.

NATURAL RESOURCE COMMISSION, *Antlerless Deer Hunting, 5/8/19 IAB, ARC 4422C, NOTICE.*

Background. The rulemaking proposes two amendments to the administrative code chapter that governs deer hunting by Iowa residents. The proposed rulemaking adds Winneshiek County to the list of counties where a January antlerless-deer-only season is allowed. The proposed rulemaking also modifies the antlerless-deer-only license quotas in a total of 24 counties, increasing the quotas in 20 counties and decreasing the quotas in four counties. The proposed rulemaking results in an increase of 3,525 licenses.

Commentary. Mr. Chris Ensminger represented the commission and responded to questions. Committee members inquired why the rulemaking was proposed. Mr. Ensminger stated that the addition of Winneshiek County to the January antlerless-deer-only season was to slow the spread of Chronic Wasting Disease. In other areas the decrease in quotas is due to the decrease in desire to hunt. In response, committee members noted that they have observed too many deer in their districts.

Committee members received an update on the status of Chronic Wasting Disease and asked for a description of how the commission determines that the deer population has fluctuated and how the commission develops quotas.

Committee members inquired who decides what is the desirable level of deer population and if the General Assembly provides guidance or determines what the desirable level of deer population is. Mr. Ensminger described a deer study advisory committee that was set up in 2009, and provided statewide harvest numbers.

Action Taken. No action taken.

PUBLIC HEALTH DEPARTMENT, *Radiological Health Programs—Fees, 5/22/19 IAB, ARC 4446C, NOTICE.*

Background. The Department of Public Health's Bureau of Radiological Health proposed rulemaking to raise fees to defray the cost of their programs for licensing, registration, and inspection related to radiation machines and radioactive materials. The bureau proposes raising fees on average 81 percent across all programs. The majority of the fees to administer bureau programs have not been raised for at least 20 years. The bureau is seeking a raise in fees to this level at this time in order to align fees with program costs. If fees are not aligned with program costs at this time, the bureau, through staff reductions and reduced oversight of the use of radiation machines and radioactive materials in Iowa, will be forced to reduce the bureau's ability to adequately protect the public from ionizing radiation. If certain programming functions are not performed, federal agencies would assume regulation of the Iowa facilities and such facilities would be forced to pay federally established fees, which are up to 175 percent higher than the fees proposed in this rulemaking.

Commentary. Ms. Susan Dixon and Ms. Angela Leek represented the department and the bureau and responded to questions. Committee members noted that an 81 percent increase is very difficult for small businesses and the hike makes committee members uncomfortable. Committee members stressed that they did not want to set the precedent for agencies to raise fees by such a stark increase and would prefer fees be updated more regularly.

In response to an inquiry, Ms. Leek was unable to state whether the cost will be passed on as health care costs and reimbursed through Medicare or Medicaid.

Ms. Leek stated that the bureau delayed raising fees as long as possible and that the bureau waited too long. She stated that the bureau will place into the bureau rules that the fees will need to be reviewed on a regular basis so that the fees do not have to be raised so drastically again.

Members of the public spoke on the rulemaking. Ms. Erin Cubit spoke on behalf of the Iowa Hospital Association. She noted that hospitals develop their budgets far in advance and would appreciate a staggering of the increase over a few years.

Mr. Matt McKinney spoke on behalf of the Iowa Dental Association. He stated that the Iowa Dental Association appreciated that the fees had not been increased since 1998 and that this fee increase will eliminate the need for future increases, but indicated that this fee increase is very concerning. He stated that the Iowa Dental Association would prefer to see a gradual increase of the fees over time even to the level proposed in order to better set budgets.

Committee members inquired whether there was a possibility to stagger the increases over a couple of years. Ms. Leek indicated that if the bureau does nothing, the bureau will be \$700,000 short of its budget this year. Ms. Leek stated she will take a look at the budget and the public comments. Committee members inquired whether the lower fees are the primary reason for the deficit or whether there are other factors. Ms. Leek indicated the bureau has not kept up over time with the increasing cost of personnel and with the cost of doing business. Additionally, Ms. Leek indicated the bureau also implemented an expensive online licensing system to ease an administrative burden from staff. Committee members inquired whether this was really just someone "asleep at the wheel." Ms. Leek responded by indicating the shortfall was caused by many factors. She indicated she was not sure why over the past 10 years the fees were not raised by rulemaking. She stated she was trying to make cuts and balance the budget. Committee members stated they were interested in determining why such a deficit developed so quickly.

Ms. Leek noted that in past years she had carryover funds, which were earmarked for the licensing system but now that the licensing system has been built those moneys are no longer available.

In response to a committee inquiry, Ms. Leek stated that Iowa is not exceeding federal regulations on radiological material regulations. Ms. Leek stated that the bureau has not previously come before the committee, sought a fee increase, and been denied a fee increase in the past 10 years, in response to a committee inquiry.

Committee members stated that the committee needed to keep the increase in perspective; this is not a large increase for dentists. Furthermore, it is good that the bureau used up their surplus.

Ms. Leek noted that by regulating at the state level, the bureau has saved the industry \$20 million in the past 20 years. Even with the proposed increase, the industry will still save \$5 million.

Committee members expressed skepticism of the department's fee increases. Furthermore, committee members stated that this increase may not be much to many individuals, but it is a lot to an entity like the University of Iowa. Committee members also requested a better justification for the deficit than the development of an online system, for which they said they did the math and it did not explain the \$700,000 deficit. Finally, committee members expressed concern the budgetary situation is such that it could put the department at neutral for several years.

Action Taken. No action taken.

DENTAL BOARD, *Expanded Functions, 5/8/19 IAB, ARC 4424C, NOTICE.*

Background. The proposed rulemaking establishes clearer requirements for training in expanded functions of the scope of practice for dental assistants and dental hygienists to ensure that a minimum standard of competency is met at completion of all expanded function training courses. The proposed rulemaking also creates a process whereby expanded function dental assistants and dental hygienists may obtain a certification from the Dental Board recognizing the ability of those dental assistants or dental hygienists to perform level 1 and level 2 expanded functions.

Commentary. Ms. Jill Stuecker and Ms. Christel Braness represented the board and responded to questions. Committee members commented that content such as that found in this rulemaking, specifically new licenses, is typically done by legislation. Committee members encouraged the board to be in contact with the chairs of the Senate and House State Government Committees.

Mr. Tom Cope spoke on behalf of the Iowa Dental Hygienist Association in favor of the rulemaking. He stated that the certificate educates the patient and is not a new license.

Committee members asked Mr. Cope why he thinks this should be done administratively rather than legislatively. Mr. Cope stated that the board has high quality legal representation in the Attorney General, who makes a determination regarding statutory authority prior to rulemaking. He stated that the state dental code gives the dental board broad authority to determine what a dental hygienist can do.

Committee members stated that the committee needs to be protective of the General Assembly's authority and determine whether the rulemaking is truly gap filling or if it is more than that. Committee members stated that it is important to discuss whether this is a matter for the agency to address or a matter for the General Assembly to address.

Ms. Braness, Mr. Cope, and committee members engaged in a conversation about the need for a certificate, training for level 1 and level 2 expanded functions, and the rulemaking goals. Ms. Braness indicated that level 2 dental hygienists or assistants are performing expanded functions and are questioned by patients because they do not have certificates issued by the board. Committee members stated that they think there are problems with the rulemaking.

Action Taken. No action taken.

DEPARTMENT OF PUBLIC SAFETY, *Ignition Interlock Devices, 5/8/19 IAB, ARC 4418C, NOTICE.*

Background. This rulemaking requires that monitoring cameras be installed on ignition interlock devices (IIDs), which are required by Iowa law for all offenders under the state's laws prohibiting operation of a vehicle while intoxicated.

Commentary. Committee members expressed concern regarding the constitutional and privacy ramifications of installing cameras on IIDs as well as the lack of clear statutory authority for the department to do so and suggested that the matter should be addressed legislatively.

Committee members asked if the department trusts the accuracy of IIDs. Mr. Jim Bleskacek, speaking on behalf of the department, explained that the department does trust the accuracy of IIDs, that Iowa was one of the first states to use IIDs, and that IID technology has improved over time, although the department did not update its technology and rules for many years. He explained that IIDs only work when people blow into the device, and cannot stop a person who is determined to drink and drive. He stated that IIDs reduce recidivism, and they work when they are effective.

Committee members stated that constituents have complained that IID technology is archaic and asked why companies that design IIDs cannot create a device that can distinguish between eating toast or breakfast pizza and drinking three beers. Mr. Bleskacek explained that even the technology used by law enforcement cannot handle that distinction, and IIDs use the same technology. He further explained that Casey's Pizza is made using a yeast that can trigger an IID, but adding camera technology could improve the situation because it would allow the department to see that a person is eating pizza rather than driving.

Committee members asked for clarification on when the camera takes pictures and how that would mitigate eating pizza triggering an IID. Mr. Patrick Hoyer, also speaking on behalf of the department, and Mr. Bleskacek explained that the camera triggers when the car is started and each time a person blows, but takes a series of three pictures: prior to blowing in the device, while blowing, and after blowing.

In response to further questions, Mr. Hoyer and Mr. Bleskacek were unsure if a company administering an IID camera would report pictures of smoking marijuana or child abuse to law enforcement, but stated they probably would not, as only IID violations are reported. Committee members stated that the question of who owns the pictures is significant and could affect who can access the pictures, whether by an open records request, a subpoena, or other means.

Committee members urged the department to seek more public input and work further on the language of the rulemaking. Committee members suggested that this matter should be pursued legislatively rather than by rulemaking and that the DOT should be consulted as well.

Additional discussion occurred regarding the cost of installing the cameras, the applicability of the rulemaking to newly installed IIDs going forward, the use of alternatives to cameras such as biometrics, the camera's ranging being limited to the front cabin of the vehicle, the incorrect July 1, 2019, applicability date in the rulemaking, and various other matters.

Action Taken. No action taken.

Next Meeting. The next committee meeting will be held in Room 116, Statehouse, on Tuesday, July 9, 2019, beginning at 9:00 a.m.

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