

NORTH DAKOTA LEGISLATIVE MANAGEMENT

Minutes of the

ADMINISTRATIVE RULES COMMITTEE

Tuesday and Wednesday, December 14-15, 2010
Roughrider Room, State Capitol
Bismarck, North Dakota

Senator Jerry Klein, Chairman, called the meeting to order at 7:00 p.m.

Members present: Senators Jerry Klein, John M. Andrist, Tom Fischer, Layton Freborg, Joan Heckaman; Representatives Randy Boehning, Chuck Damschen, Duane DeKrey, Bill Devlin, George J. Keiser, Kim Koppelman, Joe Kroeber, Jon Nelson, Blair Thoreson, Lonny B. Winrich, Dwight Wrangham

Members absent: Representatives Wesley R. Belter, Stacey Dahl, Jim Kasper

Others present: See [Appendix A](#)

It was moved by Representative Koppelman, seconded by Representative Keiser, and carried on a voice vote that the minutes of the previous meeting be approved as distributed.

DEPARTMENT OF HUMAN SERVICES

Early Childhood Services Rules

Chairman Klein said the early childhood services rules submitted by the Department of Human Services were carried over for consideration from the September meeting. He said he was gratified to see the large number of child care providers in attendance at this meeting and thanked them for their participation in discussions of improvements to rules provisions. He said he believes suggested changes to the rules will be presented, which should address concerns raised at the previous meeting.

Chairman Klein called on Ms. Julie Leer, legal counsel, Department of Human Services, for presentation of testimony relating to the early childhood services rules. A copy of Ms. Leer's prepared testimony and proposed amendments is attached as [Appendix B](#).

Representative Koppelman asked if the concerns addressed in the proposed rules changes came forward during public hearings on the rules. Ms. Leer said many comments were received by the department during and after the public hearings. She said she is not certain all of the concerns were raised, but she is reasonably sure these issues were discussed.

Representative Koppelman said he appreciates the Department of Human Services checking into the comment that providers should not contact legislators. He said he hopes department staff understands there should be no indication, intentional or unintentional, that legislators should not be contacted with concerns. Ms. Leer said the general policy is that the staff of the

Department of Human Services uniformly provides information to concerned citizens on how they may contact legislators.

Representative Winrich said one suggested additional rule change would be for a provider to check on a sleeping infant regularly. He asked if there is any guideline on what "regularly" means. Ms. Leer said the attempt to provide a specific time period for checking on sleeping infants proved unacceptable, and the word "regularly" is now to be substituted. She said regularly is not defined and the department trusts that we have good child care providers and some flexibility is needed in the rules in this regard.

Senator Klein said there appear to be changes in the rules that do not change anything except to make the rules more consistent and readable. Ms. Leer said that is correct. She said some of the changes are made to clean up language and make it reader-friendly. She said the department also intends to keep the advisory commission in place to continue discussions and review of the early childhood services rules.

Representative Thoreson asked why it took 10 years to update the early childhood services rules. Ms. Leer said there have been patchwork fixes of rules issues, but staff time availability did not allow for a thorough and complete review of the rules until the effort that led to the current changes. She asked Ms. Jennifer Barry, Program Director, Early Childhood Services, Department of Human Services, to describe the process followed in updating the rules. Ms. Barry said an advisory committee was selected to assist the department with the review and update process. She said the advisory committee was selected to include membership from locations across the state to obtain statewide input and to inform early childhood services providers of the update process. She said the large number of comments received indicated statewide interest and participation through the rulemaking process.

Representative Keiser thanked Chairman Klein for scheduling an evening meeting to allow attendance of child care providers. He thanked the Department of Human Services staff for working with concerned parties. He said it is appropriate and important for child care providers to be part of the process, and he commended child care providers for participating in the development of policy and for attending this meeting.

Ms. Leer reviewed each of the changes to the rules recommended by the department. She said the format of the suggested changes differs from the rules as considered by the committee at the September meeting. She said the overstrike and underscore language from the September meeting has been incorporated into the rules so that this set of rules shows the overstrike and underscore as the additional changes the department is recommending. She said all of the rules, originally submitted and these additional changes, would have an effective date of January 1, 2011, if approved by the committee.

Senator Heckaman congratulated the child care providers and staff of the Department of Human Services for the cooperative approach to rulemaking. She asked if the advisory committee or Department of Human Services will be recommending any legislation relating to early childhood services. Ms. Barry said the Department of Human Services will be seeking a statutory change on the provision relating to license suspension during an investigation.

Chairman Klein called on Ms. Angie Neigum, licensed child care provider, Bismarck, for comments on the early childhood services rules and recommended changes. A copy of Ms. Neigum's prepared comments is attached as [Appendix C](#).

Chairman Klein called on Ms. Joy Kaul for comments on the early childhood services rules. Ms. Kaul said she was formerly a child care provider and is speaking on behalf of the Child Care Connection of Bismarck. She expressed thanks to the Administrative Rules Committee for permitting further discussion of these important issues. She expressed thanks to Ms. Barry and the child care providers who participated in the process. She said the Child Care Connection supports the rules of the Department of Human Services with the proposed changes.

Chairman Klein called on Ms. Bi Bi Mehring, who said she has been a child care provider since 1993. She expressed thanks to Senator Klein and Representative Keiser for meeting with child care providers to discuss concerns with the pending rules. She said she agrees with the changes suggested by the Department of Human Services and agrees there is more to be done to update and improve the rules. She said it will be important for the advisory committee to continue its work. She said one improvement that could be made is to provide providers and groups representing providers with notice of pending rules.

Representative Damschen asked Ms. Leer if a notice list is maintained by the Department of Human Services. Ms. Leer said the Department of Human Services maintains mailing lists for individuals interested in department activities. She said mailing lists are maintained separately for different topics within the department. She said for these rules, notice of rulemaking was sent to all licensed child care providers.

Representative Nelson said it appears communication from the Department of Human

Services to day care providers needs to be reviewed. He said it is important to allow providers an opportunity to understand changes being considered. Ms. Barry said she has been working on that issue. She said the department tries to provide notice and access to information for interested parties with regard to any rulemaking activity. She said she receives questions from providers when information is sent out so she knows many providers are receiving and reviewing information provided. She said she will continue to seek ways to make information available to all providers.

Representative Winrich asked if providers have a professional organization representing them. Ms. Barry said there are a number of associations organized for localities and some have a broader membership. She said there is no statewide association performing lobbying and informational functions.

Ms. Leer said she and Ms. Barry would like one more opportunity after the meeting to review the early childhood services rules to see if any further changes are needed to make provisions consistent throughout the early childhood services rules chapters. She asked if the chairman would be willing to delay the committee vote on the proposed changes suggested by the department. Chairman Klein said it appears the committee can vote on the changes offered and if the department would like to offer further changes in the morning, those changes could be considered at that time.

It was moved by Representative Keiser, seconded by Representative DeKrey, and carried on a roll call vote that the Administrative Rules Committee agree with the Department of Human Services on the additional early childhood services rules changes offered by the department. Voting in favor of the motion were Senators Klein, Fischer, Freborg, and Heckaman and Representatives Boehning, Damschen, DeKrey, Devlin, Keiser, Koppelman, Kroeber, Nelson, Thoreson, Winrich, and Wrangham. No negative votes were cast.

Chairman Klein recessed the meeting at 8:40 p.m. and reconvened the meeting at 9:00 a.m. on Wednesday, December 15, 2010.

Chairman Klein called on Mr. Don Offerdahl, State Electrical Board, for testimony relating to rules adopted by the board. A copy of Mr. Offerdahl's prepared testimony is attached as [Appendix D](#). Representative Boehning said the rules amendment to North Dakota Administrative Code Section 24-02-01-10 appearing on page 87 of the compiled Administrative Code rules for committee consideration states that when any wall has had sheetrock removed, the wiring must be brought up to current code standards. He asked how much sheetrock may be removed before the wiring upgrade is required. Mr. Offerdahl said when you open up a wall, that is the best time to place receptacles and upgrade to current code standards. Mr. Offerdahl said this is not a new requirement and has been the practice of the

board for several years, but this is the first time the practice has been placed in the rules. He said the requirement is intended to apply if you remove sheetrock or other wall covering for the entire room. Representative Boehning said it does not say in the rule that the wall covering must be removed from the entire room before the code upgrade is required. Mr. Offerdahl said the board would not apply the rule in a situation in which less than the entire room had sheetrock removed.

After further discussion with committee members, Mr. Offerdahl said it would be acceptable to the State Electrical Board if the language in the new subsection 6 of Section 54-02-01-10 is amended to read "in any room of an existing building where the sheetrock or wall covering has been removed from all walls, the electrical wiring requirements shall comply with the provisions of 2011 edition, national electrical code." **It was moved by Representative Boehning, seconded by Representative Koppelman, and carried on a roll call vote that the committee agree with the State Electrical Board on the amendment as stated by Mr. Offerdahl.** Voting in favor of the motion were Senators Klein, Andrist, Fischer, Freborg, and Heckaman and Representatives Boehning, Damschen, DeKrey, Devlin, Keiser, Koppelman, Kroeber, Nelson, Thoreson, Winrich, and Wrangham. No negative votes were cast.

STATE LOTTERY

Chairman Klein called on Mr. Randy Miller, Director, North Dakota Lottery, Attorney General's office, for testimony on state lottery rules changes. A copy of Mr. Miller's prepared testimony is attached as [Appendix E](#).

BOARD OF BARBER EXAMINERS

Chairman Klein called on Ms. Tona Stevenson, President, Board of Barber Examiners, for testimony relating to rules adopted by the Board of Barber Examiners. A copy of Ms. Stevenson's prepared testimony is attached as [Appendix F](#).

Senator Klein said the rule change in Section 14-02-05-02 appears to provide that a barber, apprentice, or student is allowed to practice with the listed communicable diseases, and it appears the list of communicable diseases applies only to the client. Ms. Stevenson said that is not the intention and that a barber, apprentice, or student would be prohibited from practicing if the individual is afflicted with one of the listed communicable diseases. She said the board would suggest clarifying language be added to provide that no barber, apprentice, or barber school student may practice or knowingly serve a person afflicted. She said this should make clear that a barber, apprentice, or student may not practice if that individual is afflicted with one of the listed communicable diseases. **It was moved by Representative DeKrey, seconded by Representative Nelson, and carried on a roll call**

vote that the committee agree with the additional amendment to Section 14-02-05-02 as suggested by Ms. Stevenson. Voting in favor of the motion were Senators Klein, Andrist, Fischer, Freborg, and Heckaman and Representatives Boehning, Damschen, DeKrey, Devlin, Keiser, Koppelman, Kroeber, Nelson, Thoreson, Winrich, and Wrangham. No negative votes were cast.

STATE BOARD OF REGISTRATION FOR PROFESSIONAL ENGINEERS AND LAND SURVEYORS

Chairman Klein called on Mr. Clifford Keller, State Board of Registration for Professional Engineers and Land Surveyors, for testimony relating to rules adopted by the board. A copy of Mr. Keller's prepared testimony is attached as [Appendix G](#).

STATE DEPARTMENT OF HEALTH

Chairman Klein called on Mr. Kirby Krueger, Director, Division of Disease Control, State Department of Health, for testimony relating to rules adopted by the State Department of Health. A copy of Mr. Krueger's prepared testimony is attached as [Appendix H](#).

Chairman Klein called on Mr. Dan Harman, Air Quality Division, State Department of Health, for testimony regarding radiological health rules adopted by the department. A copy of Mr. Harman's prepared testimony is attached as [Appendix I](#).

Representative Koppelman inquired about the regulatory analysis for the radiological health rules. Mr. Harman said the rules are required by the Nuclear Regulatory Commission and allow no flexibility to states. He said the fee update in the rules was intended to make the state program self-supporting and to be phased in over a period of six years.

STATE BOARD OF ANIMAL HEALTH

Chairman Klein called on Dr. Beth Carlson, Deputy State Veterinarian, State Board of Animal Health, for testimony relating to brand inspection fee rules adopted by the board. A copy of Dr. Carlson's prepared testimony is attached as [Appendix J](#). Dr. Carlson said the brand inspection fee increase was suggested by the North Dakota Stockmen's Association.

In response to a question from Representative Boehning, Dr. Carlson said the brand inspection fee applies to all cattle, even without a brand, upon change of ownership.

Ms. Julie Ellingson, Executive Vice President, North Dakota Stockmen's Association, testified in support of the fee change. A copy of Ms. Ellingson's prepared testimony is attached as [Appendix K](#). She said the costs of the brand inspection program have increased since the last fee change in 2003. She said livestock producers support the program, and several testified in support of the fee increase.

STATE BOARD OF PHARMACY

Chairman Klein called on Mr. Howard Anderson, Executive Director, State Board of Pharmacy, for testimony relating to rules adopted by the State Board of Pharmacy. A copy of Mr. Anderson's prepared testimony is attached as [Appendix L](#).

STATE BOARD OF DENTAL EXAMINERS

It was moved by Representative Koppelman, seconded by Representative Nelson, and carried on a voice vote that the rules of the State Board of Dental Examiners be carried over to the next meeting on the grounds that no representative of the board appeared at this meeting.

DEPARTMENT OF HUMAN SERVICES

Chairman Klein called on Ms. Leer for testimony relating to rules adopted by the department. Ms. Leer distributed copies of proposed changes to early childhood services rules which are in addition to the changes adopted by the committee earlier in the meeting. She said these changes are to make the rules consistent throughout with the additional changes already approved. She reviewed each proposed change in the materials distributed, a copy of which is attached as [Appendix M](#). **It was moved by Representative Keiser, seconded by Representative DeKrey, and carried on a roll call vote that the committee agree with the Department of Human Services on the additional changes offered by the department to the early childhood services rules.** Voting in favor of the motion were Senators Klein, Andrist, Fischer, Freborg, and Heckaman and Representatives Boehning, Damschen, DeKrey, Devlin, Keiser, Koppelman, Kroeber, Nelson, Thoreson, Winrich, and Wrangham. No negative votes were cast.

Ms. Leer reviewed her prepared testimony ([Appendix N](#)) regarding rules changes for the temporary assistance for needy families program. Representative Keiser asked if fiscal notes on rules changes are prepared. Ms. Leer said a regulatory analysis is required by law and is focused on identifying the cost to the regulated community. She

said this differs from a fiscal note in that the fiscal effect to the state is not addressed.

Ms. Leer reviewed her prepared testimony ([Appendix O](#)) on rules changes for Medicaid and children's health insurance program rules.

Ms. Leer reviewed her prepared testimony ([Appendix P](#)) regarding provider reimbursement for services to individuals with developmental disabilities and eligibility for mental retardation-developmental disabilities case management services. She said these rules were adopted as emergency rules.

Ms. Leer said at the previous committee meeting, questions were asked of the department regarding department program benefits and coverage for illegal aliens. A copy of her prepared testimony addressing these questions is attached as [Appendix Q](#).

EMERGENCY RULEMAKING

Chairman Klein called on committee counsel for presentation of a memorandum entitled [Emergency Rulemaking Statutory Provisions](#). Committee counsel said at the previous committee meeting, the committee reviewed a district court decision regarding State Board of Pharmacy rules adopted on an emergency basis. He said the district court judge pointed out provisions of law regarding emergency rulemaking and rulemaking notice requirements. He said one of the circumstances the judge indicated as significant is that notice of rulemaking required by law is not required to contain any indication about rules adopted on an emergency basis.

Mr. Anderson said the board was involved in the court decision on adoption of emergency rules. He said one of the issues raised by the judge is that the Legislative Council does not publish emergency rules. He suggested that the Legislative Council publish interim final rules like federal agencies do.

No further business appearing, Chairman Klein adjourned the meeting at 11:15 a.m.

John Walstad
Code Revisor

ATTACH:17