

NORTH DAKOTA LEGISLATIVE MANAGEMENT

Minutes of the

ADMINISTRATIVE RULES COMMITTEE

Tuesday, March 11, 2014
Roughrider Room, State Capitol
Bismarck, North Dakota

Representative Bill Devlin, Chairman, called the meeting to order at 9:00 a.m.

Members present: Representatives Bill Devlin, Randy Boehning, Joshua A. Boschee, Brenda Heller, Ben Koppelman, Kim Koppelman, Mark S. Owens, Mike Schatz, Peter F. Silbernagel, Blair Thoreson, Nathan Toman, Robin Weisz; Senators John Andrist, Kelly M. Armstrong, Joan Heckaman, Jerry Klein, Connie Triplett

Member absent: Representative Robert Frantsvog

Others present: See [Appendix A](#)

It was moved by Representative Thoreson, seconded by Representative Owens, and carried on a voice vote that the minutes of the December 12, 2013, meeting be approved as distributed.

DEPARTMENT OF HUMAN SERVICES

Chairman Devlin called on Ms. Julie Leer, Legal Advisory Unit, Department of Human Services, for presentation of testimony on six sets of rules adopted by the department.

Ms. Leer distributed and reviewed a copy ([Appendix B](#)) of the report of the Department of Human Services relating to child care assistance rules under North Dakota Administrative Code (NDAC) Chapter 75-02-01.3. Senator Triplett inquired about the new requirements added in NDAC Section 75-02-01.3-05 regarding approved relative provider's background check information. Ms. Leer said this is a new provision in this chapter regarding child care assistance, but the disqualifying offenses listed are the same as provided in other chapters of rules of the department.

Representative K. Koppelman inquired about the provision of NDAC Section 75-02-01.3-05(3)(c), which provides that passage of five years from the end of a probation, parole, or community corrections or imprisonment, is evidence of sufficient rehabilitation. Ms. Leer said the completion of five years without an offense is prima facie evidence of rehabilitation, but this still allows the Department of Human Services to look further into the type of offense and circumstances before making the determination that the individual is rehabilitated for purposes of licensing.

Representative Owens inquired why it appears that the amendments in NDAC Section 75-02-01.3-12 appear to be reducing the penalty for intentional program violations. Ms. Carol Cartledge, Director, Economic Assistance Policy Division, Department of Human Services, said there are very few actual fraud cases. She said these changes were made as a result of a review of the state plan. She said finding that an individual has committed an intentional program violation subjects the individual to disqualification from child care assistance payments for six months for the first offense, one year for the second offense, and permanent disqualification for the third offense.

Ms. Leer reviewed the report ([Appendix C](#)) of the Department of Human Services on amendments to NDAC Chapter 75-02-02.1 relating to eligibility for Medicaid. Senator Triplett inquired about the language in the rule regarding course of dealing between the individual and attorney under NDAC Section 75-02-02.1-43. She suggested that Ms. Leer consider and perhaps suggest language later in the meeting to clarify this provision.

Ms. Leer reviewed the report ([Appendix D](#)) of the department regarding provider integrity under NDAC Chapter 75-02-05.

Representative K. Koppelman inquired about the change in the language in NDAC Section 75-02-05-09 from reference to an appeal to reference to a request for a review of a sanction. Ms. Leer said the language was changed to be consistent with language in provisions for other providers. She said the practical effect is not a significant difference and is primarily for terminology consistency.

Ms. Leer reviewed the report ([Appendix E](#)) of the Department of Human Services on licensing of early childhood services. Senator Triplett said in NDAC Section 75-03-07.1-06(3)(c), it appears the word "a" should be inserted preceding the word "misdemeanor". Committee Counsel said the missing word appears to be inadvertent and can be corrected without committee action. Chairman Devlin directed Committee Counsel to make this correction.

Ms. Leer distributed a copy ([Appendix F](#)) of an additional amendment proposed by the Department of Human Services for NDAC Section 75-03-10-08. She said a change was made in subdivision a of subsection 2, but the companion change was inadvertently not included in subdivision c. She said the proposed amendment would make the companion change in subdivision c. **It was moved by Representative K. Koppelman, seconded by Representative Owens, and carried on a roll call vote that the committee agree with the amendment proposed by the Department of Human Services to NDAC Section 75-03-10-08(2)(c) to increase maximum group size from 8 children to 10 children.** Voting in favor of the motion were Representatives Devlin, Boehning, Boschee, Heller, B. Koppelman, K. Koppelman, Owens, Schatz, Silbernagel, Thoreson, Toman, and Weisz and Senators Andrist, Armstrong, Heckaman, Klein, and Triplett. No negative votes were cast.

Senator Triplett inquired about the changes in the rule regarding staffing and group size requirements in NDAC Section 75-03-10-08. Ms. Jennifer Barry, Administrator, Early Childhood Services, Department of Human Services, said the department has been tracking maximum group size restrictions and has not seen significant capacity changes.

Senator Heckaman asked about the ratio and group size changes. Ms. Barry said the increase in group size without increasing the ratio of staff to children provides more flexibility for providers.

Senator Armstrong said in NDAC Section 75-03-07-06 relating to denial or revocation of in-home registration, the offense listing includes simple assault and assault, but in the reference to misdemeanor offenses, simple assault is included but ordinary assault is not listed even though there is a misdemeanor level punishment for that offense. He asked if Ms. Leer would consider that issue and comment on it later in the meeting.

Ms. Leer reviewed the report ([Appendix G](#)) of the Department of Human Services regarding amendments to Chapters 75-03-16 and 75-03-17 governing licensing of group homes, residential child care facilities, and psychiatric residential treatment facilities for children.

Representative Weisz asked about the new rule added as NDAC Section 75-03-16-02.6 relating to residential bed conversion. He asked why the facility must submit a 12-month budget with a request. Ms. Kelsey Bless, Children and Family Services Division, Department of Human Services, said the requirement is provided elsewhere in the chapter and included here. She said 288 beds are available, but fewer than that are licensed. She said there is room for additional licensing, and it is important that application contents are clear.

Chairman Devlin inquired about NDAC Section 75-03-17-06 and the provision that a resident's bedroom is prohibited from use for timeout. Ms. Leer said a bedroom is often not in a convenient place for observation, and the bedroom should be considered by the individual as the individual's "safe place" and not take on a punishment aspect.

Senator Heckaman said in NDAC Section 75-03-17-16(12)(a), it appears the word "interim" was meant to be "intern". Ms. Leer said it appears that was an error in transcription, and "intern" would be the correct term. Chairman Devlin directed Committee Counsel to correct the error in the final rule.

Chairman Devlin called on Ms. Susan M. Gerenz, Director, Heartview Pride Manchester House, for comments on the rules of the Department of Human Services for psychiatric residential treatment facilities for children. Ms. Gerenz said she is concerned about the staff-to-child ratio rules changes in NDAC Section 75-03-17-15. She said she understood the rule adopted would be different. She said the accrediting body is the Commission of Accreditation (COA). She said these standards should be applied but are not provided in the rule as submitted. She said she would propose the rules contain a statement in line with use of COA standards. She said in subdivisions a through d in subsection 1 of NDAC Section 75-03-17-15, there should be an and/or to allow use of other staff if direct care staff are not available in the required number.

Ms. Gerenz said with regard to the question of timeout, a bedroom can be an inappropriate place for timeout in some circumstances but may be an appropriate place for timeout in other circumstances.

Chairman Devlin asked if Ms. Gerenz shared her suggestions with the Department of Human Services. She said during the consideration of the rules, there were suggestions to make changes. She said she would be glad to discuss these issues further with the department.

Chairman Devlin said the committee does not have authority to amend administrative rules by its own action. He said the rules are rules of the agency, and the agency has discretion to suggest changes. He said the committee may authorize rules changes suggested by the agency.

Chairman Devlin called on Ms. Jane Brown, Chief Operations Officer, Dakota Boys and Girls Ranch, for comments ([Appendix H](#)) on the rules. After several committee questions, Ms. Leer said the summary of comments attached to the department's report on the rules submitted reflects intended changes to the rules that the department agreed to based on the concerns of the representatives of facilities raised this morning. She said those intended changes did not get transitioned into the rules as submitted and before the committee. She said she will work with the concerned parties and department staff and report back to the committee later in the meeting to correct this oversight.

After additional discussion, Ms. Leer said perhaps carrying over the rules on staff-to-child ratio might be the best way to assure the correct version is presented.

It was moved by Representative K. Koppelman, seconded by Senator Armstrong, and carried on a voice vote that the committee carry over consideration of the proposed changes to NDAC Section 75-03-17-15 to allow the Department of Human Services to make sure the correct version of the rule is submitted.

Ms. Leer presented the report ([Appendix I](#)) of the Department of Human Services on changes to NDAC Chapter 75-09.1-10 regarding licensing and treatment standards for opioid treatment programs.

STATE BOARD OF CHIROPRACTIC EXAMINERS

Chairman Devlin called on Dr. Carol Winkler, Board Member, State Board of Chiropractic Examiners, for testimony ([Appendix J](#)) relating to rules changes of the board.

Representative K. Koppelman said it appears the board required a license fee increase to bolster the treasury. He asked if the fee increase would go away after the treasury is replenished. Dr. Winkler said the increase is not scheduled to end. She said that possibility was considered by the board, but it was determined that the fee can be reduced at a time when the board becomes comfortable with the financial stability of the treasury.

STATE DEPARTMENT OF HEALTH

Chairman Devlin called on Mr. Tom Bachman, Senior Environmental Engineer, Division of Air Quality, State Department of Health, for presentation ([Appendix K](#)) of testimony relating to air pollution control rules amendments. Mr. Bachman said the rules adopted by the State Department of Health were made to update state rules to match federal requirements in rules adopted by the Environmental Protection Agency (EPA) and to be consistent with federal requirements. He said the primary reason to adopt these changes was to maintain primacy and state control of major air pollution programs in the state. He said federal sanctions and loss of state primacy could apply to North Dakota if the rules changes are not adopted.

Representative K. Koppelman said he has more confidence in the State Department of Health than the EPA for regulatory programs in North Dakota. Mr. Wax asked if North Dakota primacy is threatened by any pending EPA action. Mr. Bachman said the EPA has expressed concern in the past with some issues of state discretion, and the State Department of Health is monitoring EPA activity on this and other issues.

Chairman Devlin called on Mr. Peter Wax, Environmental Health Section, State Department of Health, for testimony ([Appendix L](#)). Mr. Wax reviewed the testimony regarding rules amendments for standards of quality for waters in the state.

Senator Triplett asked why the rules require chlorophyll testing for lakes and reservoirs. Mr. Wax said the rules require monthly samples during the year for chlorophyll content. He said chlorophyll content is a good measure of biota. He said this rule provision is a guideline.

DEPARTMENT OF TRANSPORTATION

Chairman Devlin called on Mr. Mark Nelson, Interim Deputy Director for Driver and Vehicle Services, Department of Transportation, for testimony ([Appendix M](#)) relating to rules adopted by the department. Mr. Nelson reviewed the rules testimony, including the changes to allow motor vehicle branch offices to charge fees pursuant to amendments to North Dakota Century Code Section 39-02-03.

OIL AND GAS DIVISION, INDUSTRIAL COMMISSION

Chairman Devlin called on Mr. Bruce Hicks, Assistant Director, Oil and Gas Division, Industrial Commission, for testimony ([Appendix N](#)) regarding Oil and Gas Division rule revisions.

Senator Triplett said in the rule on drilling pits in NDAC Section 43-02-03-19.4, there is a reference to a "subsequent sundry notice" and inquired what deadline would be for filing the notice. Mr. Hicks said the Oil and Gas Division has a general rule that filings must be within 30 days after a reportable event. Senator Triplett said in the new language added to NDAC Section 43-02-03-28, there is a requirement of prior written notice for an operator conducting any well "simulation". She said she believes the word should be "stimulation". Mr. Hicks agreed. Chairman Devlin directed Committee Counsel to correct the wording.

INSURANCE COMMISSIONER

Chairman Devlin called on Mr. Jeff Ubben, General Counsel, Insurance Department, for presentation of testimony ([Appendix O](#)) relating to rules adopted by the Insurance Commissioner relating to accounting practices, unclaimed life insurance benefits, short-term care insurance, and the petroleum tank release compensation fund.

In response to a question from Senator Andrist, Mr. Ubben said short-term care insurance is basically the same product as long-term care insurance but covers stays of less than 12 months in a care facility.

STATE BOARD OF NURSING

Chairman Devlin called on Dr. Constance Kalanek, Executive Director, State Board of Nursing, for testimony ([Appendix P](#)) relating to rules adopted by the board.

BOARD OF OCCUPATIONAL THERAPY PRACTICE

Chairman Devlin called on Ms. Marsha Waind, Board Member, Board of Occupational Therapy Practice, for testimony ([Appendix Q](#)) relating to the rules adopted by the board.

PUBLIC EMPLOYEES RETIREMENT SYSTEM

Chairman Devlin called on Mr. Sparb Collins, Executive Director, Public Employees Retirement System, for testimony ([Appendix R](#)) relating to rules adopted.

Representative K. Koppelman questioned the reason for the amendment in NDAC Section 71-03-07-07 regarding the possibility of political subdivisions being forced out of the uniform group insurance program. Mr. Collins said this relates to changes made by the Affordable Care Act. He said political subdivisions having five or fewer employees are affected. Blue Cross Blue Shield of North Dakota determined that it could not comply with Affordable Care Act requirements unless small employee groups went to the exchanges to obtain coverage.

Senator Klein asked about the funding status of the main retirement system. Mr. Collins said the retirement fund is now projected at approximately 60 percent funded over the long term, and with 2013 legislative changes, it will be funded at approximately 80 percent.

DEPARTMENT OF HUMAN SERVICES

Chairman Devlin called on Ms. Leer for additional testimony for the Department of Human Services. She distributed a copy ([Appendix S](#)) of a proposed change to NDAC Section 75-02-02.1-43. She said the rule as submitted did not include some language that was intended to be included in the rule. She said this copy contains the language the department and providers agreed would be an improvement.

Ms. Leer distributed a copy ([Appendix T](#)) of provisions to be changed in NDAC Section 75-03-17-06. She said this contains changes regarding timeout use of the resident's bedroom and that that use is prohibited if the child demonstrates an imminent risk of harm to self or others. She said this language was intended to be included in the rules but was overlooked.

Senator Armstrong said he is concerned the misdemeanor exclusions in the early childhood services disqualifying offenses are incomplete as written. He said offenses, such as menacing or disorderly conduct, are not included which could provide an incentive to plea bargaining to a different offense to preserve license eligibility.

Ms. Leer suggested in NDAC Section 75-03-07-06(3)(c) the word "a" should be inserted preceding the word "misdemeanor" to match the change suggested by the committee earlier. Chairman Devlin directed Committee Counsel to correct the oversight.

Ms. Leer said in NDAC Section 75-03-17-06(3)(b) the words "safety holds" should be replaced with the word "restraints" as suggested in the comments attached to the department testimony and by agreement with suggestions of commenters on the rules. Chairman Devlin directed Committee Counsel to make these changes in the rules.

Ms. Leer said the department agreed with suggestions of commenters, and the comments attached to the department's testimony reflect the proposed change to NDAC Section 75-03-17-06(4)(c) with regard to a seclusion room being equipped with a lock that only operates with staff present.

It was moved by Representative K. Koppelman, seconded by Representative Boschee, and carried on a roll call vote that the committee agree with the Department of Human Services on the additional rules changes in NDAC Sections 75-02-02.1-43 and 75-03-17-06 as distributed ([Appendix S](#)) and ([Appendix T](#)). Voting in favor of the motion were Representatives Devlin, Boehning, Boschee, Heller, B. Koppelman, K. Koppelman, Owens, Schatz, Silbernagel, Thoreson, Toman, and Weisz and Senators Andrist, Armstrong, Heckaman, Klein, and Triplett. No negative votes were cast.

It was moved by Senator Heckaman, seconded by Representative K. Koppelman, and carried on a roll call vote that the committee agree with the Department of Human Services on the additional changes pointed out by Ms. Leer and reflected in the comments attached to the testimony of the Department of Human Services, relating to changes to NDAC Section 75-03-17-06(3)(b)(c). Voting in favor of the motion were Representatives Devlin, Boehning, Boschee, Heller, B. Koppelman, K. Koppelman, Owens, Schatz, Silbernagel, Thoreson, Toman, and Weisz and Senators Andrist, Armstrong, Heckaman, Klein, and Triplett. No negative votes were cast.

TAX COMMISSIONER

Chairman Devlin called on Mr. Joe Becker, Tax Department, for presentation ([Appendix U](#)) of testimony relating to rules adopted by the Tax Commissioner. Mr. Becker said the primary purpose of the rules is to make necessary adjustments after the financial institutions tax law was repealed in 2013 and financial institutions were transitioned to corporate income tax treatment.

WORKFORCE SAFETY AND INSURANCE

Chairman Devlin called on Ms. Anne Green, Staff Attorney, Workforce Safety and Insurance, for testimony ([Appendix V](#)) relating to rules adopted by Workforce Safety and Insurance.

PEACE OFFICER STANDARDS AND TRAINING BOARD

Chairman Devlin called on Major Les Witkowski, Chief Deputy, Burleigh County Sheriff's Department, and Chairman, Peace Officer Standards and Training Board, for presentation ([Appendix W](#)) of testimony.

COMMITTEE DISCUSSION

Representative Weisz said after he reexamined the rules and testimony of the Board of Occupational Therapy Practice, he has a concern with the requirements for licensure rules in NDAC Section 55.5-02-01-01.1. He said the rules were changed to reflect that currently a master's degree is required for entry-level occupational therapy certification. He said previously a bachelor's degree was required for entry-level certification. He said the rules were changed to reflect the new requirement, but he is concerned that some licensed therapists would now be required to obtain a master's degree for relicensing. He said, unfortunately, the representative of the board is no longer present, but he is concerned that the rule would not allow some currently licensed therapists to renew their licenses. He said he believes the committee should carry over the consideration of this rule to find out if that creates a problem.

It was moved by Representative Weisz, seconded by Senator Silbernagel, and carried on a voice vote that the committee carry over consideration of NDAC Section 55.5-02-01-01.1 until information can be obtained from the Board of Occupational Therapy Practice on the effect of the rule on existing licensees.

No further business appearing, Chairman Devlin adjourned the meeting at 3:15 p.m.

John Walstad
Code Revisor

ATTACH:23