

# MINUTES

## Interim Rules Review Committee



Senator Alan Solano, Chair  
Representative Jean Hunhoff, Vice Chair

**Three hundred eighty-third meeting**  
**Monday**  
**September 9, 2019**

**Room 414**  
**State Capitol**  
**Pierre, South Dakota**

The three hundred eighty-third meeting of the Interim Rules Review Committee was called to order by Senator Alan Solano (Chair), at 10:02 a.m. CT, on September 9, 2019, in Room 414 at the State Capitol, Pierre, South Dakota.

A quorum was determined with the following members answering the roll call: Senators Craig Kennedy, Lance Russell, and Alan Solano (Chair), and Representatives Ryan Cwach, Jon Hansen, and Jean Hunhoff (Vice Chair). Staff members present were Wenzel Cummings, Code Counsel, and Kelly Thompson, Senior Legislative Secretary.

*All material distributed at the meeting is attached to the original minutes on file at the Legislative Research Council (LRC). For continuity, these minutes are not necessarily in chronological order. This meeting was recorded by South Dakota Public Broadcasting. The archived recording is available at the LRC website at <http://sdlegislature.gov> under "Interim."*

### **Approval of Minutes**

***Representative Hunhoff moved, seconded by Senator Russell, that the August 12, 2019, meeting minutes be approved. Motion prevailed on a unanimous voice vote.***

### **Staff Report**

**Mr. Wenzel Cummings, Code Counsel, LRC**, gave an update on the changes that have taken effect since he became Code Counsel. Committee members now receive the Style and Form edits provided by LRC to the agencies on their proposed rules. At the November meeting, they will also receive a document outlining the discrepancies between the final rules and the proposed rules.

Senator Kennedy asked if under the new policy, a revised copy of the rules will be provided to LRC after the agency has reviewed the Style and Form edits and made appropriate changes to determine if all the requested edits were made. Mr. Cummings said agencies may dispute some of the changes and the rules could also be further revised at their agency hearings. Once LRC receives the rules adopted at the agency's public hearing, he will review them and compile a list of discrepancies. The goal of the policy change is to recognize that it is the job of the Interim Rules Review Committee (IRRC) to rule on the rules as a matter of policy not to function as proofreaders.

Senator Russell noted the changes are helpful to committee members and having the LRC's suggested edits makes it easier to review and make a decision on the proposed rules. Mr. Cummings replied that previously, agencies would contact the Code Counsel directly to negotiate suggested changes to their rules

and it was the role of the committee to agree or disagree with those changes. He advised that he will not continue that practice and that an appeals process will be developed for agencies when the committee looks at the rules review statutes.

Representative Hunhoff commented on the redesign of the South Dakota Register and asked if LRC has received any public feedback on the changes. Mr. Cummings said the electronic publication was redesigned to bring it in line with statutory requirements regarding content and make it a more useful document for users. Updates include expanded content, more accurate headings, the addition of hyperlinks, and a more professional layout. Public comment has been positive.

### **Rules Reviewed**

**Department of Agriculture:** Amend rules to:

- Align South Dakota dairy regulations with federal regulations as determined by the FDA Milk Safety Branch; and
- Update references to the most current form.

**Ms. Heather Rogers, Department of Agriculture,** reviewed the proposed rules.

Representative Hunhoff asked what administrative rules govern milk buyers who purchase milk out of state. Ms. Rogers noted that when the National Farmers Organization buys milk in South Dakota, they need to purchase a milk buyers' license. If a milk buyer purchases milk out of state and brings it to South Dakota for processing, the rules they must follow depend on the grade of the milk.

Ms. Rogers explained the minimum requirements for testing and noted official tests must be conducted by a certified lab.

Senator Kennedy drew attention to several minor edits in the proposed rules which need to be corrected before filing with the Secretary of State. Ms. Rogers advised the changes would be made before filing.

***Representative Hunhoff moved, seconded by Representative Hansen, that the review of the rules proposed by the Department of Agriculture is complete. Motion prevailed on a roll call vote with 6 ayes. Voting aye: Cwach, Hansen, Hunhoff, Kennedy, Russell, and Solano.***

**Department of Social Services:** Amend rules to:

- Move information to the department's website;
- Update repealed citations and rule references;
- Repeal duplicative rules and information;
- Align with federal regulations;
- Clarify coverage for incontinence items;
- Update to the most recent version of coding manuals;
- Clarify coverage for medically necessary services with no transportation provided by a ground ambulance;
- Update medical record documentation and retention requirements;
- Update third party liability claim requirements for prenatal care;

- Clarify training costs are still covered for the equipment that previously had a bundled coding structure;
- Update the list of psychology services providers in a school district setting to be consistent with eligible providers in the Mental Health Service by Independent Practitioners chapter;
- Update primary care provider terminology, claim requirements, and program requirements;
- Align medical services diagnostic assessment and treatment plan requirements with the Division of Behavioral Health rules;
- Update rules related to federally qualified health centers and rural health clinics regarding definitions, covered services, and reimbursement methodology;
- Allow early intervention for substance use disorders as a covered service;
- Update citations to federal authority regarding program requirements;
- Align substance use disorder rules with medical service rules to reference the department's fee schedule website for billing information; and
- Clarify progress note requirements.

**Ms. Teresa Schulte, Mr. William Schneider, Ms. Carrie Johnson, and Ms. Brenda Tidball-Zeltinger, Department of Social Services (DSS)**, reviewed the proposed rules. Ms. Schulte reported that the agency had disagreed with several of the LRC Style and Form edits but worked with them to reach a compromise.

Senator Kennedy asked who would oversee the updating and maintenance of the fee schedules to be posted on the department website. Ms. Schulte clarified that everything posted on the DSS website goes through their state plan and for things like the Temporary Assistance for Needy Families (TANF) program, the department is just relaying the information. As to whether there is opportunity for public input on federal guidelines, when the federal government promulgates rules, there is a comment period like that which exists when state rules are promulgated.

Senator Russell wondered what process exists at the state level to determine whether a new rule promulgated on the federal level is an appropriate move for South Dakota. Ms. Tidball-Zeltinger said from a budget perspective, DSS would talk about the changes as part of their budget address to the Appropriations Committee and go through the rules process accordingly if it was decided the rules needed to be changed.

Senator Russell then asked what prevents an agency from simply saying they are going to post the information on their website without going through the rules process. Ms. Tidball-Zeltinger responded that in order to make payment schedule changes, the department does not have the flexibility to do that without approval like that given through the rules process.

Senator Russell asked Mr. Cummings if the new set of rules would allow agencies to avert the rules process by posting information directly to their websites. Mr. Cummings said if the rules were approved as written, they would authorize the agency to bypass the IRRC.

Senator Solano wondered if the IRRC had the ability to alter dollar amounts once they were approved. Mr. Cummings replied no, as the committee only ensures the proposed rules are in compliance with the statutory authority for the rules.

Senator Kennedy asked who compiles the TANF payment standards table when the Appropriations Committee makes an appropriation for the program. Ms. Tidball-Zeltinger said the table is set by the federal government and the benefits payments resulting from the appropriation are worked out by the state agency.

Representative Hunhoff asked a series of questions relating to how the proposed rules address gambling addiction services, podiatry services, transportation costs, primary care providers, mental health treatments, peer review entities, visiting nurses, and diagnostic assessments.

Representative Cwach inquired why DSS did not just cite to the federal rule as opposed to a website. Ms. Johnson said the amounts in the rules stem from TANF federal regulations and any changes require state legislative approval.

Senator Russell cited SDCL 1-26-6.6 as directing a state agency to cite within their rules that they are adopting a federal regulation and said no such citation was included in the proposed rules, essentially allowing DSS to make changes to its website without going through the IRRC. Ms. Tidball-Zeltinger replied if the committee was suggesting the department update the citation, they would look to the committee for direction on how to do that.

Senator Russell stated his intention to revert the rules and asked that the agency analyze their statutory authority as to whether they can update their rules without coming before the IRRC.

Senator Solano said the proposed rules and the resulting discussion bring to light issues that may arise in the future regarding the use of technology to disseminate information. He also noted that since DSS is such a large department, in the future it may be helpful to break the proposed rules down by division to make them easier to review and act upon.

***Senator Russell moved that the review of the rules proposed by the Department of Social Services is complete and that 67:10:05:03 and 67:10:05:05 should be reverted to a prior step according to SDCL 1-26-4.7(4). The motion was not seconded and was subsequently withdrawn.***

***Senator Kennedy moved, seconded by Senator Russell, that the review of the rules proposed by the Department of Social Services is complete and that 67:10:05:03, 67:10:05:05, 67:16:29:04.01, 67:46:05:15, 67:46:07:12, 67:61:12:03, 67:61:13:04, 67:61:14:04, 67:61:15:04, 67:61:16:05, 67:61:17:09, and 67:61:18:06 should be reverted to a prior step according to SDCL 1-26-4.7(4).***

***A substitute motion was made by Senator Solano, seconded by Representative Hunhoff, that the review of the rules proposed by the Department of Social Services is complete and that 67:10:05:03, 67:10:05:05, 67:16:29:04.01, 67:46:05:15, and 67:46:07:12 should be reverted to a prior step according to SDCL 1-26-4.7(4). Motion failed on a roll call vote with 2 ayes and 4 nays. Voting aye: Hunhoff and Solano. Voting nay: Cwach, Hansen, Kennedy, and Russell.***

***Action reverted to the previous motion which prevailed on a roll call vote with 3 ayes and 2 nays. Voting aye: Hansen, Kennedy, and Russell. Voting nay: Hunhoff and Solano. Due to a technical issue with the telephone, Cwach was briefly disconnected and did not vote.***

***Representative Cwach moved, seconded by Senator Russell, that the review of the rules proposed by the Department of Social Services is complete and that 67:16:39:07 be reverted to a prior step according to SDCL 1-26-4.7(2). Motion prevailed on a roll call vote with 6 ayes. Voting aye: Cwach, Hansen, Hunhoff, Kennedy, Russell, and Solano.***

***Senator Russell moved, seconded by Senator Solano, that the review of the remaining rules proposed by the Department of Social Services is complete. Motion prevailed on a roll call vote with 6 ayes. Voting aye: Cwach, Hansen, Hunhoff, Kennedy, Russell, and Solano.***

**Abstracters' Board of Examiners (Department of Labor and Regulation):** Amend rules to:

- Add the executive secretary to the board;
- Repeal unanimous consent meetings;
- Repeal outdated language on orders and decisions of the board;
- Update language to require notarized signature for applicants;
- Provide additional locations and designated representatives for examinations;
- Revise the timeline for grading examinations;
- Update language for general requirements for books, records, and indexes;
- Update language relating to grading of plant examinations; and
- Update language regarding fees and expenses for plant examinations and language for issuance of certificate for plant.

**Mr. Greg Wick, Abstracters' Board of Examiners,** reviewed the proposed rules.

***Senator Russell moved, seconded by Senator Solano, that the review of the rules proposed by the Abstracters' Board of Examiners (Department of Labor and Regulation) is complete. Motion prevailed on a roll call vote with 6 ayes. Voting aye: Cwach, Hansen, Hunhoff, Kennedy, Russell, and Solano.***

**Department of Public Safety:** Amend rules to:

- Expand the 1 psi Reid Vapor Pressure waiver;
- Adopt the 2019 edition of the Commercial Vehicle Safety Alliance handbook;
- Expand the definition of immediate family for crime victims' compensation; and
- Expand the service period for which victims of crime may be reimbursed for counseling services.

**Department of Public Safety:** Adopt an emergency rule to:

- Allow the shipment of ethanol-blended gasoline into the State of South Dakota on and after September 16, 2019.

**Ms. Jenna Howell, Department of Public Safety,** reviewed the proposed rules and explained the emergency rule. She noted there are currently no issues with ethanol in South Dakota.

### **Public Testimony**

**Mr. Steve Willard, American Petroleum Institute,** expressed his support for the proposed waiver, and said South Dakota should mirror the standards of the surrounding states by adopting the waiver.

**Mr. Rod Lawrence, Magellan Midstream Partners**, said of the 24 states in which his company operates, South Dakota is the only state without the 1 psi Reid Vapor Pressure waiver. The recent hurricanes and flooding have negatively impacted refineries in the United States, causing supply shortages in the Midwest and other parts of the country. Adoption of the rules will provide assistance for that situation.

**Ms. Dawna Leitzke, South Dakota Petroleum and Propane Marketers Association**, also voiced support for the changes.

***Senator Kennedy moved, seconded by Senator Solano, that the review of the rules proposed by the Department of Public Safety is complete. Motion prevailed on a roll call vote with 6 ayes. Voting aye: Cwach, Hansen, Hunhoff, Kennedy, Russell, and Solano.***

**South Dakota Cosmetology Commission (Department of Labor and Regulation):** Amend rules to:

- Update and clarify safety and infection control rules;
- Allow licensees to see the criteria for salon and booth inspections and what constitutes a failed inspection; Formalize disciplinary proceedings into rule;
- Clarify the high school graduation requirement for applicants; and
- Reduce re-testing requirements for out-of-state applicants.

**Ms. Kate Boyd, South Dakota Cosmetology Commission**, reviewed the proposed rules. She advised members that nearly all of the LRC Style and Form edits were incorporated. Among those that were not were definitions, left unchanged because of their specificity and similarity to other states, and the number of inspections for cosmetology schools and salons. The inspection references were left in to allow for more inspections and flexible scheduling of inspections, if needed.

Senator Kennedy and Representative Hansen pointed out several grammatical and Style and Form edits that needed to be made. Ms. Boyd assured them the changes would be made before filing.

Representative Cwach wondered how the process for disciplinary proceedings works. Ms. Boyd explained the commission only accepts formal complaints that are signed and notarized. Complaints are reviewed by a violations committee to determine if action is needed. The preference is for complaints to be handled through consent agreements. The agreement is sent to the licensee and if the licensee does not agree to it and sign it, the complaint goes to a formal hearing. Licensees may also request a formal hearing in lieu of a consent agreement.

***Representative Hunhoff moved, seconded by Representative Hansen, that the review of the rules proposed by the South Dakota Cosmetology Commission (Department of Labor and Regulation) is complete. Motion prevailed on a roll call vote with 6 ayes. Voting aye: Cwach, Hansen, Hunhoff, Kennedy, Russell, and Solano.***

**State Board of Elections (Office of the Secretary of State):** Amend rules to:

- Update the voter registration form;
- Revise the timeframe for the notice of deadline for filing primary nominating petitions;
- Revise nominating petitions for partisan and independent candidates;
- Clarify the process for county auditors to certify school board election results;

- Repeal of an obsolete rule; and
- Clarify guidelines for accepting petitions and counting petition signatures.

**Mr. Steve Barnett, Secretary of State, and Ms. Kea Warne, Division of Elections, Office of the Secretary of State,** reviewed the proposed rules, many of which are the result of legislation passed by the 2018 and 2019 Legislatures.

Senator Kennedy questioned three instances in which the Style and Form edits from LRC were not followed. Ms. Warne said the board was appealing those edits on the basis that the statutory reference in question is needed to provide additional information; a suggested edit regarding the validation of signatures changes the intent of the rule; and a change to language concerning no signature versus an individual signature creates confusion where none existed previously.

Senator Kennedy and Senator Russell agreed with Ms. Warne's explanation for appeal and deemed the reasoning acceptable.

***Senator Kennedy moved, seconded by Representative Hansen, that the review of the rules proposed by the State Board of Elections (Office of the Secretary of State) is complete. Motion prevailed on a roll call vote with 6 ayes. Voting aye: Cwach, Hansen, Hunhoff, Kennedy, Russell, and Solano.***

### **Closing Comments**

Senator Solano announced that at the next meeting the committee will address the appeals process, possible statutory changes, and the voting process. The next meeting of the Interim Rules Review Committee is November 4, 2019, with an earlier start time of 9:00 a.m. CT.

### **Adjournment**

***Representative Kennedy moved, seconded by Representative Hunhoff, that the meeting be adjourned. Motion prevailed on a unanimous voice vote.***

Chair Solano adjourned the meeting at 1:57 p.m.