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AGENDA

Committee on Legal Services

January 8, 2013

10:00 a.m.
House Committee Room 0112

(The Committee will work over the lunch hour;
lunch will be ordered for the Committee members)

1. Review of New Rules (rules adopted or amended on or after November 1, 2011, and before November 1, 2012, and scheduled to expire May 15, 2013):

   a. Rules of the Medical Services Board, Department of Health Care Policy and Financing, concerning medical assistance - section 8.443 - nursing facility reimbursement, 10 CCR 2505-10 (LLS Docket No. 120311; SOS Tracking No. 2012-00287).
   Staff: Chuck Brackney and Brita Darling
   (Uncontested)

   b. Rules of the Medical Services Board, Department of Health Care Policy and Financing, concerning financial management of the children's basic health plan - presumptive eligibility for pregnant women, 10 CCR 2505-3 (LLS Docket No. 120190; SOS Tracking No. 2011-00942).
   Staff: Jeremiah Barry and Brita Darling
   (Contested)

   c. Rules of the State Board of Education, Department of Education, concerning administration of the accreditation of school districts, 1 CCR 301-1 (LLS

Docket No. 120356; SOS Tracking No. 2012-00366).
Staff: Julie Pelegrin
(Contested)

d. Rules of the State Board of Education, Department of Education, concerning administration of the educator licensing act of 1991, 1 CCR 301-37 (LLS Docket No. 120431; SOS Tracking No. 2012-00537).
Staff: Julie Pelegrin
(Uncontested)

e. Rules of the State Board of Education, Department of Education, concerning administration of the early literacy grant programs, 1 CCR 301-90 (LLS Docket No. 120510; SOS Tracking No. 2012-00723).
Staff: Julie Pelegrin
(Uncontested)

f. Rules of the Executive Director, Department of Revenue, concerning gambling payment intercept, 1 CCR 210-1 (LLS Docket No. 120499; SOS Tracking No. 2012-00711).
Staff: Ed DeCecco
(Status Unknown)

g. Rules of the Secretary of State, Department of State, concerning elections - county security procedures, 8 CCR 1505-1 (LLS Docket No. 120269; SOS Tracking No. 2012-0024).
Staff: Kate Meyer
(Uncontested)

h. Rules of the State Treasurer, Department of the Treasury, concerning state public finance policy, 8 CCR 1508-2 (LLS Docket No. 120551; SOS Tracking No. 2012-00831.
Staff: Esther van Mourik
(Uncontested)

i Rules of the State Board of Human Services, Department of Human Services, concerning special projects - domestic violence program, 12 CCR 2512-2 (LLS Docket No. 120236; SOS Tracking No. 2012-00132).
Staff: Michael Dohr
(Uncontested)

j. Rules of the Transportation Commission, Department of Transportation, concerning the statewide transportation planning program, 2 CCR 604-2 (LLS

Docket No. 120528; SOS Tracking No. 2012-01015).
Staff: Jason Gelender
(Uncontested)

2. Review of New Rules (rules adopted or amended on or after November 1, 2012, and before November 1, 2013, and scheduled to expire May 15, 2014):

   a. Rules of the Colorado State Board of Chiropractic Examiners, Division of Professions and Occupations, Department of Regulatory Agencies, concerning the scope of practice of chiropractors, 3 CCR 707-1 (LLS Docket No. 130070; SOS Tracking No. 2012-01055).
   Staff: Chuck Brackney
   (Contested)

3. Approval of the Rule Review Bill and Sponsorship of the Rule Review Bill
   Staff: Debbie Haskins

4. Sponsorship of Other Committee on Legal Services Bills:
   Bill to Enact the C.R.S.
   Revisor's Bill
   Staff: Jennifer Gilroy, Revisor of Statutes

5. Setting a Date for a Brief Organizational Meeting for COLS in January.

6. Scheduled Meetings During the Session on First Friday of the Month.
   February 1, March 1, April 5, May 3 - Noon to 2:00 p.m.

7. Other.

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MEMORANDUM

TO: Committee on Legal Services

FROM: Chuck Brackney and Brita Darling, Office of Legislative Legal Services

DATE: December 27, 2012

RE: Rules of the Medical Services Board, Department of Health Care Policy and Financing, concerning medical assistance- Section 8.443- nursing facility reimbursement, 10 CCR 2505-10 (LLS Docket No. 120311; SOS Tracking No. 2012-00287).[1]

Summary of Problem Identified and Recommendation

Section 25.5-6-203 (1) (g), C.R.S., directs the Department of Health Care Policy and Financing ("Department") to require nursing facility providers to report the total number of days of care provided to nonmedicare residents every month, but Rule 8.443.17. A 4.e. of the Medical Services Board ("Board") requires that a nursing facility provider report nonmedicare patient care days annually. **We therefore recommend that Rule 8.443.17. A 4.e. of the rules of the Medical Services Board concerning Nursing Facility Provider Fees not be extended.**

Analysis

The nursing facility provider fee rule requires annual reporting instead

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[1] Under section 24-4-103, C.R.S., the Office of Legislative Legal Services reviews rules to determine whether they are within the promulgating agency's rule-making authority. Under section 24-4-103 (8) (c) (I), C.R.S., the rules discussed in this memo will expire on May 15, 2013, unless the General Assembly acts by bill to postpone such expiration.

of monthly reporting.

The Colorado Medical Assistance Act ("Act") governs the provision of long-term care services in nursing facilities. The Act establishes requirements for nursing facilities to report information to the Department for purposes of reimbursing the facilities for the cost of care provided to patients. Section 25.5-6-203 (1) (g), C.R.S. , states as follows:

> **25.5-6-203. Nursing facilities - provider fees - federal waiver - fund created - rules.** (1) (g) The state department shall establish a schedule to assess the provider fee on a monthly basis and shall collect the fee from nursing facility providers by no later than the end of the next succeeding calendar month. The state board shall establish rules so that provider fee payments from a nursing facility provider and the state department's supplemental medicaid payments to the nursing facility are due as nearly simultaneously as feasible; except that the state department's supplemental medicaid payments to the nursing facility shall be due no more than fifteen days after the provider fee payment is received from the nursing facility. **The state department shall require each nursing facility provider to report monthly its total number of days of care provided to nonmedicare residents**. **(emphasis added)**

This section directs the Department to require nursing facilities to report the total number of days of care provided by the facility to nonmedicare residents every month.

The Board's rule regarding this reporting is Rule 8.443.17. A 4.e., which reads as follows:

> **8.443.17 PROVIDER FEES**
>
> 8.443.17. A The state department shall charge and collect provider fees on health care items or services provided by nursing facility providers for the purpose of obtaining federal financial participation under the state's medical assistance program. The provider fees shall be used to sustain or increase reimbursement for providing medical care under the state's medical assistance program for nursing facility providers.
>
> 4. The state department shall calculate the fee to collect from each nursing facility during the July 1 rate-setting process.
>
> > e. **Each nursing facility will report annually its total number of days of care provided to non-Medicare residents to the Department of Health Care Policy & Financing**. The non-Medicare patient days reported will be from the calendar year prior to the July 1 rate setting process. Providers with less than a full year of non-

> Medicare patient days will have their non-Medicare days annualized. New providers with no non-Medicare patient days data will have their non-Medicare days estimated by the Department. The non-Medicare patient days will be used for the provider fee calculation. **(emphasis added)**

The rule directs nursing facilities to report to the Department the total number of non-medicare patient care days annually. The new version of the rule replaces the word "monthly" in the prior version of the rule with the word "annually".

Because rule 8.443.17. A 4.e. directs nursing facilities to report the total number of non-medicare patient days annually, it conflicts with the language of section 25.5-6-203 (1) (g), C.R.S., which requires monthly reporting of this information, and should not be extended.

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MEMORANDUM

TO: Committee on Legal Services

FROM: Jeremiah Barry and Brita Darling, Office of Legislative Legal Services

DATE: December 27, 2012

RE: Rules of the Medical Services Board, Department of Health Care Policy and Financing, concerning financial management of the children's basic health plan - presumptive eligibility for pregnant women, 10 CCR 2505-3 (LLS Docket No. 120190; SOS Tracking No. 2011-00942).[1]

Summary of Problem Identified and Recommendation

Section 25.5-8-104, C.R.S., authorizes the Medical Services Board ("Board") to adopt rules to implement the Children's Basic Health Plan ("Plan"). Section 25.5-8-107 (1) (a) (I), C.R.S., requires the schedule of health care services adopted by those rules to include, among other items, "inpatient and outpatient hospital services". But the Board's Rule 170.5 excludes "inpatient hospital care, including labor and delivery" for presumptively eligible clients. **We therefore recommend that Rule #170.5 of the rules of the Medical Services Board concerning presumptive eligibility not be extended.**

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[1] Under section 24-4-103, C.R.S., the Office of Legislative Legal Services reviews rules to determine whether they are within the promulgating agency's rule-making authority. Under section 24-4-103 (8) (c) (I), C.R.S., the rules discussed in this memo will expire on May 15, 2013, unless the General Assembly acts by bill to postpone such expiration.

Analysis

I. History of the children's basic health plan.

The Children's Basic Health Plan Act, article 8 of title 25.5, C.R.S., was originally enacted in 1997 to provide health care to low-income children who were not eligible for other health benefits or insurance. In 2002, the Plan was expanded to include low-income pregnant women who also were not eligible for other health benefits or insurance. With the 2002 amendments, pregnant women who stated that their family income met the threshold were presumptively eligible for benefits under the Plan. Section 25.5-8-109 (5) (a) (I), C.R.S., specifically provides in part:

> **25.5-8-109. Eligibility - children - pregnant women.** (5) (a) (I) A pregnant woman whose family income does not exceed the applicable level specified in section 25.5-8-103 (4) (b) shall be presumptively eligible for the plan. . . .

Under a program that uses presumptive eligibility, in-take staff is trained to screen applicants for eligibility and temporarily enroll them in the program in order for the applicant to promptly receive care prior to the verification of income, assets, and status. Under section 25.5-8-109 (4.5) (a) (I), C.R.S., the pregnant woman self-declares her income and assets, subject to verification.

> **25.5-8-109. Eligibility - children - pregnant women.** (4.5) (a) (I) To the extent authorized by federal law, **the department shall require an applicant to state only the applicant's family income and shall notify the applicant that the applicant's family income will be verified by the department** through the most recently available records of the division of unemployment insurance in the department of labor and employment or through the income, eligibility, and verification system. The department shall allow an applicant to provide income information more recent than the records of the division of unemployment insurance or the income, eligibility, and verification system. **(emphasis added)**

II. The statute requires the Plan to cover inpatient hospital services.

Section 25.5-8-107 (1) (a) (I), C.R.S., directs the Department of Health Care Policy and Financing ("Department") to design, subject to the approval of the Board, a schedule of health services to be covered by the Plan:

> **25.5-8-107. Duties of the department - schedule of services - premiums - copayments - subsidies.** (1) In addition to any other duties pursuant to this article, the department shall have the following duties:

> (a) (I) To design, and from time to time revise, **a schedule of health care services included in the plan** and to propose said schedule to the medical services board for approval or modification. **The schedule of health care services as proposed by the department and approved by the medical services board shall include**, but shall not be limited to, preventive care, physician services, prenatal care and postpartum care, **inpatient and outpatient hospital services**, prescription drugs and medications, and other services that may be medically necessary for the health of enrollees. . . . **(emphasis added)**

The statute gives the Department and the Board latitude to design the schedule of services, but specifically requires certain services, including inpatient hospital services, to be included in the schedule.

III. Rule 170.5 conflicts with the statutes.

On February 10, 2012, the Board adopted Rule 170.5 which states:

> 170.5 Inpatient hospital care, including labor and delivery, is not a covered benefit for presumptively eligible clients.

This rule denies health benefits required to be provided under the Plan to a woman solely because the woman was *presumptively* eligible. Section 25.5-8-109 (5) (a) (I), C.R.S., provides that a pregnant woman who states that her income does not exceed the income level is "presumptively eligible for the plan". Sections 25.5-8-107 (1) (a) (I) and 25.5-8-109 (4.5) (a) (I) and (5) (a) (I), C.R.S., do not authorize the Department or Board to create a separate plan for the period that her eligibility is verified or to limit the services to which she is eligible.

We therefore recommend that Rule 170.5 of the rules of the Medical Services Board concerning presumptive eligibility not be extended.

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MEMORANDUM

TO: Committee on Legal Services

FROM: Julie Pelegrin, Office of Legislative Legal Services

DATE: December 27, 2012

RE: Rules of the State Board of Education, Department of Education, concerning administration of the accreditation of school districts, 1 CCR 301-1 (LLS Docket No. 120356; SOS Tracking No. 2012-00366).[1]

Summary of Problems Identified and Recommendations

Section 22-11-204 (5) (a) (I) (E), C.R.S., requires the Department of Education ("Department") to calculate the percentage of students enrolled in a public school who score at each of the achievement levels on the statewide assessments. This is one of the measures the Department uses to determine each public school's achievement of the performance indicator relating to closing the achievement and growth gaps. But the State Board of Education ("State Board") Rule 9.02 (D) (1) (e) applies this measure only to public high schools. **We therefore recommend that Rule 9.02 (D) (1) (e) of the rules of the State Board of Education concerning administration of the accreditation of school districts not be extended.**

Section 22-11-210 (1) (a), C.R.S., requires the State Board to establish by rule the criteria that the Department must use in recommending the type of

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[1] Under section 24-4-103, C.R.S., the Office of Legislative Legal Services reviews rules to determine whether they are within the promulgating agency's rule-making authority. Under section 24-4-103 (8) (c) (I), C.R.S., the rules discussed in this memo will expire on May 15, 2013, unless the General Assembly acts by bill to postpone such expiration.

performance plan a public school must adopt. The statute specifies that the criteria must place greatest emphasis on a school's attainment of the performance indicators and then lists five additional issues that the criteria must consider. The State Board Rule 10.01 directs the Department to base its recommendation on an objective analysis of each public school's attainment of the performance indicators, placing greatest emphasis on two of the four indicators, and does not adopt additional criteria. The State Board Rule 10.03 allows school districts, in response to the Department's recommendation, to submit information that the Department may use to consider three of the five issues listed in section 22-11-210 (1) (a), C.R.S., but a school district cannot submit this information with regard to all of its schools and the information does not address two of the five statutory issues. **We therefore recommend that Rules 10.01 and 10.03 of the rules of the State Board of Education concerning administration of the accreditation of school districts not be extended.**

Analysis

I. Rule 9.02 (D) (1) (e) conflicts with statute because it limits a specific measure of a public school's progress in closing the achievement and growth gaps to apply only to public high schools.

Each public school's accreditation is based on the school's level of achievement of four performance indicators.[2] One of the performance indicators concerns the public school's progress in closing the achievement and growth gaps among groups of students.[3] The statute specifies several measures that the Department must apply to determine a public school's achievement of this performance indicator, one of which is described as follows:

> **22-11-204. Performance indicators - measures.** (5) The department shall determine the level of attainment of each public school, each school district, the institute, and the state as a whole on the performance indicator that concerns the progress made in closing the achievement and growth gaps by using the following measures:
>
> (a) (I) For **each public school**, the department shall disaggregate by student group:
>
> (E) The percentage of students enrolled in the public school at each grade level who score at each of the achievement levels in each of the

[2] §22-11-210, C.R.S.

[3] §22-11-204 (1) (a) (III), C.R.S. The other three performance indicators are student achievement, student longitudinal growth, and student achievement of postsecondary and workforce readiness.

subjects included in the statewide assessments; and **(emphasis added)**

The State Board adopted Rule 9.02 (D) to specify the measures the Department must use in determining each public school's progress in closing the achievement and growth gaps among groups of students. The rule at issue, Rule 9.02 (D) (1) (e), is intended to correspond with the measure specified in section 22-11-204 (5) (a) (I) (E), C.R.S., but it reads as follows:

> **9.02(D) Progress made on closing the achievement and growth gaps.**
> 9.02(D)(1) Progress made on closing the achievement and growth gaps shall be calculated based on the following information disaggregated by Student Group:
>
> 9.02(D)(1)(e) **for a public high school**, the percentage of students enrolled in the Public School at each grade level who score at each of the Achievement Levels in each of the subjects included in the Statewide Assessments; and **(emphasis added)**

Clearly, the statute does not limit the application of this measure to public high schools; it applies to all public schools. We therefore recommend that Rule 9.02 (D) (1) (e) of the rules of the State Board of Education concerning administration of the accreditation of school districts not be extended.

II. Rule 10.01 conflicts with statute because it does not establish criteria that the Department must apply in recommending the type of plan that a public school must adopt and it does not require the Department to emphasize attainment of the performance indicators.

Under the accreditation statutes, the Department must review each public school's performance and, depending on how well the public school is achieving the performance indicators, recommend that the public school adopt a performance plan, an improvement plan, a priority improvement plan, or a turnaround plan. Section 22-11-210 (1) (a), C.R.S., specifically requires the State Board to adopt rules to guide the Department's recommendations, as follows:

> **22-11-210. Public schools - annual review - plans - supports and interventions - rules.** (1) (a) The state board shall promulgate rules establishing **objective, measurable criteria** that the department shall apply in recommending to the state board that a public school shall implement a performance, improvement, priority improvement, or turnaround plan or that a public school shall be subject to restructuring. In promulgating the

rules, the state board shall place the **greatest emphasis on attainment of the performance indicators.** In addition, the rules shall, at a minimum, take into consideration:

(I) A public school's level of attainment of the statewide and school district or institute targets on the performance indicators and the public school's level of attainment of its own annual targets;

(II) A public school's level of attainment of the performance indicators compared with statewide attainment of the performance indicators;

(III) The length of time during which a public school has been unable to meet the statewide targets, the school district or institute targets, or its own targets;

(IV) The improvements, changes, and interventions a public school implements to improve its performance if it is not meeting the statewide targets, the school district or institute targets, or its own targets; and

(V) The progress a public school makes in improving its performance and in moving closer to meeting the statewide targets, the school district or institute targets, and its own targets. **(emphasis added)**

In response to this directive, the State Board adopted Rule 10.01, the introductory portion of which reads as follows:

10.00 SCHOOL PLANS AND SCHOOL RESTRUCTURING

10.01 No later than August 15th of each school year, **based on an objective analysis** of each Public School's attainment on the four key Performance Indicators, **which analysis shall place greatest emphasis upon the longitudinal growth and Postsecondary and Workforce Readiness Performance Indicators**, the Department shall determine whether the Public School exceeds, meets, approaches or does not meet statewide targets. The Department shall formulate an initial recommendation for each Public School as to whether the Public School should implement a Performance Plan, an Improvement Plan, a Priority Improvement Plan or a Turnaround Plan, or that the Public School should be subject to restructuring. **(emphasis added)**

It does not appear that Rule 10.01 establishes any criteria. Instead, it instructs the Department to make its initial recommendation based on "an objective analysis" of performance. Further, section 22-11-210 (1) (a), C.R.S., states that the State Board, through its rules, must place the greatest emphasis on attainment of the performance indicators, presumably all four of them. But Rule 10.01 places emphasis on only two of the performance indicators, one of which applies only to public high schools. We therefore recommend that Rule 10.01 of the rules of the State Board of Education concerning administration of the accreditation of school districts not be extended.

III. Rule 10.03 addresses some of the statutory issues that the

Department must consider in recommending the type of plan that a public school must adopt, but it conflicts with statute because it does not address all of the issues and it does not require the Department to consider all of the issues with regard to all schools.

Rule 10.03 (See **Addendum A**) requires school districts and the state charter school institute to submit certain information to the Department after receiving the Department's initial recommendation of a plan for the public schools of the school districts and the charter school institute. Rule 10.03 may be intended to establish the criteria required by section 22-11-210 (1) (a), C.R.S., quoted above, for the Department's review of schools and recommendations concerning performance plans because the Department must consider this information before making its final recommendations to the State Board. However, the information submitted under Rule 10.03 pertains to only three of the five statutory issues, and a school district or the institute will submit information pertaining to two of those three issues only if it disagrees with the Department's initial recommendation.

After the Department makes its initial plan recommendations, Rule 10.03 (A) requires each school district and the state charter school institute to inform the Department of the accreditation category to which the district or the institute has assigned each of its public schools. In addition, for each school, the district and the institute must submit information concerning the school's attainment of state, district or institute, and school performance targets. This information enables the Department to consider the issue specified in section 22-11-210 (1) (a) (I), C.R.S., for all public schools.

If the school district or the institute disagrees with the Department's initial plan recommendation, Rule 10.03 (B) (2) allows the district or the institute to submit information concerning the school's progress in implementing improvements, changes, and interventions. This information enables the Department to consider the issue specified in section 22-11-210 (1) (a) (IV), C.R.S., but only for this subset of public schools.

Further, if the school district or the institute disagrees with the Department's initial recommendation and the public school implemented a priority improvement plan or turnaround plan in the preceding year, the district or the institute may submit information concerning the progress the school has made in improving its performance. This information enables the Department to consider the issue specified in section 22-11-210 (1) (a) (V), C.R.S., but only for an even smaller subset of public schools.

Rule 10.03 does not, in any context, require a school district or the institute to submit, or the Department to consider, information concerning a public school's level of attainment of the performance indicators compared with statewide attainment of the performance indicators or the length of time during which a public school has been unable to meet the statewide, district or institute, or school targets. The Department needs this information to be able to consider the issues specified in section 22-11-210 (1) (a) (II) and (1) (a) (III), C.R.S. Apparently, the State Board's rules do not require the Department to consider these issues. So, even if Rule 10.03 possibly establishes some criteria that the Department must consider, it does not require the Department to consider all of the statutory issues.

Further, Rule 10.03 does not require the Department to consider all of the five issues required in section 22-11-210 (1) (a), C.R.S., with regard to all public schools. The Department must consider only one of the issues for all public schools. The Department may consider one or two other issues, but only if the district or the state charter school institute disagrees with the Department's initial recommendation concerning a plan. And the Department will consider one of those two issues only if the public school under consideration is a low-performing school.

Rule 10.03 conflicts with section 22-11-210 (1) (a), C.R.S., and we therefore recommend that Rule 10.03 of the rules of the State Board of Education concerning administration of the accreditation of school districts not be extended.

Addendum A

10.00 SCHOOL PLANS AND SCHOOL RESTRUCTURING

10.03 No later than October 15th of each school year, each District and the Institute shall submit to the Department the following:

10.03(A) The Accreditation category assigned to each Public School, as determined by the Local School Board or Institute, and the school performance framework used for that Accreditation assignment, including evidence of the Public School's level of attainment of District or Institute targets on the Performance Indicators and the Public School's level of attainment of its own annual targets; and

10.03(B) If the District or Institute disagrees with the Department's initial recommendation concerning the type of plan that the Public School shall implement and wishes to provide additional information for consideration, the District or Institute shall submit:

10.03(B) (1) A recommendation from the District or Institute regarding the type of plan the Public School shall implement;

10.03(B) (2) A statement about the extent to which the Public School effectively implemented with fidelity either the School Performance Plan, School Improvement Plan, School Priority Improvement Plan or School Turnaround Plan during the previous academic school year. Said statement shall include information about the specific improvements, changes, and interventions the Public School has implemented to improve its performance and the extent to which the Public School has successfully met the implementation benchmarks in the Public School's plan during the previous academic school year; and

10.03(B) (3) For Public Schools that the Department has initially recommended to implement a School Priority Improvement Plan or a School Turnaround Plan, valid and reliable data demonstrating the progress the Public School

has made in improving its performance and in meeting the statewide targets on the Performance Indicators, the District or Institute targets on the Performance Indicators, and its own school targets, including evidence from a Department-approved third-party review of performance.

10.03(C) No later than November 15th of each school year, the Department shall formulate a final recommendation as to whether each Public School should implement a Performance Plan, an Improvement Plan, a Priority Improvement Plan or a Turnaround Plan, or that the Public School be subject to restructuring. This final recommendation shall take into consideration both the objective analysis of each Public School's attainment on the Performance Indicators, as described in section 10.01 of these rules, and the additional information submitted by a District or Institute, as described in section 10.03(B) of these rules. The Department shall submit its final recommendation to the State Board, along with any conflicting recommendation provided by the District or Institute.

OFFICE OF LEGISLATIVE LEGAL SERVICES

COLORADO GENERAL ASSEMBLY

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MEMORANDUM

TO: Committee on Legal Services

FROM: Julie Pelegrin, Office of Legislative Legal Services

DATE: December 27, 2012

RE: Rules of the State Board of Education, Department of Education, concerning administration of the educator licensing act of 1991, 1 CCR 301-37 (LLS Docket No. 120431; SOS Tracking No. 2012-00537).[1]

Summary of Problems Identified and Recommendations

Section 22-60.5-111, C.R.S., authorizes the State Board of Education ("State Board") to promulgate rules that establish the criteria for issuing a school speech-language pathology assistant (SLP-A) authorization. But State Board Rule 4.11 (6) establishes requirements that an employing school district must meet in supervising a person who holds the SLP-A authorization. **We therefore recommend that Rule 4.11 (6) of the rules of the State Board of Education concerning administration of the Educator Licensing Act of 1991 not be extended.**

There is no statute that authorizes the State Board to promulgate rules regarding an adult basic education authorization. But State Board Rule 4.16 establishes the criteria for issuing an adult basic education authorization. **We therefore recommend that Rule 4.16 of the rules of the State Board of**

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[1] Under section 24-4-103, C.R.S., the Office of Legislative Legal Services reviews rules to determine whether they are within the promulgating agency's rule-making authority. Under section 24-4-103 (8) (c) (I), C.R.S., the rules discussed in this memo will expire on May 15, 2013, unless the General Assembly acts by bill to postpone such expiration.

Education concerning administration of the Educator Licensing Act of 1991 not be extended.

Analysis

I. Background

To be employed as an educator by a school district in Colorado, a person must hold an educator license or an authorization issued by the Department of Education ("Department").[2] Section 22-60.5-111, C.R.S., specifies the types of authorizations that the Department may issue. These authorizations allow a person to work as an educator even though the person does not qualify for an educator license. The State Board of Education ("State Board") must adopt rules that establish the qualifications or criteria for each of the authorizations created in statute.

> **22-60.5-111. Authorization - types - applicants' qualifications - rules.** (1) Pursuant to the rules of the state board of education, the department of education may issue the **authorizations specified in this section** to persons of good moral character who meet the **qualifications prescribed** by this section and **by the rules of the state board of education. (emphasis added)**

A person must demonstrate that he or she meets these qualifications or criteria before the Department can issue an authorization to the person.

II. Rule 4.11 (6), which attempts to dictate the conditions under which a school district may employ a person who holds an SLP-A authorization, is not authorized by statute.

Section 22-60.5-111 (10), C.R.S., creates the school speech-language pathology assistant (SLP-A) authorization. (See **Addendum A**) This statute directs the State Board to adopt rules to specify the criteria that a person must meet to obtain the SLP-A authorization and states the minimum criteria that the rules must include.

In implementing the SLP-A authorization, the State Board adopted Rule 4.11. The first five subsections of this rule set forth the requirements that a person must meet to obtain the authorization. Subsection (6) of this rule specifies the manner in which the employing school district must supervise the SLP-A, as follows:

---

[2] Section 22-63-201 (1), C.R.S.

4.11	**Authorization: School Speech-Language Pathology Assistant, for Ages Birth - 21.**
4.11 (6)	Supervision of the School SLP-A
4.11 (6) (a)	direct supervision may be conducted electronically via a live internet broadcast of video conference by a nationally-certified SLP residing and working within the state of Colorado or within a reasonable commuting distance to Colorado.
4.11 (6) (b)	SLP-A students or SLP-As under an emergency authorization require fifty percent direct supervision.
4.11 (6) (c)	authorized SLP-As require the following amount of supervision: first ninety days thirty percent total supervision with twenty percent being direct supervision and ten percent being indirect supervision; and, after ninety days twenty percent total supervision with ten percent being direct supervision and ten percent being indirect supervision.
4.11 (6) (d)	the maximum number of SLP-As under the supervision of one SLP shall not exceed three.

Rule 4.11 (6) does not set criteria for obtaining an SLP-A authorization; it sets the supervision requirements that a school district must meet if it employs a person who holds an SLP-A authorization. Section 22-60.5-111, C.R.S., does not authorize the State Board to adopt rules that limit, control, or otherwise dictate a school district's employment of a person who holds an SLP-A authorization.

We therefore recommend that Rule 4.11 (6) of the rules of the State Board concerning administration of the Educator Licensing Act of 1991 not be extended.

III. Rule 4.16, which creates an adult basic education authorization, is not authorized in statute.

As stated previously, section 22-60.5-111, C.R.S., specifies the authorizations that the Department may issue to qualifying persons. The statute specifies **fifteen** authorizations: An adjunct instructor authorization; a special services intern authorization; an emergency authorization; a temporary educator eligibility authorization; a substitute authorization; an interim authorization; a military spouse interim authorization; an exchange educator interim authorization; a career and technical education authorization; a school speech-language pathology assistant authorization; an educational interpreter authorization; a junior reserve officer training corps instructor authorization; a literacy instruction authorization; a principal authorization; and a Native American language and culture instruction authorization.

The statute requires the State Board to adopt criteria for issuing each of these authorizations, but it does not authorize the State Board to create additional authorizations.

Rule 4.16 creates the adult basic education authorization.

> **4.16 Authorization: Adult Basic Education.**
> An adult basic education authorization shall be valid for five years from the date of issuance, and may be issued to an applicant who has an associate degree or higher and provides documented evidence of adult basic education instruction training and experience, based upon successful completion of adult basic education authorization requirements.
>
> 4.16(1) The adult basic education authorization may be renewed based upon documented evidence of additional adult basic education instruction training as required every five years.

This authorization is not authorized or created in statute. We therefore recommend that Rule 4.16 of the rules of the State Board of Education concerning administration of the Educator Licensing Act of 1991 not be extended.

Addendum A

22-60.5-111. Authorization - types - applicants' qualifications - rules. (10) **School speech-language pathology assistant authorization.** (a) The department of education may issue a school speech-language pathology assistant authorization to a person who meets the criteria specified by rule of the state board of education, which at a minimum shall include:

(I) (A) Completion of at least a bachelor's degree, which degree is from an accepted institution of higher education, in speech communication, speech-language pathology, or communication disorders-speech sciences, or a bachelor's degree in any other field if the unauthorized school speech-language pathology assistant has completed a minimum number of credits of course work in speech, language, and hearing sciences, which minimum number of credits is established by rules promulgated by the state board of education pursuant to paragraph (c) of subsection (10) of this section.

(B) (Deleted by amendment, L. 2010, (HB 10-1034), ch. 116, p. 391, § 1, effective August 11, 2010.)

(II) Successful completion of a school speech-language pathology assistant program that:

(A) Meets or exceeds recommended guidelines established by a national association of speech-language-hearing professionals; and

(B) Includes a requirement that each student complete at least one hundred clock hours of a school-based practicum under the supervision of a nationally certified speech-language pathologist who resides or works within Colorado or within a reasonable commuting distance to Colorado, which supervision may be performed electronically via remote interactive technology; and

(III) (Deleted by amendment, L. 2010, (HB 10-1034), ch. 116, p. 391, § 1, effective August 11, 2010.)

(IV) Demonstrated knowledge and skills in competencies specified by rule of the state board of education.

(b) A school speech-language pathology assistant authorization is valid for five years. The department of education may renew the authorization for succeeding five-year periods upon presentation of documented evidence of completion of content-related renewal requirements established by rule of the state board of education, which requirements shall include, but not be limited to, continuing education requirements.

(c) On or before November 1, 2010, the state board of education shall promulgate rules establishing a minimum number of credits of course work in speech, language, and hearing sciences that a person with a bachelor's degree must complete for the purposes of sub-subparagraph (C) of subparagraph (I) of paragraph (a) of subsection (4) of this section and of sub-subparagraph (A) of subparagraph (I) of paragraph (a) of this subsection (10).

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MEMORANDUM

TO: Committee on Legal Services

FROM: Julie Pelegrin, Office of Legislative Legal Services

DATE: December 27, 2012

RE: Rules of the State Board of Education, Department of Education, concerning administration of the early literacy grant program, 1 CCR 301-90 (LLS Docket No. 120510; SOS Tracking No. 2012-00723).[1]

Summary of Problem Identified and Recommendation

Section 22-7-1213 (2), C.R.S., requires each local education provider that receives a grant through the early literacy grant program (grant program) to report specified information describing its use of the grant moneys. But the State Board of Education ("State Board") Rule 4.01 (D) requires each grant recipient to submit additional information that the Department of Education ("Department") may request to monitor the effectiveness of the grant program. **We therefore recommend that Rule 4.01 (D) of the rules of the State Board of Education concerning administration of the early literacy grant program not be extended.**

Analysis

I. Rule 4.01 (D) conflicts with section 22-7-1213 (2), C.R.S., because

[1] Under section 24-4-103, C.R.S., the Office of Legislative Legal Services reviews rules to determine whether they are within the promulgating agency's rule-making authority. Under section 24-4-103 (8) (c) (I), C.R.S., the rules discussed in this memo will expire on May 15, 2013, unless the General Assembly acts by bill to postpone such expiration.

it potentially requires a much more burdensome level of reporting than the statute authorizes.

In 2012, the General Assembly created the grant program in section 22-7-1211, C.R.S., and directed the State Board to adopt rules to implement the program.[2] The purpose of the grant program is to provide moneys to local education providers to implement literacy support and intervention instruction programs to assist kindergarten through third grade students to achieve reading competency.

In section 22-7-1213 (2), C.R.S., the General Assembly specified the information that each grant program recipient must submit to the department:

> **22-7-1213. Reporting requirements.** (2) Each local education provider that receives an early literacy grant pursuant to section 22-7-1211 ... shall, at the conclusion of each budget year in which it receives the grant ... , submit to the department information describing:
>
> (a) The instructional programs, full-day kindergarten program, summer school literacy program, tutoring services, or other intervention services for which the local education provider used the grant ...;
>
> (b) The number and grade levels of students who participated in each of the types of programs or services provided; and
>
> (c) The progress made by participating students in achieving reading competency.

In adopting rules to implement the grant program, the State Board included rules that require grant recipients to submit specific information concerning the recipients' use of the moneys:

> 4.01 Each Local Education Provider that receives an early literacy grant shall submit information to the Department describing the following:
>
> 4.01 (A) The instructional programs or services for which the Local Education Provider used the grant;
>
> 4.01 (B) The number and grade levels of students who participated in each of the types of programs or services provided;

---

[2] **22-7-1209. State board - rules - department - duties.** (1) The state board shall promulgate rules in accordance with the "State Administrative Procedure Act", article 4 of title 24, C.R.S., as necessary to implement the provisions of this part 12, which rules shall include, but need not be limited to:

(f) Rules for implementing the early literacy grant program pursuant to section 22-7-1211.

4.01 (C) The progress made by participating students in achieving reading competency; and

4.01 (D) **Other information that the Department may deem necessary to monitor the effectiveness of the grant program. (emphasis added)**

The statutory list of required information is specific and exclusive and does not include language that authorizes the Department or the State Board to require local education providers to submit additional information concerning the use of these grants. Further, the language of Rule 4.01 (D) is very broad and potentially imposes a significant reporting burden on grant recipients that the statutory reporting requirements do not contemplate. Rule 4.01 (D) clearly conflicts with the statute. We therefore recommend that Rule 4.01 (D) of the rules of the State Board of Education concerning administration of the early literacy grant program not be extended.

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MEMORANDUM

TO: Committee on Legal Services

FROM: Ed DeCecco, Office of Legislative Legal Services

DATE: December 27, 2012

RE: Rules of the Executive Director, Department of Revenue, concerning gambling payment intercept, 1 CCR 210-1 (LLS Docket No. 120499; SOS Tracking No. 2012-00711).[1]

Summary of Problem Identified and Recommendation

Section 24-35-607, C.R.S., requires the Executive Director of the Department of Revenue to promulgate a rule that allows a gaming licensee to retain a portion of a cash winner's gambling payment intercept to cover the licensee's cost of compliance with the Gambling Intercept Payment Act.[2] But the Executive Director's Rule 11 creates an unauthorized charge by requiring the licensee to forward $10 to the intercept registry operator for the operator's payment processing cost. **We therefore recommend that Rule 11 of the rules of the Executive Director of the Department of Revenue concerning gambling payment intercepts not be extended.**

Analysis

---

[1] Under section 24-4-103, C.R.S., the Office of Legislative Legal Services reviews rules to determine whether they are within the promulgating agency's rule-making authority. Under section 24-4-103 (8) (c) (I), C.R.S., the rules discussed in this memo will expire on May 15, 2013, unless the General Assembly acts by bill to postpone such expiration.

[2] Part 6 of article 35 of title 24, C.R.S.

I. The Executive Director of the Department of Revenue is required to promulgate a rule to allow a licensee to retain a portion of the gambling payment intercept to cover the licensee's cost of compliance.

The "Gambling Intercept Payment Act" ("Act") requires a limited gaming or pari-mutuel wagering licensee ("licensee") to check a registry to determine whether a cash winner owes unpaid child support debt or child support costs, court-ordered restitution, or an unpaid debt to the state (collectively, "outstanding debt"). If a cash winner owes an outstanding debt, the licensee withholds all or part of the winnings and transmits the money to the registry operator, which in turn sends it to the proper department for payment.

The "registry operator" is defined in section 24-35-603 (5), C.R.S., to be "the department of revenue or the private entity that maintains the registry under the direction and control of the department." The Department of Revenue ("Department") entered into an agreement with the State Internet Portal Authority ("SIPA") to be the registry operator.

The Executive Director of the Department is required to promulgate rules regarding the retention of fees to cover the licensee's cost of compliance. Specifically, section 24-35-607 (4), C.R.S., states:

> **24-35-607. Contracting authority - memoranda of understanding - rules.** (4) The executive director of the department of revenue shall promulgate a rule in accordance with article 4 of this title **allowing a licensee to retain at least thirty dollars of each payment withheld** pursuant to this part 6 to cover the licensee's costs of compliance with this part 6, which amount shall be added to the debtor's outstanding debt. (**emphasis added**)

The amount of these costs is added to the cash winner's outstanding debt. To comply with this requirement, the Executive Director promulgated Rule 11, which reads as follows:

> **11 Licensee Costs.**
>
> To cover the cost for the licensee's compliance with the Gambling Payment Intercept Act and these regulations, the licensee shall retain $40.00 from the cash payment intercept. **A total of $10.00 of the $40.00 withholding shall be submitted to the registry operator with the intercept payment as a payment processing cost.** The remaining $30.00 shall be retained by the licensee as a compliance cost. (**emphasis added**)

The $30 that a licensee retains is clearly allowed under the statutory authority. It is the $10 payment processing cost submitted to SIPA as the registry operator, which was in Rule 11 prior to the Executive Director's most recent rule changes,[3] that is at issue here.

II. The Executive Director does not have authority under the Act to allow the registry operator to collect a $10 payment processing cost.

Under section 24-35-607 (4), C.R.S., the Department is required to promulgate a rule to allow a licensee to retain a portion of the intercept to cover the licensee's costs of compliance with this Act. But the Department has addressed both the licensee's costs and the registry operator's costs in Rule 11. This is problematic for two reasons.

First, the payment fails to meet the plain language of section 24-35-607 (4), C.R.S. This provision allows a licensee to "retain" some of the cash payment intercept to cover its cost of compliance, and "retain" means "to keep possession of."[4] Under Rule 11, however, the licensee does not keep possession of the $10, instead it transmits it to the registry operator.

And this transmittal is part of the second, broader issue with Rule 11 -- the Executive Director is using a provision that requires a licensee to be reimbursed for complying with the Act to pay for the administration of the Act itself. Yet the Act contains no authority for the $10 payment processing cost. If the General Assembly had intended the registry operator to charge this $10 fee, it could have included the fee in the Act, as it did when it enacted a $25 fee that is added to each outstanding debt that is to be used for direct and indirect costs associated with the administration of the Act. The relevant sections for this fee are as follows:

> **24-35-604. Registry - creation - information.** (5) On and after the date that the judicial department receives notice from the department of revenue pursuant to section 24-35-605.5 (2) (b) (I), the registry operator shall add a fee of twenty-five dollars to each outstanding debt certified by a department pursuant to this section.
>
> **24-35-605. Payments - limited gaming and pari-mutuel wagering licensees - procedures.** (3) The registry operator shall deduct an

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[3] Rule 11 was modified to increase the amount that the licensee was permitted to retain from $15 to $30.

[4] Dictionary.com

> amount equal to the fee added to the outstanding debt pursuant to section 24-35-604 (5) from each payment received from a licensee and forward such amount to the state treasurer for deposit in the gambling payment intercept cash fund created in section 24-35-605.5.
>
> **24-35-605.5. Gambling payment intercept cash fund - creation - gifts, grants, donations - intercepts for restitution.** (1) There is hereby created in the state treasury the gambling payment intercept cash fund, referred to in this section as the "fund". The fund shall consist of any moneys deposited in the fund pursuant to section 24-35-605 (3), any allocations made to the fund pursuant to section 24-33.5-506 (1) (c.5) (I), any other moneys appropriated to the fund by the general assembly, and any gifts, grants, or donations from private or public sources, which the department of revenue is hereby authorized to seek and accept for the purposes set forth in this section. All private and public funds received through gifts, grants, or donations shall be transmitted to the state treasurer, who shall credit the same to the fund. The state treasurer shall also credit to the fund any moneys that are allocated thereto pursuant to section 24-33.5-506 (1) (c.5) (I).
>
> (2) (b) Once the intercept program has been expanded as described in paragraph (a) of this subsection (2):
>
> ...
>
> (II) Moneys in the fund shall be subject to annual appropriation by the general assembly for the direct and indirect costs associated with the administration of this part 6.

For these reasons, the Executive Director should not be able to use the indirect authority of section 24-35-607 (4), C.R.S., related to reimbursing a licensee to pay for the registry operator's cost of administering the Act.

III. SIPA does not have separate authority to collect the $10 charge.

The fact that SIPA is the registry operator does not make the $10 fee permissible. Under section 24-37.7-107 (1) (f), C.R.S., SIPA partially funds its operations through the "sale of services, products, or information", but this authority is limited by section 24-37.7-106 (1), C.R.S. It states that:

> . . . [SIPA] shall not increase or decrease the amount of any charge or fee that a state agency . . . is authorized by law to impose for electronic information, products, and services.

And this limit applies here. As previously mentioned, a $25 statutory fee is added to each outstanding debt that is credited to the gambling intercept

payment cash fund for the direct and indirect costs of administering the Act.[5] The administration of the Act includes the registry operator's costs in processing intercept transactions. Accordingly, the General Assembly has established $25 as the amount that the Department or any other private registry operator may charge for electronically processing an intercept transaction, and under section 24-37.7-106 (1), C.R.S., SIPA can neither increase nor decrease this fee. Therefore, even if SIPA is the registry operator, the additional $10 payment processing cost is prohibited.

This does not mean that SIPA cannot collect a $10 fee for its payment processing costs. It just means that the fee must come from the $25 statutory fee, which is currently not being used.[6]

Because the $10 payment processing cost cannot be included as a valid cost of compliance with the Act, we recommend that Rule 11 of the rules of the Executive Director of the Department of Revenue concerning the Gambling Payment Intercept Act not be extended.

---

[5] Section 24-35-605.5 (2) (b) (II), C.R.S.

[6] According to the Department, it has never expended any of the $25 fee that is deposited in the gambling payment intercept cash fund.

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MEMORANDUM

TO: Committee on Legal Services

FROM: Kate Meyer, Office of Legislative Legal Services

DATE: December 27, 2012

RE: Rules of the Secretary of State, Department of State, concerning elections, county security procedures, 8 CCR 1505-1 (LLS Docket No. 120269; SOS Tracking No. 2012-0024.[1]

Summary of Problem Identified and Recommendation

Section 1-5-616 (5), C.R.S., sets forth the procedure by which the Secretary of State must review and approve written procedures developed by designated elections officials to ensure the accuracy and security of voting conducted on electronic or electromechanical systems. However, the Secretary of State's Rule 43.4.4 exempts the Secretary of State from the time periods prescribed by statute, and deems plan modifications approved until the review is completed. **We therefore recommend that Rule 43.4.4 of the rules of the Secretary of State concerning elections not be extended.**

Analysis

I. Rule 43.4.4 disregards the statutory time period during which the

[1] Under section 24-4-103, C.R.S., the Office of Legislative Legal Services reviews rules to determine whether they are within the promulgating agency's rule-making authority. Under section 24-4-103 (8) (c) (I), C.R.S., the rules discussed in this memo will expire on May 15, 2013, unless the General Assembly acts by bill to postpone such expiration.

Secretary of State must review plan revisions and allows designated election officials to operate under unreviewed plans.

Part 6 of article 5 of title 1, C.R.S., governs the use of electronic and electromechanical voting systems in state and local elections. Section 1-5-616 (5) (a), C.R.S., directs designated elections officials to develop written procedures to ensure that voting conducted on such systems is secure and accurate. Paragraph (b) of that subsection (5) describes the process for modifying those procedures. Both new plans and modifications to existing procedures must be submitted to the Secretary of State, who has fifteen days from the date of receipt to review and approve or reject the proposed procedures or revisions thereto. Section 1-5-616, C.R.S., reads as follows:

> **1-5-616. Electronic and electromechanical voting systems - standards - procedures.** (5) (a) Each designated election official shall establish written procedures to ensure the accuracy and security of voting in the political subdivision and submit the procedures to the secretary of state for review. The secretary of state shall notify the designated election official of the approval or disapproval of the procedures no later than fifteen days after the secretary of state receives the submission.
>
> (b) Each designated election official shall submit any revisions to the accuracy and security procedures to the secretary of state no less than sixty days before the first election in which the procedures will be used. **The secretary of state shall notify the designated election official of the approval or disapproval of said revisions no later than fifteen days after the secretary of state receives the submission. (emphasis added)**

Accordingly, whether reviewing new procedures or proposed revisions to previously approved plans, the Secretary of State is required to complete his or her review (and notify the designated local official of approval or disapproval) within a fifteen-day time period.

Rule 43.4 of the Secretary of State concerns the manner in which security plans are amended and reviewed. Section 43.4.4, however, allows the Secretary of State an indefinite period of time with which to review the revisions. The rule reads as follows:

> **43.4 Amendments and review of Security Plans**[2]
> **43.4.4. If, under section 1-5-616(5) (b), C.R.S., the Secretary of State is unable to complete its review,** the Secretary will notify the county that the security plan or revisions are **temporarily approved until the review is complete. (emphasis added)**

[2] The terms "accuracy and security procedures" and "security plans" are synonymous (the former is used in statute and the latter in rule).

Under the administrative scheme of Rule 43.4.4, the Secretary of State may defer reviewing, and approving or disapproving, a proposed plan revision until an unspecified future date. While that review and decision are pending, the plan or revision at issue is deemed "temporarily approved".

The rule conflicts with the statute in two crucial respects. First, the open-ended time period conflicts with the time frame prescribed by statute. More egregiously, the default assumption is that any plan revisions that the Secretary of State simply cannot review in time are deemed approved. This approach is an abdication of a duty imposed by statute, and potentially results in the approval *and use* of plan alterations that are unexamined (at best) or deficient and ultimately rejected, post-election (at worst).

Because Rule 43.4.4 allows un-reviewed modifications to security plans to be effected, and indefinitely defers the Secretary of State's statutorily imposed duty to review such modifications, it conflicts with the requirements of section 1-5-616 (5) (b), C.R.S., and should not be extended.

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MEMORANDUM

TO: Committee on Legal Services

FROM: Esther van Mourik, Office of Legislative Legal Services

DATE: December 27, 2012

RE: Rules of the State Treasurer, Department of the Treasury, concerning state public financing policy, 8 CCR 1508-2 (LLS Docket No. 120551; SOS Tracking No. 2012-00831).[1]

Summary of Problems Identified and Recommendations

Section 24-36-121 (5) (k), C.R.S., requires the State Treasurer to promulgate by rule a state public financing policy that includes policies related to post-issuance compliance with federal and state tax and securities laws, including arbitrage, rebate, and remedial action requirements. But State Treasurer Rule 1.12. D does not actually include the required policies and instead merely states that the State Treasurer **may** adopt post-issuance compliance procedures, allowing the state treasurer to adopt the policies at a later date, in a separate document, or not at all. **We therefore recommend that Rule 1.12. D of the rules of the State Treasurer concerning the state public financing policy not be extended.**

Section 24-4-103 (4) (b) (III), C.R.S., requires every executive agency rule to be clear and simple enough to be understood by any party who must comply with it. But the first sentence of State Treasurer Rule 1.11, Rules 1.11

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[1] Under section 24-4-103, C.R.S., the Office of Legislative Legal Services reviews rules to determine whether they are within the promulgating agency's rule-making authority. Under section 24-4-103 (8) (c) (I), C.R.S., the rules discussed in this memo will expire on May 15, 2013, unless the General Assembly acts by bill to postpone such expiration.

A., 1.11 B., 1.11 C., and 1.11 D., and Rule 1.12 A. impose duties on "the State" without specifying which state official or state agency must fulfill the duties. This makes it impossible for officials and agencies that have historically been involved in state public financing, including the State Treasurer, the State Controller, and agencies that receive public financing revenues, to know whether or not they or another official or agency must fulfill a particular duty imposed by the rules. **We therefore recommend that the first sentence of Rule 1.11 and Rules 1.11 A., 1.11 B., 1.11 C., 1.11 D. and Rule 1.12 D. of the rules of the State Treasurer concerning the state public financing policy not be extended.**

Analysis

I. Origin and Purpose of Section 24-36-121, C.R.S.

In the fall of 2011, the Deputy State Treasurer relayed to the Capital Development Committee the State Treasurer's desire to centralize the management of the state's public financing. The Deputy State Treasurer explained that centralized management could have a positive impact on the state's credit rating by giving credit rating agencies a single expert point of contact with the state for state public financing matters and that centralized management would also better ensure that the state met federal tax and securities law post-issuance compliance requirements. As a result, the committee sponsored and the General Assembly enacted S.B. 12-150, which established the State Treasurer as the manager of much of the state's public financing. The major provisions of S.B. 12-150 are codified in section 24-36-121, C.R.S.

Section 24-36-121 (4) (a) (I), C.R.S., gives the State Treasurer sole discretion to manage the issuance of all approved state financial obligations, including post-issuance compliance, subject to the criteria established in the state public financing policy. Section 24-36-121 (5), C.R.S., requires the State Treasurer to promulgate by rule the state public financing policy. The purpose of the state public financing policy is to transparently lay out the procedures by which the State Treasurer will manage the issuance of approved financial obligations of the state and any related post-issuance compliance.

II. Rule 1.12 D. conflicts with section 24-36-121 (5) (k), C.R.S., because the rule does not include policies related to post-issuance compliance with federal and state tax and securities laws as required by the statute.

Section 24-36-121 (5) (k), C.R.S., requires the State Treasurer to promulgate by rule a state public financing policy that includes policies related to post-issuance compliance with federal and state tax and securities laws as follows:

> **24-36-121. Authority to manage state public financing - state public financing cash fund - rules - legislative declaration - definitions.** (5) No later than ninety days after May 24, 2012, **the state treasurer shall promulgate by rule**, in accordance with article 4 of this title, **a state public financing policy**, and, in so doing, shall collaborate with various experts, including but not limited to the state controller, the office of state planning and budgeting, bond counsel, and the attorney general. . . . **The state public financing policy shall include, but shall not be limited to,** the following components:
>
> (k) **Policies related to post-issuance compliance with federal and state tax and securities laws,** including arbitrage, rebate, and remedial action requirements; and (**emphasis added**)

Neither Rule 1.12 D., nor any other section of the State Treasurer rules concerning state public financing policy includes the required policies related to post-issuance compliance with federal and state tax and securities laws. Instead, Rule 1.12 **allows** the State Treasurer to adopt post-issuance compliance procedures as follows:

> **1.12 Disclosure and Continuing Disclosure**
>
> D. The State Treasurer **may adopt post-issuance compliance procedures,** to ensure that each Financial Obligation complies with state and federal law and the financial covenants made by the State in the related financing documents governing the issuance or incurrence, and may request information from the related State Agency including the following:
>
> (1) *Tax Compliance*. Upon the advice of tax or bond counsel, post-issuance compliance procedures which are required by the Internal Revenue Service for the issuance or incurrence of a particular type of Financial Obligation such as Qualified School Construction Bonds.
>
> (2) *Private Use*. Procedures to monitor and take corrective action to comply with Internal Revenue Code requirements restricting the private use of facilities acquired with tax-exempt proceeds.
>
> (3) *State Law Compliance*. Procedures to ensure compliance with state law governing lease purchase financing that requires annual appropriation and renewal of a lease.
>
> (4) *Financial Covenants*. Procedures to ensure compliance

with the covenants made by the State in the related financing documents requiring insurance and record retention.

(5) *Reporting Covenants*. Procedures to ensure compliance with reporting requirements pursuant to documentation with providers of credit enhancement and/or liquidity support or continuing disclosure agreements. (**emphasis added**)

Because Rule 1.12 D. does not include the policies related to post-issuance compliance with federal and state tax and securities laws that section 24-36-121 (5) (k), C.R.S., requires and instead allows the state treasurer to adopt the policies at a later date, in a separate document, or not at all, Rule 1.12 D should not be extended.

III. The first sentence of Rule 1.11 and Rules 1.11 A., 1.11 B., 1.11 C., 1.11 D., and Rule 1.12 A. conflict with section 24-4-103 (4) (b) (III), C.R.S. because they are not clear enough to allow state officials and state agencies to identify their duties under them and comply with them.

Section 24-4-103 (4) (b) (III), C.R.S., requires every executive agency rule to be clear and simple enough to be understood by any party who must comply with it as follows:

24-4-103. Rule-making - procedure - definitions - repeal. (4) (b) All proposed rules shall be reviewed by the agency. No rule shall be adopted unless:

(III) To the extent practicable, the regulation is clearly and simply stated so that its meaning will be understood by any party required to comply with the regulation;

The first sentence of Rule 1.11 and Rules 1.11 A., 1.11 B., 1.11 C., 1.11 D., and Rule 1.12 A. impose duties related to arbitrage compliance and disclosure on "the State" as follows:

1.11 Arbitrage Compliance

The State shall comply with the applicable arbitrage regulations mandated by the Internal Revenue Code, including, but not limited to, regulations regarding timely filings.

A. The direction of investments related to proceeds of the issuance or incurrence of Financial Obligations will be undertaken in accordance with applicable State law and, if applicable, the State's Investment Policy.

B. The State shall maintain separate accounts by source of

funds and record pro rata interest income of any commingled funds used to accumulate the moneys to pay the principal and interest on Financial Obligations, on a monthly basis.

C. Balances in project accounts shall be monitored to document the spending and allocation of the proceeds of Financial Obligations.

D. Rebate computations should be performed until Financial Obligations are paid in full, in accordance with Internal Revenue Code regulations.

1.12 Disclosure and Continuing Disclosure

A. The State Treasurer acknowledges the State's disclosure responsibilities under its continuing disclosure undertakings. The State will make reasonable efforts to assist underwriters in their efforts to comply with SEC Rule 15c2-12 and the various MSRB rules pertaining to underwriters.

Most provisions of the State Treasurer's state public financing policy refer repeatedly to "the State Treasurer" when imposing duties or specifying powers related to the management of state financial obligations and to "State Agencies" when imposing similar duties on all agencies that seek to obtain financing. But the quoted portions of Rules 1.11 and 1.12 each impose duties on "the State" without naming a specific state official or state agency responsible for actually executing the duty. In fact, the State Treasurer's state public financing policy includes a definitions section in Rule 1.4 that defines "State Agency" but does not define "the State".

For example, Rule 1.11 B. imposes a duty to maintain separate accounts by source of funds on a monthly basis. Either the State Controller or the State Treasurer could reasonably fulfill this duty, but the rule does not actually require either of them to do so. Rule 1.12 A. does not indicate which state official or state agency, must "make reasonable efforts" to help underwriters comply with various federal disclosure rules, a duty that the Attorney General, the State Treasurer, or perhaps another state official or state agency that has responsibility related to state public financing might be willing and able to execute if the rule actually required one of them to do so. The other quoted portions of Rule 1.11 suffer from a similar lack of clarity and therefore violate the simplicity, clarity, and understandability requirements of section 24-4-103 (4) (b) (III), C.R.S., and should not be extended.

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MEMORANDUM

TO: Committee on Legal Services

FROM: Michael Dohr, Office of Legislative Legal Services

DATE: December 27, 2012

RE: Rules of the State Board of Human Services, Department of Human Services, concerning special projects - domestic violence program, 12 CCR 2512-2 (LLS Docket No. 120236; SOS Tracking No. 2012-00132).[1]

Summary of Problem Identified and Recommendation

Section 26-7.5-104, C.R.S., requires the State Board of Human Services ("State Board") to promulgate rules regarding standards and regulations for the domestic violence program. But State Board Rules 12.200.4 and 12.200.7 moved domestic violence program funding standards and the complaint process from its rules to an administrative handbook. **We therefore recommend that Rules 12.200.4 and 12.200.7 of the rules of the State Board concerning the domestic violence program not be extended.**

Analysis

I. The State Board improperly repealed rules for domestic violence program funding standards and the complaint process by repealing the existing rules and placing them in an administrative handbook.

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[1] Under section 24-4-103, C.R.S., the Office of Legislative Legal Services reviews rules to determine whether they are within the promulgating agency's rule-making authority. Under section 24-4-103 (8) (c) (I), C.R.S., the rules discussed in this memo will expire on May 15, 2013, unless the General Assembly acts by bill to postpone such expiration.

The General Assembly requires the State Board to promugate rules for standards and regulations for domestic violence programs. Section 26-7.5-104 (2) (a), C.R.S., states:

> **26-7.5-104. Community domestic abuse programs - contracts with state department - rules and regulations.** (2) (a) The state department **shall establish, by rule**, and enforce **standards and regulations for all domestic abuse programs** established pursuant to this article and shall require that each such domestic abuse program meets approved minimum standards as established by rule. (**emphasis added**)

But, the State Board repealed rules related to requirements and funding awards in the domestic violence program and placed the requirements in an administrative handbook. In addition, the State Board repealed the rules related to formal complaints replacing the rule with a statement that an individual has a right to file a complaint with the domestic violence program, as set forth in the domestic violence handbook. See Rules 12.200.4 and 12.200.7 in **Addendum A**. The repealed rules relate to the standards and regulations of domestic violence programs. The General Assembly directed the State Board to promulgate rules; it did not give the State Board the authority to circumvent the "State Administrative Procedures Act", article 4 of title 24, C.R.S., by using an administrative handbook rather than promulgating rules as required by section 26-7-104 (2) (a), C.R.S.

II. The State Board's Rules 12.200.4 and 12.200.7 do not comply with the rulemaking requirements of the "State Administrative Procedure Act".

The "State Administrative Procedure Act" ("APA") governs rulemaking by executive branch agencies. Section 24-4-103 (1), C.R.S., states:

> **24-4-103. Rule-making - procedure - definitions - repeal.** (**1) When any agency is required or permitted by law to make rules**, in order to establish procedures and to accord interested persons an opportunity to participate therein, **the provisions of this section shall be applicable.** Except when notice or hearing is otherwise required by law, this section does not apply to interpretative rules or general statements of policy, which are not meant to be binding as rules, or rules of agency organization. **(emphasis added)**

When adopting rules, a state agency must follow the APA. This includes complying with the definition of "rule", found at section 24-4-102 (15), C.R.S.:

> **24-4-102. Definitions.** As used in this article, unless the context otherwise requires:
>
> (15) "Rule" means the whole or any part of **every agency statement of general applicability and future effect implementing, interpreting, or declaring law or policy or setting forth the procedure or practice requirements of any agency.** "Rule" includes "regulation". **(emphasis added)**

The definition of "rule" in the APA is very broad and includes "every" statement from an agency implementing or interpreting law or policy and establishing the practices of the agency.

Instead of specifying the standards for how funding will be awarded or how complaints will be handled in the rules, the rules refer to an administrative handbook. These standards come within the statutory definition of "rule" in section 24-4-102 (15), C.R.S., for purposes of the APA. They also constitute agency statements of general applicability and future effect. But in the current versions of these two rules, the State Board bypasses the APA requirements by using an administrative handbook rather than promulgating the rules as required by the APA.

We therefore recommend that Rules 12.200.4 and 12.200.7 of the state board of human services concerning the domestic violence program not be extended.

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Addendum A

12.200.3 ELIGIBILITY (continued)

4. Develop policies to ensure that victims and their dependants are not required to attend a religious activity or instruction as a requirement to receive domestic violence services;

5. Document appropriate legal status or standing as a nonprofit or nongovernmental agency or corporation as required by federal or Colorado law;

6. Develop written articles of incorporation and by-laws, as appropriate, to include a functioning board of directors or advisory committee, which provides oversight and governance; and,

7. Document evidence of compliance with applicable federal, state, and local laws and regulations.

12.200.4 **REQUEST FOR APPLICATION (RFA)** ~~REQUIREMENTS AND FUNDING AWARDS~~

THE DVP WILL ANNOUNCE AVAILABILITY OF FUNDING THROUGH A REQUEST FOR APPLICATION (RFA) AND SOLICIT RESPONSES TO A RFA AS REQUIRED BY THE STATE. IN DISTRIBUTING FUNDING, THE DVP FUNDING RECOMMENDATION COMMITTEE WILL SET FORTH STANDARDS IN THE DVP ADMINISTRATIVE HANDBOOK TO MINIMALLY INCLUDE:

A. NO LESS THAN SEVENTY-FIVE PERCENT (75%) OF FUNDING AVAILABLE THROUGH THE DVP SHALL BE ALLOCATED TO NON-GOVERNMENTAL ENTITIES;

B. A PROCESS TO EQUITABLY DISTRIBUTE DVP FUNDING WITHIN COLORADO BETWEEN URBAN AND RURAL AREAS;

C. A PROCESS USED TO NOTIFY APPLICANTS OF THE OUTCOME OF THEIR APPLICATION; AND,

D. A PROCEDURE AVAILABLE TO APPLICANTS TO GRIEVE THE OUTCOME OF THEIR APPLICATION.

~~12.200.4 REQUEST FOR APPLICATION (RFA) REQUIREMETNS AND FUNDING AWARDS (continued)~~

~~Add eff. 8/1/09~~ ~~The DVP administers and distributes funds designated to the Colorado Department of Human Services for community-based programs that intervene, respond, and prevent domestic violence. These funds include, and are not limited to, the Federal Family Violence Prevention and Services Act formula grant, Temporary Assistance to Needy Families block grant, Colorado Domestic Abuse Fund individual state income tax contributions, and may also include other funds received by the Department for purposes of distribution to eligible entities.~~

~~A. The DVP will announce availability of funding through a Request for Application (RFA) and solicit responses to an RFA as required by the state.~~

~~B. Eligible entities that request funding from the DVP shall complete the RFA in its entirety.~~

~~C. The RFA and announcement shall state the following:~~

~~1. Amount of funding available;~~

~~2. Purpose of funding;~~

~~3. Sources of funding;~~

~~4. Allowable and disallowable expenses;~~

~~5. State contracting requirements;~~

~~6. Timelines for RFA review process, funding determinations, and contract period;~~

~~7. Technical assistance available for the RFA instructions;~~

~~8. Funding grievance policy and procedures;~~

~~9. Instructions for completing the RFA; and,~~

~~10. Criteria used in evaluating RFAs.~~

~~D. In distributing funding, no less than seventy-five percent (75%) of funding available through the DVP shall be allocated to non-governmental entities.~~

~~E. The DVP staff and the Funding Recommendation Committee shall review all completed RFAs and recommend funding awards using the following criteria:~~

~~1. Ability to demonstrate eligibility for DVP funding;~~

~~2. Ability to abide by the RFA requirements and instructions; and,~~

12.200.4 REQUEST FOR APPLICATION (RFA) REQUIREMETNS AND FUNDING AWARDS (continued)

3. Ability to comply with the rules outlined in Section 12.201.

F. The DVP reserves the right to deny funding to any entity for failure to complete the RFA and/or adhere to all procedures and timeframes outlined in the RFA instructions.

G. Funding award approvals are determined through the following process:

1. The Funding Recommendation Committee provides the recommendations to the DVP Director;

2. The DVP Director reviews and provides preliminary approval;

3. The Executive Director of CDHS or designee provides final review and approval; and,

4. The advisory committee is notified of final awards.

H. The Funding Recommendation Committee, the DVP Director, and the Executive Director of CDHS may reduce award requests based on dollars available.

I. Funding Grievances

1. For purposes of these rules, a DVP funding grievance shall be defined as action taken by the DVP, which the griever believes to be unfair and warrants a formal grievance.

2. If an applicant feels that he/she has been incorrectly denied or reduced funding based on the requirements in Section 12.200.4, E, the applicant may file a grievance directly with the DVP director using the process outlined below.

3. Reductions in funding awards based on less available dollars are not grievance circumstances.

4. All grievances shall be submitted in writing within fifteen (15) business days after applicant knows, or should have known, of the facts giving rise thereto.

5. The DVP director shall conduct a preliminary review of the grievance and within ten (10) business days of receipt will issue a formal written response.

6. The preliminary review shall determine whether the alleged grievance meets the requirements for review: a denial or reduction in funding for not meeting one of the requirements in Section 12.200.4, E.

~~12.200.4 REQUEST FOR APPLICATION (RFA) REQUIREMETNS AND FUNDING AWARDS~~ (continued)

~~7. If the DVP director determines that the grievance meets the requirements for review, the supervisor for the DVP director, or designee, shall conduct a formal review and issue a formal written response within thirty (30) business days of the preliminary review. A copy of the written formal review shall also be sent to the DVP Advisory Committee.~~

~~8. The applicant may request a further review upon receipt of the formal review. The applicant may submit such a request in writing to the DVP Advisory Committee within fourteen (14) business days of the mailing of the formal review by mailing the request to the DVP director.~~

~~9. The DVP Advisory Committee shall review the grievance, the formal review, and any other materials provided by the applicant or the DVP director within sixty (60) business days of the request being received by the department and issue a response.~~

~~10. The DVP Advisory Committee shall issue a written opinion on the grievance. The opinion shall be submitted to the Executive Director of the Department or designee for review and approval. If no action is taken, the opinion becomes final within thirty (30) business days of submission to the Executive Director or designee, or the Executive Director or designee may modify, review or overturn the DVP Advisory Committee decision.~~

~~12.200.6 FUNDED PROGRAM MONITORING (continued)~~

~~4. Funded programs may appeal the DVP Director's decision to the DVP Advisory Committee within fifteen (15) days of notice of the decision.~~

~~5. The DVP Advisory Committee's written decision shall be submitted to the Executive Director of the Department or designee for review and approval. If no action is taken, the written decision becomes final agency action within thirty (30) business days of submission to the Executive Director or designee, or the Executive Director or designee may modify, revise or overturn the DVP Advisory Committee decision.~~

12.200.7 REVIEW OF FORMAL COMPLAINTS

AN INDIVIDUAL WHO HAS RECEIVED OR WAS DENIED SERVICES FROM A PROGRAM RECEIVING DVP FUNDING SHALL HAVE THE RIGHT TO FILE A COMPLAINT WITH THE DVP, AS SET FORTH IN THE DVP ADMINISTRATIVE HANDBOOK.

~~Add eff. 8/1/09 The DVP shall review formal complaints from concerned citizens regarding the delivery of services from funded entities using the following process:~~

~~A. For purposes of these rules, formal complaints are defined as dissatisfaction with services performed by a funded program.~~

~~B. All formal complaints shall be made in writing and submitted to the DVP staff no later than sixty (60) days after the incident leading to the complaint arose.~~

~~C. DVP staff shall review complaints within forty-five (45) days of receipt of the written complaint and develop a written response to the program impacted to include a summary of the complaint and request for the impacted program to respond to the complaint.~~

~~D. The identity of the concerned citizen bringing forth the complaint shall remain confidential, unless the citizen signs a confidentiality waiver.~~

~~E. The impacted program has thirty (30) business days to respond to the DVP staff.~~

~~F. The DVP Advisory Committee shall review the documentation and issue a written response letter to the complainant within sixty (60) business days of receipt of impacted program's response, indicating their recommendation to the DVP director. Recommendations could include, but are not limited to, action by the DVP, no action, development of requirements or recommendations to remedy the complaint, a corrective action plan, further investigation, or deem it to be an unfounded allegation.~~

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MEMORANDUM

TO: Committee on Legal Services

FROM: Jason Gelender, Office of Legislative Legal Services

DATE: December 27, 2012

RE: Rules of the Transportation Commission, Department of Transportation, concerning the statewide transportation planning process, 2 CCR 604-2 (LLS Docket No. 120528; SOS Tracking No. 2012-01015).[1]

Summary of Problem Identified and Recommendation

Section 24-4-103 (12.5) (a), C.R.S., authorizes a state agency to incorporate by reference into its rules certain types of codes, standards, guidelines, or rules, including federal regulations, and imposes requirements for how the incorporation is to be done that help ensure that the public has ready access to the incorporated material. But various provisions of the Transportation Commission ("Commission") rules concerning the statewide transportation planning process reference federal regulations even though the incorporation by reference provision of the rules does not satisfy the statutory requirements. **We therefore recommend that Rules 1.22, 1.25, 1.42, 2.03.1, 2.03.1.1, 2.03.1.2, 2.03.1.3, 2.03.1.4, 4.01, 4.02.1, 4.02.2, 4.02.3, 4.02.5.9, 4.04.2.2, 4.04.2.4, 4.06.1.7, 6.01.2, 7.01, 7.03, and 7.04 of the rules of the Transportation Commission concerning the statewide transportation planning process not be extended.**

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[1] Under section 24-4-103, C.R.S., the Office of Legislative Legal Services reviews rules to determine whether they are within the promulgating agency's rule-making authority. Under section 24-4-103 (8) (c) (I), C.R.S., the rules discussed in this memo will expire on May 15, 2013, unless the General Assembly acts by bill to postpone such expiration.

Analysis

I. Rules 1.22, 1.25, 1.42, 2.03.1, 2.03.1.1, 2.03.1.2, 2.03.1.3, 2.03.1.4, 4.01, 4.02.1, 4.02.2, 4.02.3, 4.02.5.9, 4.04.2.2, 4.04.2.4, 4.06.1.7, 6.01.2, 7.01, 7.03, and 7.04 of the rules of the Transportation Commission concerning the statewide transportation planning process conflict with section 24-4-103 (12.5) (a), C.R.S., because they reference federal regulations even though the incorporation by reference provision of the rules does not satisfy all of the statutory requirements for incorporating material by reference.

Section 24-4-103 (12.5) (a), C.R.S., authorizes a state agency to incorporate by reference into its rules, certain types of codes, standards, guidelines, or rules and specifies requirements for incorporating such materials. Several of these requirements are located in section 24-4-103 (12.5) (a), which states:

> **24-4-103. Rule-making - procedure - definitions - repeal.** (12.5) (a) **A rule may incorporate by reference all or any part of a** code, standard, guideline, or **rule that has been adopted by an agency of the United States,** this state, or another state, or adopted or published by a nationally recognized organization or association, **if:**
>
> (II) The reference fully identifies the incorporated code, standard, guideline, or rule by citation **and date, identifies the address of the agency where the code, standard, guideline, or rule is available for public inspection, and states that the rule does not include any later amendments or editions of the code, standard, guideline, or rule;** (**emphasis added**)

The unnumbered statement of basis and purpose and statutory authority for the rules of the Transportation Commission concerning the statewide transportation planning process includes the following incorporation by reference provision:

> The Rules are intended to be consistent with and not be a replacement for the federal transportation planning requirements contained in 23 United States Code (U.S.C.) 134, 135, and 150 ("Moving Ahead for Progress in the 21st Century" or "MAP-21") and in implementing regulations, where applicable, contained in 23 Code of Federal Regulations (CFR) Part 450, including Subparts A, B, and C, all of which are incorporated herein by this reference and available at the Colorado Department of Transportation, or http://www.gpo.gov/fdsys/browse/collectionCfr.action?collectionCode=CFR."

Various other provisions of the rules reference the Code of Federal Regulations ("CFR") by simply referring to the citation of one or more regulations. For example,[2] Rules 1.22 and 4.01 state as follows:

> 1.22 Project Priority Programming Process ("4P") - the process by which CDOT adheres to 23 U.S.C. and **23 CFR 450** when developing and amending the statewide transportation improvement provision (STIP).
>
> 4.01 Regional Planning Commissions, and the Department, shall comply with all applicable provisions of 23 U.S.C. 134 and 135, **23 CFR 450** and § 43-1-1103, C.R.S., and all applicable provisions of Transportation Commission policies and guidance documents in their development of regional and statewide transportation plans, respectively. (**emphasis added**)

Read together, the unnumbered incorporation by reference provision of the rules, rules 1.22 and 4.01, and the other rules that reference one or more federal regulations and are set forth in **Addendum A,** provide citations for the regulations referenced as required by section 24-4-103 (12.5) (a) (II), C.R.S. But they fail to meet the other statutory requirements of section 24-4-103 (12.5) (a) (II), C.R.S., because they do not identify the referenced regulations by date, specify the agency address where the regulations are available for public inspection, or state that the rules do not include any later amendments to the regulations.

We therefore recommend that Rules 1.22, 1.25, 1.42, 2.03.1, 2.03.1.1, 2.03.1.2, 2.03.1.3, 2.03.1.4, 4.01, 4.02.1, 4.02.2, 4.02.3, 4.02.5.9, 4.04.2.2, 4.04.2.4, 4.06.1.7, 6.01.2, 7.01, 7.03, and 7.04 of the Transportation Commission concerning the statewide transportation planning process not be extended.

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[2] **Addendum A** lists all of the rules that reference one or more federal regulations and that we therefore recommend not be extended.

ADDENDUM A

1.22 Project Priority Programming Process ("4P") – the process by which CDOT adheres to 23 U.S.C. 135 and 23 CFR 450 when developing and amending the statewide transportation improvement program (STIP).

1.25 Regional Transportation Plan (RTP) - a technically-based, long-range plan designed to address the future transportation needs for a Transportation Planning Region including, but not limited to, anticipated funding, priorities, and implementation plans, pursuant to, but not limited to, § 43-1-1103, C.R.S. and 23 CFR § 450.

1.42 Tribal Transportation Improvement Program (TTIP) - a multi-year financially constrained list of proposed transportation projects developed by a tribe from the tribal priority list or the long-range transportation plan, and which is developed pursuant to Title 25 CFR Part 170.421. The TTIP is incorporated into the STIP without modification.

2.03.1 TPR boundaries, excluding any MPO-related boundaries, will be reviewed by the Commission at each plan update cycle for regional and statewide transportation planning. The Department will notify counties, municipalities, MPOs, Indian tribal governments, and RPCs for the TPRs of the boundary review, and will allow sixty (60) days for boundary revision requests. MPO boundary review shall be conducted pursuant to 23 U.S.C. § 134 and 23 CFR § 450 Subpart B and any changes shall be provided to the Department for updating the Rules. All boundary revision requests shall be sent to the Division Director, and shall include:

2.03.1.1 A geographical description of the proposed boundary change.

2.03.1.2 A statement of justification for the change considering transportation commonalities.

2.03.1.3 A copy of the resolution stating the concurrence of the affected Regional Planning Commission.

2.03.1.4. The name, title, mailing address, telephone number, fax number and electronic mail address (if available) of the contact person for the requesting party or parties.

4.01 Regional Planning Commissions, and the Department, shall comply with all applicable provisions of 23 U.S.C 134 and 135, 23 CFR 450 and § 43-1-1103, C.R.S. and all applicable provisions of Transportation Commission policies and guidance documents in their development of regional and statewide transportation plans, respectively.

4.02.1 Regional Planning Commissions and the Department shall provide early and continuous opportunity for public participation in the transportation planning process. The process shall be proactive and provide timely information, adequate public notice, reasonable public access, and opportunities for public review and comment at key decision points in the process. The objectives of public participation in the transportation planning process include: providing a mechanism for public perspectives, needs, and ideas to be incorporated in the planning process; developing the public's understanding of the problems and opportunities facing the transportation system; demonstrating explicit consideration and response to public input through a variety of tools and techniques; and developing consensus on plans. The Department shall develop a documented public participation process pursuant to 23 CFR 450.

4.02.2 Statewide Plans and Programs. Pursuant to 23 CFR 450 Subpart B, the Department is responsible, in cooperation with the Regional Planning Commissions, for carrying out public participation for developing, amending, and updating the statewide transportation plan, the Statewide Transportation Improvement Program (STIP), and other statewide transportation planning activities.

4.02.3 MPO Plans and Programs. Pursuant to 23 CFR Part 450 Subpart C, the MPOs are responsible for carrying out public participation for the development of regional transportation plans, transportation improvement programs and other related regional transportation planning activities for their respective metropolitan areas. Public participation activities carried out in a metropolitan area in response to metropolitan planning requirements shall by agreement of the Department and the MPO, satisfy the requirements of this subsection.

4.02.5.9 Review of the Public Involvement Process. All interested parties and the
Department shall periodically review the effectiveness of the public involvement process to ensure that the process provides full and open access to all members of the public and revise the process as necessary and allowing time for public review and comment per 23 CFR 450.
4.04.2.2 Draft Plan Review. Upon receipt of the draft RTPs, the Department will initiate its review and schedule the STAC review (pursuant to these Rules). The Department will provide its comments and STAC comments to the Transportation Planning Region within a minimum of 30 days of receiving the draft RTP. Regional transportation plans in metropolitan areas completed pursuant to the schedule identified in 23 CFR 450.322 shall be subject to the provisions of this section prior to being submitted to the Department for

consideration as an amendment to the statewide transportation plan.

4.04.2.4 Final Plan Review. Upon receipt of the final RTP, the Department will initiate its review and schedule the STAC review (pursuant to these Rules) of the final RTPs to determine if the plans incorporate the elements required by the Rules. If the Department determines that a final RTP is not complete, including if the final RTP does not incorporate the elements required by these Rules, then the Department will not integrate that RTP into the statewide plan until the Transportation Planning Region has sufficiently revised that RTP, as determined by the Department with advice from the STAC. The Department will provide its comments and STAC comments to the Transportation Planning Region within a minimum of 30 days of receiving the final RTP. Transportation Planning Regions shall submit any RTP revisions based on comments from the Department and STAC review within 30 days of the Department's provision of such comments. Regional transportation plans in metropolitan areas completed pursuant to the schedule identified in 23 CFR 450.322 shall be subject to the provisions of this section prior to being submitted to the Department for consideration as an amendment to the statewide transportation plan.

4.06.1.7 The Statewide Transportation Plan shall be coordinated with metropolitan transportation plans pursuant to 23 CFR 450, § 43-1-1103 and § 43-1-1105, C.R.S. Department selection of performance targets shall be coordinated with the MPOs to ensure consistency, to the maximum extent practicable.

6.01.2 Updates or amendments to Regional Transportation Plans in metropolitan areas completed pursuant to the schedule identified in 23 CFR 450 shall be submitted to the Department for consideration as an amendment to the Statewide Transportation Plan. Such additions, deletions, or changes may require an amendment to the Statewide Transportation Plan.

7.01 TIP development shall occur in accordance with 23 CFR 450 Subpart C. The Department will develop the STIP in accordance with 23 CFR 450 Subpart B, as well as with the STIP development guidelines, titled Project Priority Programming Process (4P) Guidelines, as adopted by the Commission.

7.03 A TIP for an MPO that is in a non-attainment or Maintenance Area must first receive a conformity determination by FHWA and FTA before inclusion in the STIP pursuant to 23 CFR 450 (MAP-21).

7.04 MPO TIPs and Colorado's STIP must be fiscally constrained and each

project or project phase included in the STIP shall be consistent with the long-range statewide transportation plan developed under 23 CFR 450 (MAP-21) and in metropolitan planning areas, consistent with an approved metropolitan transportation plan developed under 23 CFR 450 (MAP-21). Additionally, guidance on the development on TIPs and STIPs is found in Project Priority Planning Process (4P) and STIP development guidelines document.

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MEMORANDUM

TO: Committee on Legal Services

FROM: Chuck Brackney, Office of Legislative Legal Services

DATE: December 27, 2012

RE: Rules of the Colorado State Board of Chiropractic Examiners, Division of Professions and Occupations, Department of Regulatory Agencies, concerning the scope of practice of chiropractors, 3 CCR 701 (LLS Docket No. 130070; SOS Tracking No. 2012-01055).[1]

Summary of Problem Identified and Recommendations

Section 12-33-103 (1.7), C.R.S., defines the term "chiropractic" for purposes of chiropractic practice in Colorado. The definition does not authorize chiropractors to administer injections to patients, but the Colorado State Board of Chiropractic Examiners' Rule 7 C. authorizes chiropractors to administer injections and establishes a new level of certification for chiropractors who administer injections. **Because the rule is being reviewed "out -of-cycle", we therefore recommend that Rule 7 C. of the rules of the Colorado State Board of Chiropractic Examiners concerning the administration of injections be repealed.**

Analysis

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[1] Under section 24-4-103, C.R.S., the Office of Legislative Legal Services reviews rules to determine whether they are within the promulgating agency's rule-making authority. Under section 24-4-103 (8) (c) (I), C.R.S., these rules are not scheduled to expire until May 15, 2014.

I. The Colorado State Board of Chiropractic Examiners does not have the authority to permit the administration of injections by chiropractors nor to establish a new level of certification for chiropractors who administer injections.

The practice of chiropractic in Colorado is governed in law by article 33 of title 12, C.R.S. The rule-making authority of the Colorado State Board of Chiropractic Examiners ("Board") is found in section 12-33-107 (1) (a), C.R.S., which reads as follows:

> **12-33-107. Board powers.** (1) The board is authorized to and shall:
>
> (a) Adopt, promulgate, and from time to time revise such **rules and regulations not inconsistent with the law** as may be necessary to enable it to carry out the provisions of this article; except that the board shall not adopt the code of ethics of any professional group or association by rule or regulation; **(emphasis added)**

The General Assembly has granted the Board general rule-making powers. Any rules adopted by the Board must be consistent with the law regarding chiropractors.

The scope of practice of chiropractic is found in the definition of the term "chiropractic" in section 12-33-102 (1.7), C.R.S., which reads as follows:

> **12-33-102. Definitions.** As used in this article, unless the context otherwise requires:
>
> (1.7) "Chiropractic" means that branch of the healing arts that is based on the premise that disease is attributable to the abnormal functioning of the human nervous system. It includes the diagnosing and analyzing of human ailments and seeks the elimination of the abnormal functioning of the human nervous system by the **adjustment or manipulation, by hand or instrument, of the articulations and adjacent tissue of the human body, particularly the spinal column**, and the use as indicated of procedures that facilitate the adjustment or manipulation and make it more effective and the **use of sanitary, hygienic, nutritional, and physical remedial measures** for the promotion, maintenance, and restoration of health, the prevention of disease, and the treatment of human ailments. "Chiropractic" includes the use of **venipuncture for diagnostic purposes**. "Chiropractic" does not include colonic irrigation therapy. "Chiropractic" includes **treatment by acupuncture** when performed by an appropriately trained chiropractor as determined by the Colorado state board of chiropractic examiners. Nothing in this section shall apply to persons using acupuncture not licensed by the board. **(emphasis added)**

Chiropractic practice includes the adjustment and manipulation of the human

body, by hand or instrument, to alleviate abnormal functioning of the human nervous system. The statute also refers to the use of sanitary, hygienic, nutritional, and physical remedial measures. The statute specifically allows venipuncture, the drawing of a patient's blood, but only for diagnostic purposes. The use of acupuncture by a trained chiropractor is also allowed.

The statute goes on to define "chiropractic adjustment". Section 12-33-102 (2), C.R.S., reads as follows:

> **12-33-102. Definitions.** As used in this article, unless the context otherwise requires:
>
> (2) "Chiropractic adjustment" means the **application, by hand**, by a trained chiropractor who has fulfilled the educational and licensing requirements of this article, **of adjustive force to** correct subluxations, fixations, structural distortions, abnormal tensions, and disrelated structures, or to remove interference with the transmission of nerve force. The application of the dynamic adjustive thrust is designed and intended to produce and usually elicits audible and perceptible release of tensions and movement of tissues or anatomical parts for the purpose of removing or correcting interference to nerve transmission and expression. **(emphasis added)**

This section authorizes a chiropractor to use adjustment force by hand to correct a number of issues stemming from problems with the nervous system.

The rules of the Board establish the scope of practice in Rule 7. Rule 7 C. reads as follows:

> **Rule 7 Scope of Practice**
>
> C. Nutritional Remedial Measures as referenced in Section 12-33-101 (1), C.R.S., means that a doctor of chiropractic may administer, prescribe, recommend, compound, sell, and distribute homeopathic and botanical medicines, vitamins, minerals, phytonutrients, antioxidants, enzymes, glandular extracts, non-presciption drugs, durable and non-durable medical goods and devices.
>
> Administer includes Oral, Topical, Inhalation, and Injection
>
> All chiropractors that choose to administer homeopathic and botanical medicines, vitamins, and minerals, phytonutrients, antioxidants, enzymes and glandular extracts **by means of injectible procedures** shall be certified by the Board. Applications for certification in Injectables shall be made in a manner approved by the Board. Certification in Injectables by the State Board of Chiropractic Examiners may be obtained by complying with the following:
>
> 1. Successfully complete a minimum of a combined total of

> 24 hours of theoretical study and supervised clinical instruction obtained from a college of chiropractic approved by the Council on Chiropractic Education (CCE) or the equivalent hours of study and clinical obtained from an instructor recognized by the postgraduate facility of a chiropractic institution or approved by CCE to teach this course and
>
> 2. Passing a nationally recognized Injectable certification examination recognized by a CCE accredited chiropractic college. **(emphasis added)**

Rule 7 C. allows chiropractors to inject certain medicines, vitamins, and extracts into patients. However, nowhere in the definition of "chiropractic" is there any mention of the authority of chiropractors to administer subcutaneous injections to patients.

Administering injections to patients does not fall under any of the allowed practices found in the definition of "chiropractic" in section 12-33-102 (1.7), C.R.S. It is not "the adjustment or manipulation, by hand or instrument, of the articulations and adjacent tissue of the human body, particularly the spinal column" or a procedure that facilitates such an adjustment. Nor can injections be considered "the use of sanitary, hygienic, nutritional, and physical remedial measures for the promotion, maintenance, and restoration of health, the prevention of disease, and the treatment of human ailments".

The term "injection" is defined as "the act of forcing liquid into a part, as into the subcutaneous tissues, the vascular tree, or an organ".[2] Injections, by definition, constitute an invasive procedure that breaks the skin of the patient and injects a substance into the patient's body. The definition of "chiropractic" in section 12-33-102 (1.7), C.R.S., contains two specific instances in which the breaking of a patient's skin is allowed. The first is venipuncture, the drawing of blood for purposes of diagnosis, and the second is the use of acupuncture. Neither of these instances includes the administration of injections to patients. The General Assembly has specifically authorized only these two invasive procedures. By contrast, it has not done so for the administration of injections.

Finally, the definition of the term "chiropractic adjustment" in section 12-33-107 (2), C.R.S., does not include anything that could allow the administration of injections.

II. The General Assembly has considered, and rejected, past attempts

[2] Medical-Dictionary.com

to give chiropractors the authority to administer injections.

The General Assembly has in the past considered the policy of authorizing chiropractors to administer injections. H.B. 10-1416 proposed to allow chiropractors to treat "neuromuculoskeletal ailments, limited to topical, subcutaneous, and intramuscular routes of administration". Similarly, H.B. 97-1017 sought to give chiropractors the authority to inject noncontrolled drugs. Neither of these legislative proposals was successful.

The "State Administrative Procedure Act" requires the Attorney General to issue an opinion on all rules slated for adoption by an executive branch agency. The opinion of the Attorney General is that the changes to rule 7 discussed in this memorandum "exceed the legislative scope of authority granted to the Board of Chiropractic Examiners". See **Addendum A**.

The current definition of "chiropractic" does not allow for the administration of injections by chiropractors. The Board does not have the power, by rule, to expand the scope of practice of chiropractors to allow them to administer injections without the authority of a specific statutory directive.

Rule 7 C. also creates a certification process that allows chiropractors to be certified to administer injections. The rule establishes educational and testing requirements for this certification. But the creation of an additional level of certification is also beyond the authority of the Board. Rather, it is the prerogative of General Assembly to create these additional levels of certification, as well as to determine who should set the educational and testing requirements. The legislature has not authorized certification for chiropractors to administer injections.

Because neither section 12-33-102 (1.7) nor 12-33-102 (2), C.R.S., provide authority for the Board to permit chiropractors to administer injections to patients and to establish a new level of certification for this purpose, the authorization for injections by chiropractors in the Colorado State Board of Chiropractic Examiner's Rule 7 C. exceeds the authority of the Board and should be repealed.

Addendum A

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Tracking Number: **2012-01055**

OPINION OF THE ATTORNEY GENERAL RENDERED IN CONNECTION WITH THE RULES ADOPTED BY THE
Division of Professions and Occupations - Board of Chiropractic Examiners
ON 11/15/2012

3 CCR 707-1
COLORADO STATE BOARD OF CHIROPRACTIC EXAMINERS RULES AND REGULATIONS

The above-referenced rules were submitted to this office on 11/30/2012 as required by section 24-4-103, C.R.S. This office has reviewed them and our opinion is that rules 6 and 29 are constitutional and otherwise legal, but that the changes to Rule 7 exceed the legislative scope of authority granted to the Board of Chiropractic Examiners.

December 05, 2012 10:51:14 MST

JOHN W. SUTHERS
Attorney General
by DANIEL D. DOMENICO
Solicitor General