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Thomas Morris

STATE CAPITOL BUILDING, ROOM 091
200 EAST COLFAX AVENUE
DENVER, COLORADO 80203-1782

TELEPHONE: 303-866-2045 FACSIMILE: 303-866-4157
E-MAIL: olls.ga@state.co.us

SENIOR STAFF ATTORNEYS
Charles Brackney Nicole H. Myers
Edward A. DeCecco Jery Payne
Michael J. Dohr Jane M. Ritter
Kristen J. Forrestal Richard Sweetman
Esther van Mourik

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FOR ANNOTATIONS
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PUBLICATIONS COORDINATOR
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SUMMARY OF MEETING

COMMITTEE ON LEGAL SERVICES

November 9, 2010

The Committee on Legal Services met on Tuesday, November 9, 2010, at 10:01 a.m. in HCR 0112. The following members were present:

Representative Labuda, Chair
Representative Kagan
Representative Levy
Representative Roberts
Senator M. Carroll
Senator Morse, Vice-chair

Representative Labuda called the meeting to order. She said we are here for review of new rules that have been adopted or amended on or after November 1, 2009, and before November 1, 2010, that are scheduled to expire on May 15, 2011.

10:02 a.m. -- Chuck Brackney, Senior Staff Attorney, Office of Legislative Legal Services, addressed agenda item 1a - Rules of the State Board of Health, Department of Public Health and Environment, concerning standards for hospitals and health facilities: Chapter XXIV - medication administration regulations, 6 CCR 1101-1.

Mr. Brackney said the first rule I have for you today is from the state board of health and it concerns hospitals and health facilities. More specifically, it has

to do with the administration of medication in those hospitals and health facilities by unlicensed persons. The statute governing this topic directs that every unlicensed person who administers medication this way has to take a competency evaluation at least once every five years and we believe the rule in question does not allow sufficient time for those people to meet this requirement. Section 25-1.5-302, C.R.S., allows a person working in a hospital or health facility who is not otherwise authorized by law to administer medication in a facility to do so upon passage of a competency evaluation. This is somebody not otherwise authorized by law like a doctor or nurse. These people are known as qualified medication administration staff members, or QMAPs. As background, unlicensed persons have had the authority, in some capacity, to administer medication in this way in certain facilities since 1989. In 2009, the General Assembly enacted Senate Bill 128, which amended section 25-1.5-303 (3), C.R.S., concerning the administration of medication by QMAPs. The language added by Senate Bill 128 says that health facility operators and administrators shall require each unlicensed person who administers medication in the facility to pass the competency evaluation as a condition of employment at least once every five years. So, once every five years, according to the General Assembly in Senate Bill 128, the QMAPs have to pass the competency evaluations. It used to be something more akin to lawyers taking the bar exam in that you just take it once and you're good. Now, the General Assembly has decided, as a safety matter, that it's important to test the competency of these people at least once every five years. The board issued some rules in response to Senate Bill 128. Rule 4.3 has two sentences in it. The first one pretty much tracks the statute in saying that facility operators have to require unlicensed people who administer medication in their facility to pass the competency evaluation once every five years. The second sentence, though, is a little different. It says QMAPs who have not retested in the five years prior to January 1, 2010, shall do so as soon as practicable, but no later than January 1, 2012. The second sentence gives QMAPs who haven't taken the test since January 1, 2005, until 2012 to take the test. However, to figure out when the clock starts ticking on the five-year requirement that's contained in Senate Bill 128, we have to look at the effective date of that bill, which was July 1, 2009. Starting then, it means that QMAPs will have until July 1, 2014, to retake the evaluation as a condition of employment. The notion that underlies this is the idea that all statutes passed by the General Assembly are prospective and that they apply to future behavior and don't look at past behavior. We can see that underlined in the statutes in Colorado law that tell us how to construe the rest of the statutes. Section 2-4-202, C.R.S., says that a statute is presumed to be prospective in operation. It operates into the future. There is some caselaw that goes along with this section that says that the legislature can overcome this presumption

by clearly manifesting its intent to do so in the statute. If you look back at section 25-1.5-303 (3), C.R.S., there is nothing like that, there is no clear manifestation, there is no direction that it needs to be applied to the past and so we apply instead section 2-4-202, C.R.S., and apply the statute prospectively. Again, in that situation, it means that the clock started ticking on July 1, 2009, and that gives QMAPs until July 1, 2014, to pass the competency evaluation. The problem with Rule 4.3 is that it only gives QMAPs until January 1, 2012, to pass the test and not until July 1, 2014. Because the introductory portion of the board's Rule 4.3 concerning the administration of medication gives QMAPs until January 1, 2012, to retake the competency evaluation, it conflicts with section 25-1.5-303 (3), C.R.S., by not allowing them to retake the evaluation until July 1, 2014, as established by Senate Bill 128, and should not be extended.

Representative Kagan asked would it be within the board's authority to have required everybody, regardless of whether they've taken the test in the last five years, to do one of these competency evaluations by January 1, 2012? Mr. Brackney said I don't think so because what the legislature said was they have to take this test once every five years. It applies into the future under our reading of it. The clock starts ticking on July 1, 2009, so if you're talking about somebody who took it in July 2008, for example, they wouldn't have to take it again until 2013. That would be five years. I don't think they could require that person to take it by January 1, 2012, so I don't think so.

Representative Kagan said the statute says at least once every five years, so it would be within the board's authority to say you've got to take it every six months. Mr. Brackney said I think that means the most you can make someone take it. You, as a QMAP, have to take it at least once every five years. If they tried to make you take it every six months, that would be way beyond their authority. They wouldn't be able to do that.

Representative Kagan said it's a matter of simple language. If you've got to take it at least once every five years, you could be required to take it twice, because that's at least once. You could be required to take it three times every five years or five times every five years. It's just got to be at least once. Am I not right? Mr. Brackney said I think you have met the statute if you took it once in five years and for them to require you to take it more times in a five-year period would be beyond their authority to do so. I see that as the most you have to take it, once every five years. You're not required to take it more often than that.

Senator Carroll said I was the Senate sponsor on the bill and I just wanted to

comment and get your take on this, too. What we thought we were doing in the committee when we passed it, and as the sponsor who carried the bill, was that we wanted everyone to have the competency. There is a present and a future aspect to this. At present, we wanted everybody to have passed the competency test as soon as practicable. Then, we had a future component, where we were hoping, beside getting everybody current as soon as practicable, that it would, ongoing into the future, at least once every five years have an update. What has me a little concerned as the sponsor on this is it sort of merged the analysis without the present requirement. I don't think it was prospective or retroactive; it was saying there is a contemporary requirement and we understand there may be practical flags and we'll give you some time to come into compliance. But that's the present requirement - everybody taking their competency test. The testimony on this was that you can kill people with the wrong medication and we wanted to make sure they were competent to do that. The new piece is, in addition, we wanted a future requirement at least once every five years. What I'm concerned about is if the statutory interpretation of this bill eclipses the present part of the requirement and simply looks at the future every five years on an assumption that we meant to give up to five years to come up-to-date with the current. As someone who carried the bill, that's not what we thought we were doing. There may be other opinions out there, but we thought there was a present requirement - get people in as soon as practical, get that test done - then ongoing in the future. Because that info may get stale and there are medication information updates, we want to see an update at least once every five years. I thought I'd weigh in because I happened to carry that bill and what we think we do and what we write don't always reflect, but that's what we thought we had written.

Representative Levy said Representative Kagan and I seem to speak the same language here. I would also read the "at least once every five years" could also have been written as "at a minimum", meaning five years is the maximum interval that you can go before retaking the test. As I read Mr. Brackney's analysis, I also had some concerns that reading it to mean that the five-year period can't begin sooner than the effective date of the act seems contrary to what is the apparent intent, which was to be sure that unlicensed persons administering medications were in fact competent to do that. I guess my question is whether there isn't another way to interpret the presumption of prospectivity, which would be you couldn't say as of the effective date, anybody who has not taken the test within the last five years is immediately disqualified. That would be retrospective. The prohibition on retrospective legislation unless specifically stated I think could be reconciled with this rule in that it does grant a period of time. It doesn't take away a vested right or

change a status retroactively. Is that another possible interpretation of this prospective legislation statute? Mr. Brackney said sure it is. I think the situation in that case would be you're saying that we're not talking about past activity, we're just saying you have to take the competency evaluation again starting sometime now and that better have been within five years of the last time you took it. I guess one of the problems is the extraordinarily tight time frame that puts on people. The bill was signed by the Governor in April, so that would have meant you would have had to have taken that test very quickly for some people. If you took the test in 2003, for example, you would be out of compliance. There's the trouble with reading it that way. It makes it almost an impossibility for some people to meet the five-year compliance time frame at the time the statute goes into effect on July 1, 2009.

Representative Levy said I'm not sure I quite followed that. I thought I knew where you were going, so I wasn't following your dates. There probably were some alternative versions of the rule the department could have enacted. I think that the rule doesn't violate the intent of the statute. It does give two years to come into compliance for people who have not tested within the previous five years, which seems to me to be consistent with the intent, which was to be sure that people had prepared and demonstrated competency at least within the last five years.

Representative Labuda said my concern is I don't know what the prior program was, and especially when I listen to Senator Carroll's thought process since she was the Senate sponsor. I understand your arguments, too, because all bills are prospective, but I don't think the language here mandates at least once every five years. You could have put "within the next five years" and it would have been maybe clearer that you could have it sometime before the end of five years.

Mr. Brackney said going to both your arguments, in the case you're talking about, if you read it that way, you have someone who took the test in 2003 and they would need to take it as soon as possible, but the rule gives them until January 1, 2012, which, if you want to look at it that way, makes the rule out of compliance with the statute. It gives them too much time, until 2012, when they are supposed to be within five years. If you take the test in 2003, you're way past the limit, you need to take it much sooner than 2012.

Representative Levy said I want to be sure we are interpreting properly the statute that we have, which says the statutes are presumed prospective. I posed to you a possible interpretation of that and I just want to hear once again your response to that. I'm mindful of Senator Carroll's intent in drafting

and sponsoring the bill. We do have to go with the language we have, but I just want to hear a little more about the presumption of prospectivity and other possible ways that might be interpreted. Mr. Brackney said we have the interpretation I gave you that the five-year clock starts ticking on July 1, 2009, based on the effective date of the statute. I guess you could also say that the five-year requirement is prospective and so starting on July 1, 2009, you better have taken that competency evaluation within the last five years. If you took it in 2006, you better take it by the corresponding date in 2011 and that would be, in that sense, a prospective requirement I suppose. Again, the problem with the rule in that situation is it gives too much time, because now you're going to have a class of people who are allowed to go longer than five years without having taken the competency evaluation under the terms of the rule. I can see that argument, that would also be prospective in a sense. You are, nonetheless, reaching back to 2006, but you are at least making the requirement that you have taken the competency evaluation once every five years prospective. I think that could work, though it's a really tight time frame. It makes some situations of impossibility for the people who took it in 2003, for example, and, more than anything else, I think the rule is still a problem because now you've given people too much time in that situation.

Senator Carroll said I think there's another plain reading prospective interpretation, which is we start the clock July 1, and any time between then and the next five years they take the test at least once, which I see as one or more, agreeing with Representatives Kagan and Levy. So, we don't start counting the clock at all back to 2003 or 2002 because, in a way that's almost the retrospective theory. We start the clock brand new as of the effective date. I think any rule that is at least once sometime in the next five years starting on July 1 and after, it doesn't hit any retroactivity because your five-year clock isn't starting. I think if we had meant and the language had said at most, or no sooner than every five years, or at least five years but not sooner, that would have precluded requiring the competency evaluation sooner than the five-year clock. I think any requirement that covers the competency evaluation anytime at least once in the five years from the date of the effective date forward is the interpretation that I read as one that I meant or I thought we were doing. I think you have no retroactivity issue there and I think the only way you conflict is if you gave people six years from the effective date or ten years from the effective date. What I hear being raised may be some practical issues about how we could have written it differently, to give an initial phase-in. We unfortunately didn't draft it that way, so my reading on the plain language of this is you start that five-year clause on July 1, and anytime between then and the next five years is the requirement. That was just a third way that is actually the way I think it reads that I just wanted to put out to the Committee.

Mr. Brackney said would you agree, then, under that interpretation, that the rule is a problem because you don't have until 2014, you only have until 2012? Senator Carroll said I see the at least once every five years as a maximum, it can be before then, it can be more than once. I think when you do it within two years, you are doing it at least once every five years.

10:25 a.m. -- Kristen Forrestal, Senior Staff Attorney, Office of Legislative Legal Services, testified before the Committee. She said I was the drafter of the bill and worked with Mr. Brackney on this memo. When we drafted that language what it said was a facility operator and administrator shall require that their employees pass that evaluation within five years. It doesn't give the department the discretion to require it every six months of every year. The department can say at least every five years, the facility operator can say you have to do it every year, but that's not the rule-making discretion that we interpreted the department to have.

Senator Morse said I have a follow-up question for Senator Carroll. If I'm following you correctly, they could require it any time within the next five years. That means then couldn't the rule have said you've got 90 days to get this done, which I think creates some due process issues with respect to the prospective view of the way legislation is supposed to do. You could say 90 days is reasonable or you could say it's unreasonable and by an executive department doing that I would lean more toward the unreasonable. If the legislature had split this into two and said we want to get everybody into compliance as fast as we can because we think there's a huge safety issue right here and now and we've got 90 days to fix this problem, then the people would have had the opportunity to debate that and say it works, it doesn't work, it's too onerous, there's no way we can do it. In this case, to give the department that kind of discretion, I wonder if we really meant to do that. I'm exaggerating to make a point, but that's what I have a little bit of concern with.

Senator Carroll said we were working with the department when we did the bill. The other part of this is having the department host these things on-line. I contemplated the fact that the department would have an implementing rule-making role here at some point, because we were speaking to the department and we said we want a list of who's a qualified QMAP so that the consumers have a way to know who's actually qualified to be administering meds. We were really speaking to the department on that aspect, but there is more than one aspect, so we're talking to more than one audience here. The part of the bill that's saying for facilities to run competently, this is the requirement facilities need to do. It was never separated. At least in my view, I always contemplated that you would have to do a rule. I think the alternative

- to let the statute go without a rule - leaves a pretty significant ambiguity about who is supposed to test when. From my perspective, I guess I wasn't surprised that there would be a department rule. I think we need one and I think there's some doubt if we go silent.

Senator Morse said I agree with that and I wasn't suggesting there wouldn't have been a rule. I was just suggesting that the interpretation Mr. Brackney has offered would be the way the rule would have to be implemented. You've got until July 1, 2014, to get this done the first time because that's five years and you can't shrink that because that would have to be done by the legislature. Then of course you put in a rule that would put effect to how you're going to do that and who is going to do it for five years everyday after that 2014 date. Once you get everybody caught up it becomes a lot easier to do, but still requires regulation to actually input it. I wasn't suggesting there wouldn't have been a rule, I was suggesting that the rule that implements this by saying you've only got 90 days to do this, should have been the five years as opposed to anything else. That's my due process question. I know five years is a long time to get it done, but that gives people plenty of notice to see what they want to do as opposed to assuming that the department had the option of making them do it very, very quickly. I think the legislature could have made them do it very quickly if we had decided to do that in the bill, but I don't think the plain language says that.

Representative Kagan said as I understand, listening to the discussion so far, there seems to be two issues. One, a legal issue as to whether this is retroactive rule-making in violation of the rule against retroactive laws and, two, a practicality about whether this deadline is too soon to expect QMAPs to comply. I have a settled view in my mind about whether it's illegal retroactive rule-making and my feeling is that it's not. I'd like to know whether or not this practicality problem is a real problem. Is it the department's view that, regardless of the legality of this regulation, it is in fact impracticable because it's too soon a deadline?

10:31 a.m. -- Howard Roitman, Director, Health Facilities and Emergency Medical Services Division, Department of Public Health and Environment, testified before the Committee. He said I'll try to be brief because the Committee has certainly explored some of the issues that we dealt with in trying to figure out how best to approach this new statutory requirement. In our view, the rule was entirely prospective. What we were trying to do, aside from the first sentence, which reflects the statute that was passed, was fulfill the intent of the legislative language for people who had not retested within the five-year period. It seemed pretty clear to us that, going forward, people

needed to retest every five years, but there's some people out there who have not tested in 20 years because there had never been a requirement like this before. In our view, what we're trying to do is address prospectively how those folks could come into the legislative system that you all had adopted. The way we came up with the language was we looked at the numbers of people who we thought would need to come in with this requirement. We ran this program through contractors and we looked at the number of approved contractors out there and their capacity to be able to administer this examination. That's, frankly, how we came up with the two-year period. We could not have said to everybody that they had to retest within 90 days. We didn't have the capacity to be able to do that, nor did we think it was reasonable. We looked at the capacity available, the number of instructors, how many students they could take in and administer the tests to, and that's how we came up with the two-year period, which we thought was a reasonable interpretation of the intent of the statute. It is prospective. In addition, we looked to section 2-4-201, C.R.S., on intentions in the enactment of statutes. One of the things listed is that in enacting a statute, it's presumed that a result feasible of execution was intended. We thought this was a feasible approach. We also looked at the public interest, which is referenced in that section. As I mentioned, some of these folks would not have been tested for 20 years. We thought that the legislature recognized that there was an interest in having these folks retested every five years going forward and, as soon as we could, reasonably accommodate those who have not retested within five years. That's the background of what we thought and why did what we did.

Representative Labuda asked are you saying that the department is capable of getting everybody who hasn't been tested in 20 years tested by July 1, 2012? Mr. Roitman said we believe we are. About 800 people who fall in that category have already retested. We estimate there might be another 1,000. Because of the way this program was set up, we don't have very hard numbers, but what we are able to do is look at the universal facilities that are allowed to employ QMAPs. It's a fairly limited universe and it's primarily assisted living residences that use QMAPs. There are some that work for the department of corrections and department of human services and those agencies were already administering a program like this. It's substantially our assisted living residences and a few other licensed categories. Our estimate was there might be 1,800 QMAPs in that universe and we're about half through it as this point. We could accommodate the balance of that number within the time frame that's set out in the rule.

Representative Labuda said is that correct that you've tested 800? Mr.

Roitman said yes.

Representative Labuda asked if you have a pass/fail number you could give us? Mr. Roitman said I don't have it. I would have to get that for you.

Representative Labuda said part of me is curious to see how many people couldn't pass the current test who've been giving medication.

10:37 a.m.

Hearing no further discussion or testimony, Senator Morse moved to extend the introductory portion of Rule 4.3 of Chapter XXIV of the State Board of Health and asked for a no vote. Representative Kagan seconded the motion. Representative Levy said I think we need some discussion on this motion because I think that our duty here today is to determine whether the rules are consistent with the statute. Did the department, in promulgating this rule, act within the authority that was delegated to it by the legislature? It's not to determine whether the rule is reasonable or reflects an intent that may not have been embodied in statute. I do think Senator Carroll has perhaps offered a reasonable interpretation that is within the plain language of the statute that would allow us to extend this rule. I would like to hear Senator Carroll restate that for us for the record so that it is clear that we are, if we do choose to extend the rule, passing a rule that we do firmly believe is within a reasonable interpretation of this language. Senator Carroll said the reason I think it doesn't conflict and is within the scope of the plain language of Senate Bill 128 is that the plain language of the bill contemplates at least once every five years and the rule is at least once every five years. The prospective aspect of a potential conflict is resolved by running your five-year clock beginning July 1 and forward and not trying to reach back and do anything before that. When you plug the rule into that, it is at least once every five years going forward. While there could have been better, worse, or other or different ways to do it, the plain language frame of the statute and the text of the rule sit squarely within a five-year prospective requirement. Representative Kagan said as I read the statute, it would be within the rule-making authority of the board to say that everyone has to do a test next week, as soon as the thing comes into being, because there's nothing in the statute that says you have to wait before imposing a test. To me, it's fairly simple to dispose of the question of whether this is retroactive legislation or not. The motion passed on a 4-2 vote, with Senator Carroll, Representative Kagan, Representative Labuda, and Representative Levy voting yes and Senator Morse and Representative Roberts voting no.

10:42 a.m. -- Michael Dohr, Senior Staff Attorney, Office of Legislative Legal Services, addressed agenda item 1b - Rules of the State Board of Education, Department of Education, concerning educational accountability, 1 CCR 301-1.

Mr. Dohr said today I bring you rules from the state board of education. I have two rule issues for you. Both of them deal with the accreditation of school districts and the state institute of charter schools. Before I jump into the issues, I want to give you a quick background on the accreditation process in case you're unfamiliar with it. Annually, the department is required to review each of the school districts and the institute and assign them an accreditation level. If the accreditation level falls into one of the unsatisfactory categories that we'll see later, it also comes with a plan that the district or institute would work on to get better over the next year. If the district is unsatisfied with that level that they received, they can ask for reconsideration and provide additional information to the department and the department can determine whether or not to change the accreditation level at that point.

Mr. Dohr said the first issue deals with the criteria that the department applies when it is going through the review of each district and the institute. Pursuant to section 22-11-207 (2), C.R.S., the state board is required to promulgate rules establishing objective, measurable criteria that the department shall apply in determining the appropriate accreditation category for each school district and the institute. The statute goes on to require that, at a minimum, there will be criteria that can be found in paragraphs (a) through (g) of subsection (2) that need to be included in that rule. In this case, there are two rules. The first rule is Rule 4.01, and it includes all of the criteria that the department is required to apply when it is doing its accreditation reviews. That rule includes the criteria that's found in paragraphs (a), (b), (c), and (g) of subsection (2); however, it does not include the criteria that's found in paragraphs (d), (e), and (f). That criteria is found in Rule 5.05. The problem with Rule 5.05 is that it does not require the department to apply that criteria in its review. The only way that criteria comes up is if a district is unsatisfied with its accreditation level and asks for reconsideration, then they can provide the information related to the criteria in paragraphs (d), (e), and (f) in that reconsideration process. As it operates, there would probably be a pretty small number of situations when the department would actually be applying the criteria in paragraphs (d), (e), and (f) and, therefore, Rules 4.01 and 5.05 do not follow the statutory requirement found in section 22-11-207 (2), C.R.S.

Mr. Dohr said the second issue deals with the accreditation levels and how

long a district or the institute can remain at a particular accreditation level. Pursuant to section 22-11-207 (4), C.R.S., the state board is required to promulgate rules that state how long a district or the institute can remain at an accreditation that is "below accredited". The first two accreditation levels in paragraphs (a) and (b) are those that are accredited above and then paragraphs (c), (d), and (e) are the accreditation levels that are below accredited. Subsection (4) goes on to say that in any case, a district or the institute cannot remain at "accredited with priority improvement plan" or below, which are paragraphs (d) and (e), for longer than five years. The rule in this case is Rule 5.07 and it states the second half of the statute, that a district or the institute can only remain at accredited with a priority improvement plan or accredited with a turnaround plan for five years. However, the rule is silent on the issue as to how long a district can remain at accredited with improvement plan. Under the rules, a district can remain at that level indefinitely and, therefore, Rule 5.07 does not meet the requirements of section 22-11-207 (4), C.R.S. Based on those issues, we're asking that Rules 4.01, 5.05, and 5.07 not be extended.

Representative Levy said when I read the memo, I did think there was another way for the statutory language to be interpreted that would uphold the rules concerning the criteria. I looked at the rules as a package, that it's a step process, and what the statute requires is that in determining the appropriate accreditation category, at a minimum, the following factors should be taken into account. I guess I looked at the way the rules are set up as a process, that at the end of the process, each of those factors would be taken into account. It's an incremental review process. Is that a reasonable interpretation? Mr. Dohr said it is, but that incremental review process would only occur if the district actually decides that it's unhappy with the initial level it was assigned to. That's the only point where it sort of moves on and if they're happy with the level that they're at, you would never get to that next step. And, I think it would be unusual, but it's possible under the statute, that if they didn't want to reconsider, they wouldn't necessarily have to provide that information related to those categories. It still seems that, based on the statute, you could read it in a way that it's up to them what they provide at the reconsideration level. It sort of gives them the control, as opposed to the department.

10:49 a.m. -- Richard Wenning, Associate Commissioner of Education, Department of Education, testified before the Committee. He said we do see things somewhat differently on this and we think the interpretation presented by the Office is also a reasonable interpretation, so we'll be pleased to work with the legislature should you decide not to extend the rules. Representative's Levy's point is exactly the point we believe is the case. The

statute, in terms of its plain language, requires the state board to promulgate rules establishing criteria. It requires that the rules take into consideration all of those factors, which include both objective criteria that the department already collects from the field related to four key performance indicators of achievement, growth, postsecondary readiness, and gaps, and include a list of more subjective aspects that allow professional judgment to enter into it. The rules passed by the state board do, in fact, establish criteria for the department. In fact, the statute specifies that the "rule" shall take into consideration the criteria. Nowhere in statute does it say the "department" shall, in all cases, evaluate all of those criteria; it simply states that the rule shall take those criteria into consideration. Our perspective is that we have promulgated rules that do exactly what the statute is requiring. Now, if I could just address how we've gone about this, because it is exactly this issue of a package. What we've tried to do is have the least amount of burden on the field and also to be responsible with the department's resources, given that this bill had zero fiscal notes. Our interpretation is based on a less resource-intensive approach. We do, in that first phase, gather all the evidence, which we already collect from the field, so there's no burden on the field in evaluating that evidence. In the second phase, as noted, if the district disagrees with the preliminary finding of the department in terms of its performance, they are free to request that additional evidence be considered within the parameters of statute. Then, we take all that evidence into consideration and make an assignment of the category for the school and the district. In fact, we've just gone through that process for the first time, pursuant to these rules, and at the last state board meeting we presented the plan assignments based on agreements between districts and the department. Out of 178 districts, six requested reconsideration of evidence. Among 1,800 schools, we had 26 buildings. From our perspective, the rule worked very well. In those cases of reconsideration, there was about 15 to 20 hours of staff time in working with the districts to gather the additional evidence and review it. To actually do that for every district, to open up new collections of information that we would capture from every district and to assign the department staff to actually review it, would simply not be feasible under this alternative interpretation of the statute. We do request that you extend the rules and if you decide not to, we'll be very pleased to work with the legislature in clarifying the statute, but the effect of the argument to suggest that we would look at the subjective criteria in every case would be an undue burden on school districts as well as simply not be feasible within the resources the department has. Moreover, the proof is in the pudding. The rule worked. The process has gone smoothly. The vast majority of districts have agreed with the department's evidence that it already collects, and in those cases where they asked for us to reconsider evidence, we've created a process for them to submit it. To conclude, we do

believe the rule addresses exactly what the statute asked, in that it addressed those criteria, but the interpretation that we are required to address all criteria in all cases is simply not supported by statute, even though it's certainly a reasonable interpretation by the Office. We respectively disagree with that conclusion.

Representative Labuda said am I correct in saying that the main reason you didn't require consideration of all the factors for every school district is basically a financial one? Mr. Wenning said it's twofold. One, given that the department already collects extensive evidence from districts, there's a burden issue. It's not simply financial, it's also just a burden issue and so I guess we're making a good public policy argument. The statute was clear that the evidence we already collect on the four key performance indicators are the primary ones that should be considered. They do the job and they allow the public to have a very consistent understanding of every school and district performance. The statute does allow, appropriately, some subjective judgment to be brought into play, to allow for professional judgment. Our approach is both practicality, efficiency, and effectiveness in carrying out the intent of statute and resource implications, both in the burden we would put on school districts across the state and our own burden at the department. If we had construed this meaning in this manner originally, we would no doubt have asked for a fiscal note on the bill to provide sufficient resources to examine a host of subjective factors in every school district.

Representative Labuda said so in effect you're still just collecting those hard, factual measurements of factors and not looking at any of the subjective factors that we included in the statute when we passed it? Mr. Wenning said we do look at those upon the request of the district. This coming year will be the first year that plans are collected that will allow any systematic examination of whether improvements are taking place in the district. Again, our goal is to create a very consistent public understanding of performance and then to have room for these more subjective characteristics. To collect subjective information from every 1,800 schools in this state is a rather large task. The approach, based on tremendous input from the field during the rule-making process, was to set up the stage system, so that if districts felt that the purely objective information does not tell the whole story about their performance, they would have the opportunity to present that to us and have it reconsidered.

Representative Levy said as I understand the memo from the state board, they don't take issue with the conclusion with Rule 5.07. Once again, I think that when we give departments and agencies authority to promulgate rules to

implement statute, we do contemplate that they will exercise that discretion within the parameters we've conferred upon them and if we want things to be much tighter, then it's incumbent upon us to draft them that way. Philosophically, you could take another view, which is that we can't let these independent boards and departments run rampant over the legislative branch and we have to reign them in. I guess I do believe that the interpretation that allows them to do this in two phases is a reasonable interpretation of the language. It wouldn't necessarily be productive to request all that data and information at the first phase because some of it may not even be relevant unless they've been assigned to a category that would reflect that they haven't been meeting the attainment standards.

10:59 a.m.

Hearing no further discussion or testimony, Representative Levy moved to extend Rules 4.01 and 5.05 of the State Board of Education and asked for a yes vote. Representative Kagan seconded the motion. Representative Labuda said the thing that concerns me is that we don't have anybody from the education committee who helped with the drafting, such as Senator Carroll on the last issue. If the department had agreed to do the subjective testing, knowing that they didn't have the funds to do it, I don't understand why they agreed with all of this. Senator Morse said this is hearsay, but Senator Hudak spoke with me specifically about this issue and concurs with the department's evaluation of this. Senator Hudak told me that the way the department is interpreting this rule is the way that she, at least, intended it initially. Representative Labuda said but if I look at the statute, it seems to read another way. The motion passed on a 5-1 vote, with Senator Carroll, Senator Morse, Representative Kagan, Representative Levy, and Representative Roberts voting yes and Representative Labuda voting no.

11:02 a.m.

Representative Levy moved to extend Rule 5.07 of the State Board of Education and asked for a no vote. Senator Morse seconded the motion. The motion failed on a 0-6 vote, with Senator Carroll, Senator Morse, Representative Kagan, Representative Labuda, Representative Levy, and Representative Roberts voting no.

11:03 a.m. -- Julie Pelegrin, Assistant Director, Office of Legislative Legal Services, addressed agenda item 1c - Rules of the State Board of Education, Department of Education, concerning rules concerning administration of accountability for alternative campuses, 1 CCR 301-57.

Ms. Pelegrin said alternative campuses are schools that have a very high population of at-risk children. They're either at risk because they have an individual education program - they're special ed kids - or they meet certain at-risk factors, including having been adjudicated delinquent, having dropped out of or been expelled from school, having a family history that includes child abuse or domestic violence, having a history of drug use or gang involvement, being pregnant, or being a migrant child or homeless. These are all factors that go into making it especially difficult for that child to receive an education. Because these alternative campuses have such a high population, 95% or more, of students who are at-risk, they are held to different standards with regard to accountability. As you were just discussing with the accountability measures, you know there are statewide targets and performance indicators that apply to all of the school districts and public schools in the state. If a school is identified or designated by the state board as an alternative campus or alternative education campus, then that school is held to separate criteria for performance, given the population that they have.

Ms. Pelegrin said the first issue concerns the process for designating the alternative campuses and the timing. Section 22-7-604.5 (2) (a), C.R.S., sets out the timing by which a school may apply for this designation. The school district board for the public school has to file with the state board a request by October 1 and then by November 15 the state board determines whether to grant the designation. The state board has adopted Rules 2207602-R-3.02, 3.03, and 3.04 that also set out the timing for determining the designation. Under the rules, the school district must apply no later than July 1, the state board responds by August 20, if the school district is not satisfied with the response they receive, they may resubmit within ten days, and the state board makes a final determination by September. Obviously the time lines between the rules and the statute do not agree. Under the statute, a school district and the state board have more time to decide whether to make this designation. Therefore, we would recommend that Rules 2207602-R-3.02, 3.03, and 3.04 not be extended.

Ms. Pelegrin said issue number two goes to those accountability standards that apply to the alternative education campuses. I mentioned they're held to different standards. Under section 22-11-210, C.R.S., the state board is to promulgate rules that set the criteria by which the department will measure the alternative education campus's performance. Specifically, these are to be objective, measurable criteria that the department shall apply. In response to this section, the state board promulgated Rules 2207602-R-3.05, 3.06, 3.07, and 3.08, but these rules don't actually state criteria. What these rules state is that the department will issue policy guidance that specifies and defines the

criteria. For example, policy guidance will be used to define "postsecondary and workforce readiness" and "student engagement" as it applies to these campuses. It will also be used to set the measures and targets for evaluating the performance of the campuses and to define the relative weight to be accorded to each of them. Also, the department is to promulgate the policy guidance by July 1, 2010, and revise it on an ongoing basis. Section 22-11-210, C.R.S., is very clear that the state board is to adopt the criteria for measuring performance and does not authorize the state board to delegate that authority to the department by directing the department to define it through policy guidance. Therefore, we would recommend that Rules 2207602-R-3.05, 3.06, 3.07, and 3.08 not be extended because they are outside the authority of the state board. Just to let you know, the department agrees with our conclusions on both of these issues. In the first issue, they will be seeking a statutory change to align the time lines with what's in the rules and in the second one, they are working on rewriting the rules to specify the criteria and measures.

11:09 a.m.

Hearing no further discussion or testimony, Senator Carroll moved to extend Rules 2207602-R-3.02, 3.03, 3.04, 3.05, 3.06, 3.07, and 3.08 of the State Board of Education and asked for a no vote. Representative Kagan seconded the motion. The motion failed on a 0-6 vote, with Senator Carroll, Senator Morse, Representative Kagan, Representative Labuda, Representative Levy, and Representative Roberts voting no.

11:10 a.m. -- Julie Pelegrin addressed agenda item 1d - Rules of the State Board of Education, Department of Education, concerning administration of the Colorado school awards program, 1 CCR 301-51.

Ms. Pelegrin said as you may or may not recall, some years ago the General Assembly adopted two forms of awards that go to high performance schools. The first is the John Irwin schools of excellence award, which is based on student achievement or how high a score the kids get on the CSAPs. Section 22-11-602, C.R.S., states that the award will go to the public schools whose level of attainment on the performance indicator concerning achievement levels is within the top eight percent of all public schools. The statute goes on to say that there's going to be three levels of awards, a five thousand dollar award, a ten thousand dollar award, and a fifteen thousand dollar award, and the amount awarded will depend on the number of students attending the public school. The state board promulgated Rule 2207-R-3.01 (D) to establish the student population cut-off for determining the award amount. If it's fewer

than 200 students, $5,000; if it's 200 to 499 students, $10,000; and if it's 500 or more students, $15,000. Then the state board went on to adopt Rule 2207-R-3.01 (D) (5), which states that if a school building has more than one complete school level, then they can receive only one monetary award regardless of the number of report cards received. Let's take the example of a single building that has a 100-student elementary-level school (K-8) and a 75-student secondary-level school (9-12). Both of those schools are credited independently, each one receives their own school performance reports and assuming each of them scores in the top eight percent, under the statute they should each get $5,000. Under the rule, they would only get one $5,000 award because they happen to be in the same school building. If they happened to be in two buildings on the same campus, they would get two awards. Rule 2207-3.01 (D) (5) conflicts with the statute and should not be extended.

Representative Labuda said when I was reading this I was thinking of some or our rural schools with very small buildings. If we have an outstanding elementary grade and an outstanding high school, because it's a small school district, they have to be in one building and they'd get $5,000, whereas if it happened in Denver where we have separate buildings for elementary and high school, we'd get $5,000 twice. Ms. Pelegrin said yes. Also, the department agrees with our conclusion on this one and they will be rewriting the rule.

Ms. Pelegrin said the second type of award that was created is the governor's distinguished improvement award. These go to schools that demonstrate the largest degree of academic growth. Specifically, section 22-11-603, C.R.S., states that the state board is to establish by rule the method by which to identify the schools that demonstrate the highest rate of student longitudinal growth in a school year, as measured by the growth model. Arguably, that means that over the course of one year, those schools that have the greatest growth over one year would get this award and that would be measured, presumably, by their scores for the previous spring, the end of the school year, compared to the end of this year. It's how much growth is made in one year. In response to this statutory requirement, the state board adopted Rule 2207-R-3.02 (B), which provides that the awards will go to those schools demonstrating the highest rates of sustained student longitudinal growth across multiple years. Granted, longitudinal growth does usually apply to multiple years, not to one year, but the statute is written as it being one year. The rule implies it's going to be at least two, and the word "sustained" implies it's going to be more than that. Therefore, we would recommend that Rule 2207-R-3.02 (B) not be extended because it conflicts with the statute. The

department does agree with our conclusion and will be seeking a statutory change.

Representative Levy said the department's memo suggests that they concur with the analysis, but would like to make changes to the rule. Their previous memo had a time line by which a new rule could be adopted, but for this rule there isn't one. This suggests that maybe they want to take their time in promulgating a new rule, so if the motion, and the vote, goes as you recommend, that could leave a period of time when there's no rule in place. Ms. Pelegrin said my comment in general with regard to the concern about repromulgating Rule 3.01 (D) (5) now or later and the possibility of a gap, is given the fact that this goes to how much money a school could get and could potentially hurt a small district school, the department can always do emergency rules. They don't take that long to do. I would stick by the original recommendation and encourage the department to consider the schedule.

11:17 a.m. -- Richard Wenning, Associate Commissioner of Education, Department of Education, testified before the Committee again. He said I just wanted to provide a little rationale. These aren't necessarily different schools. It just happens that when we evaluate school performance, we group it into elementary, middle, and high. If there is a single, building, with a single principal, and a single school code, we consider that a school. If it had three principals and three different school codes, we would say there are three different schools. This issue that we're dealing with is with a single school with a single principal who happens to get three ratings because it's a K-12 building. Our intention is to provide an award to a building and every single leader. If this were a small rural school, which just happens to have three schools in the building and three different codes, they would be eligible for three different awards. I'm splitting a hair here to be clear that in our interpretation, the way we evaluate schools, the thing that is called a school would have a single leader and would have single code and in those cases we would provide an award for one school. Should that entity, regardless of how many buildings it's in, actually have multiple codes or multiple leaders, then we would treat that as multiple schools and they would be allowed to get multiple awards as well.

Representative Labuda said I understand Mr. Wenning's rationale, but when I look particularly at the rural schools, which have one chance to compete, and if they were to get $10,000 instead of $5,000, that could make a huge difference in what they could provide to their students. Kids now don't have money for their own pencils or papers and the school could provide that. I'm

looking at the divisions in education we make that are sort of arbitrary. That's the problem I have with your interpretation.

Mr. Wenning said we very much appreciate that. Of course, in the situation we are talking about, there are no funds appropriated for these awards and we would be delighted to actually make those awards to them. Obviously your interpretation is extremely reasonable and we are very conscious of those issues as well. We are presented with the issue of what is a school, and the basis for my argument was there's differences between what quantifies a school versus what levels it happens to have. Again, we would be delighted to deal with this and we don't really contest the analysis that was made.

Representative Labuda said I know there isn't any money available but there is status that goes with an award. I'm just thinking that if I were principal of a school and I saw that we really worked to get our elementary kids up to par and our high school teachers really worked to get our high school kids up to par, and we just got one award, instead of two.

Representative Levy said my only concern goes to your proposed timing for repromulgating the rule. My question is the implication for a motion to repeal the rule, which would be effective on the effective date of the rule review bill and where it leaves school districts if they don't have a time line to promulgate a complying rule. Mr. Wenning said perhaps I could ask for advice on this. Where we are right now is we're about to make these awards this cycle and that will be done this winter. The governor's image improvement award will probably be earlier and then the John Irwin award is a little bit later in the winter. My understanding is the rule would expire as of May 15, so we would have time to repromulgate rules for the next cycle, so we would proceed under the existing rule and then repromulgate in time for the second cycle of next year. I don't believe there would be any gap.

Ms. Pelegrin said actually, I think Representative Levy's question and the memo gets to the issue of what is the issue here. If it's really just a repromulgation of a definition and no change in practice, then it doesn't matter if it doesn't get done right away, but I think what I'm arguing is there should be a change in practice, in which case it might matter.

11:23 a.m.

Hearing no further discussion or testimony, Senator Morse moved to extend Rules 2207-R-3.01 (D) (5) and 2207-R-3.02 (B) of the State Board of Education and asked for a no vote. Representative Kagan seconded the

motion. The motion failed on a 0-6 vote, with Senator Carroll, Senator Morse, Representative Kagan, Representative Labuda, Representative Levy, and Representative Roberts voting no.

11:24 a.m. -- Julie Pelegrin addressed agenda item 1e - Rules of the State Board of Education, Department of Education, concerning administration, certification, and oversight of Colorado on-line programs, 1 CCR 301-71.

Ms. Pelegrin said first, accountability is based on standard-based education in Colorado. The state board adopts state model content standards and then it adopts the state assessment program that is aligned with those standards. Each local education provider, which is a school district or a charter school, or a BOCES if it's operating a school, adopts its own standards and those standards have to meet or exceed the state standards. The local standards are adopted locally and then they adopt a curriculum that aligns with those standards and they adopt assessments that align with those standards. The idea being that Colorado is a strong local control state. Second, an on-line program is either a school in and of itself or it's a full-time on-line program that's operated by a school that also offers a brick and mortar program. In any event, it's a school, it's a public school. Every public school is part of a district, either as a regular school or as a charter school, or it is an institute charter school.

Ms. Pelegrin said the state board is charged with adopting criteria for measuring and accrediting on-line programs. Rule 3.02 generally establishes the quality standards that each on-line program is required to meet. Rule 3.02.2 specifically requires the on-line program to have adopted curriculum that is aligned with the Colorado model content standards. As we just discussed under section 22-7-1013, C.R.S., each on-line program should be subject to the content standards adopted by its school district or, if it's a charter school, it has adopted its own content standards through its charter. Therefore, it should have a curriculum that is aligned with its own content standards, not aligned with those of the state. Therefore, Rule 3.02.2 conflicts with the statute and should not be extended. The department also agrees with the analysis on this one and will be repromulgating the rule.

11:28 a.m.

Hearing no further discussion or testimony, Representative Kagan moved to extend Rule 3.02.2 of the State Board of Education and asked for a no vote. Senator Carroll seconded the motion. The motion failed on a 0-6 vote, with Senator Carroll, Senator Morse, Representative Kagan, Representative Labuda, Representative Levy, and Representative Roberts voting no.

11:28 a.m. -- Chuck Brackney addressed agenda item 1f - Rules of the State Board of Health, Department of Public Health and Environment, concerning provisional certification for emergency medical technicians, 6 CCR 1015-3.

Mr. Brackney said section 25-3.5-203 (1) (c), C.R.S., was amended in 2009 by House Bill 1275 to create a provisional certification for emergency medical technicians. It says that a provisional certification shall be valid for not more than 90 days. The key point of that bill back in 2009 was to create provisional certification along with a 90-day time limit. The whole rationale for having the provisional certification in the first place for EMTs is to address the shortage of them in the field and allow those who have met every other requirement but they have not yet received the results of their fingerprint-based criminal history background checks to go ahead to the next level of training. Once the results of that check come back, assuming they're positive, then their provisional certification is converted into a regular certification and they're allowed to go out in the field as EMTs. The rules that were promulgated by the board in response to House Bill 1275 include 5.4.1 D), which says that the department may renew a provisional certification. This, on the very face of it, means that a renewed provisional certification will last longer than 90 days. Notice also in the statute that there was no mention made of renewal and not even implicit authority for the department to renew these beyond the 90 days. Because the board's Rule 5.4.1 D) concerning provisional certification for emergency medical technicians authorizes the renewal of a provisional certification beyond the 90-day limit, it conflicts with section 25-3.5-203 (1)(c)(I), C.R.S., and should not be extended. The board and department are not disputing our recommendation regarding this rule.

Senator Morse said I was the Senate sponsor of the bill in question and I agree with Mr. Brackney's assessment.

11:32 a.m.

Hearing no further discussion or testimony, Senator Morse moved to extend Rule 5.4.1 D) of the State Board of Health and asked for a no vote. Senator Carroll seconded the motion. The motion failed on a 0-6 vote, with Senator Carroll, Senator Morse, Representative Kagan, Representative Labuda, Representative Levy, and Representative Roberts voting no.

11:33 a.m. -- Thomas Morris, Senior Attorney, Office of Legislative Legal Services, addressed agenda item 2 - Discussion of options for addressing section 25-7-133.5 (2) (n), C.R.S., an obsolete statute that amends an air quality control commission rule that is no longer in the Colorado Code of

Regulations.

Mr. Morris said when we were reviewing title 25 for publication, we noticed this statute that's been on the books for a very long time. It does appear to be obsolete. Since it relates to a rule issue, we thought the Committee ought to know about it. It actually amends a rule. In section 25-7-133.5 (2) (n), C.R.S., it says that amendments in the following provisions of the regulation shall read as follows, and it amends the language of the rule and it's in the statute. That's an unusual situation and that's why we thought we should bring it to your attention, to get some guidance on how to proceed. The background on this is it's a rule that creates an oxygenated fuels requirement. That's when you go to the gas station and there's E85 gasoline that has extra oxygen in it, which helps reduce the amount of carbon monoxide that's in the air. Colorado was in nonattainment under the federal clean air act and our state standards for carbon monoxide until the air quality commission promulgated this rule that required oxygenated fuels to be used during certain periods during the winter. The legislature at that time had a process where every one of these types of rules that are called state implementation plan (SIP) rules, the plan that the state is going to follow in order to come into attainment, had to go to Legislative Council and had to be approved by the legislature by bill. This statute was then passed to change a couple of those provisions in that SIP rule. It decreased the amount of the percentage oxygenated fuels had to be oxygenated to, and it decreased the period during which those fuels had to be used. Then Colorado came into attainment and the air commission submitted a new SIP proposal that got rid of the oxygenated fuels provision. It was submitted to the legislature as the statute then required, the EPA approved it, and so there is no longer a requirement for an oxygenated fuels program. The air commission recently promulgated a rule to repeal this oxygenated fuels program, effective next February. By the time the legislature adjourns, there will no longer be any sort of oxygenated fuels rule, but we'll still have this statute on the books that says the oxygenated fuels rule shall read this way. That rule came to our Office this past session. I reviewed it and found that it was authorized because there's no statute that requires we have an oxygenated fuels program, with maybe the potential exception of this one little statute right here that seems to be pretty far out of date. Our conclusion is that it is obsolete and we would seek the Committee's guidance on what to do about it. The options are a Committee member could run a bill, the Committee could run a bill, or the revisor of statutes could include this statute in the revisor's bill as an obsolete statute.

Representative Labuda said I have a question on your last comment. In the revisor's bill, I don't think we usually repeal whole statutes, do we? Mr.

Morris said the revisor's bill does get prepared every year and it can vary depending upon how things are. If an entire subsection of law becomes obsolete, we can get rid of the whole thing, get rid of a whole statute, or get rid of just a few words. It depends and it varies.

Representative Labuda said my thought is this can be covered in the revisor's bill, unless anybody is dying to carry another bill and try to explain this on the floor.

Representative Levy said I was just going to endorse your suggestion. I think that's the cleanest way to take care of it because running a bill to repeal it would suggest that there is some substantive policy change we would like to make and I would be weary of the potential for mischief in that regard.

Senator Morse said I agree with that, but I'm a little bit worried. What we don't want to do is create any issues in the revisor's bill, that the revisor's bill somehow becomes contentious. I don't know that this would be contentious in any way, but if we did do a Committee bill, then at least that would theoretically propel it through the legislature as a legal services bill that is noncontentious and not a big deal, we just need to do it. It gives the public the opportunity to say that's inaccurate and here's how, whereas the revisor's bill is so much more difficult to do that with because it's so arcane to begin with.

Representative Roberts said I'm hearing what you say; however, if the reason we want to strike this is it's obsolete, then putting it in the revisor's bill underscores that. If we run into headaches over the revisor's bill, we could always amend it and then run a Committee bill to deal with it that way. I think it's unlikely that anybody is going to pay attention to the revisor's bill, but we know why it's there. I think you almost red flag it if you pull it out if, again, it's about being obsolete.

Representative Labuda said I remember one time when I carried the revisor's bill and all of a sudden there was an objection on the floor, which floored me. When I went back into the well, I withdrew a motion on one of the items in the revisor's bill, so it has been done. Even if we put this in the revisor's bill, someone may find it and we'll just withdraw it. Then the next year we can come back and do it by bill.

Senator Morse said I would withdraw my comments and I'll support whatever the Committee wants to do. It sounds like if for some reason we need to do a late bill as a Committee because somebody drew attention to it, that we

would have the flexibility to do that. If we have that kind of flexibility then I agree to put it in the revisor's bill and see what happens.

Representative Labuda asked if the Committee needs to have vote on this? Debbie Haskins, Assistant Director, Office of Legislative Legal Services, said I don't know that we need to have vote on this. We were just wanting some guidance from the Committee about how you wanted us to approach it.

Representative Labuda said the Committee is in agreement that we will put this obsolete statute in the revisor's bill and see what happens.

11:43 a.m. -- Bob Lackner, Senior Attorney, Office of Legislative Legal Services, addressed agenda item 3 - Litigation Update.

Mr. Lackner said I'm here to provide the litigation update. Copies of a document have been passed out to you, which is the summary of litigation affecting the General Assembly. The document summarizes two types of cases: Those in which the General Assembly is a party and those in which members of the General Assembly may have an interest. Now I'd like to briefly summarize developments in each of the cases in which the General Assembly is a party. The first case is the *Severance* case. This matter stems back several years to purported notices of election contests that were filed with the Secretary of State's office challenging the election of four members of the General Assembly: Senators Tapia and Keller and Representatives Butcher and Gagliardi. One of the filers, Mary Severance, later filed documents that were interpreted as liens against the property of Senator Tapia and Representative Butcher. Subsequently, it was discovered that various additional spurious liens filed by Ms. Severance had violated a preliminary injunction that had been entered against her in November 1996 in Pueblo. In March 2008, she was found in contempt of court for violating the terms of this injunction. Subsequent to that, among other events in this very long saga, she was arrested in April 2008 on criminal charges arising from the filing of false or fraudulent documents, later sentenced to 90 days in jail. She attempted to appeal the civil contempt case, which appeal was ultimately denied by the Court of Appeals, and she accepted a plea agreement in the criminal case that required her to accept 18 months of unsupervised probation. More recently, Ms. Severance has filed an objection to the Court of Appeals' dismissal of her appeal of the civil contempt case, which was denied. She twice filed a demand for the Court of Appeals to transfer the matter to the Supreme Court, both of which were denied. She filed a notice and demand for application of recall of mandate with the Court of Appeals, which was also denied. She currently has no other pleadings pending before the Court of Appeals and her

time to file a petition for writ of certiorari with the Supreme Court has expired.

Representative Labuda asked if she did all her additional filings during her 18-month period of unsupervised probation? Mr. Lackner said that could well be. I'm not as familiar with all the details, but it looks like she has been an active user of the judicial system.

Mr. Lackner said the next case is *Colorado Republican Party v. Benefield*. Veteran Committee members will also recall this as another case that's dragged on for a number of years. The case began in 2006 when the Colorado Republican Party made a request under our open records act of several Democratic members of the House of Representatives, requesting a copy of documentation relating to an entity identified as Research & Democracy and all contributions received into and expenditures made from any office accounts maintained by the Democratic Representatives related to Research & Democracy. In April 2007, the matter went to trial in Denver District Court. The District Court's holding was ultimately reversed by the Colorado Court of Appeals. In February of this year, the Democratic Representatives produced certain constituent surveys to the Republican Party that are not confidential under certain guidelines for the production of documents that were set forth by the Court of Appeals in its opinion. Thereafter, the Republican Party challenged the propriety of the Democratic Representatives' production, and further requested that the Representatives' withholding of public records was not proper under the open records act. Ultimately, it became clear that the majority of surveys were either properly withheld or made available. On September 7, 2010, the District Court concluded on remand that the Democratic Representatives had correctly sorted, produced, and withheld the surveys at issue and had properly complied with the Court of Appeals' order. The Court declined to enter a final order regarding fees but directed the parties to brief the issue of whether the Republican Party is entitled to fees under the open records act, which the parties subsequently did. By order dated October 28, 2010, the District Court denied the Republican Party's motion for reasonable costs and attorney fees, finding that the Democratic Representatives' response to the Republican Party's request was proper and that the Republican Party was not a prevailing applicant within the meaning of the open records act provision upon which it had relied for payments of its fees. The Court considered the relative strengths and weaknesses of each party's success over the course of four years of litigation and concluded that neither is a prevailing party and that the Republican Party is not a prevailing applicant. It is unknown at this time whether the Republican Party will appeal the denial of its motions.

Mr. Lackner said the next case is *Bruce v. State*. In March 2010, Plaintiff Douglas Bruce filed a complaint against the State, the General Assembly, and Governor Ritter alleging that only cash, and not capital assets, may be designated as part of the emergency reserve required by the TABOR. Bruce alleges that all the Defendants violated the constitution because TABOR requires a purely cash-based emergency reserve and because Defendants have designated certain capital assets as part of the emergency reserve in addition to cash. In his complaint, he asserts claims for injunctive and declaratory relief, recovery of stolen funds, and conversion. The General Assembly had moved to dismiss Bruce's complaint on the grounds that, among other things, the doctrine of legislative immunity bars Bruce's claim for injunctive relief and his other tort claims, the governmental immunity act bars his claim for recovery of stolen funds and conversion; and his complaint failed to state a claim upon which relief can be granted. The General Assembly has also asserted its entitlement to reasonable attorney fees. A hearing on the motion to dismiss filed by the General Assembly, the State, and Governor Ritter was held on July 15, 2010. On August 23, 2010, the Denver District Court issued an order dismissing all claims against the General Assembly on legislative immunity grounds as well as the tort claims on the basis of the governmental immunity act. The Court also issued an order dismissing the tort claims against the State and Governor Ritter on the same grounds. Bruce did not appeal the dismissal of these claims. However, the District Court did allow the injunctive and declaratory relief claim against the State and the Governor to proceed. A trial on those claims has been set to begin on April 28, 2011.

Mr. Lackner said the next case is *Gruber v. Colorado State Patrol*. In April 2010, Plaintiff Mark Gruber, who goes by the name of Israel, filed a complaint, which was subsequently amended, against the State of Colorado, the Colorado State Patrol, three officers employed by the Colorado State Patrol, and Representatives Amy Stephens and James Kerr, asserting 25 different claims for relief. The plaintiff seeks, among other things, exemplary damages on his claims and has requested a jury trial. The claims arose out of certain events that transpired in the 2009 regular session of the General Assembly, at which time the plaintiff was engaged as a lobbyist. He was ultimately arrested after a number of encounters with members of the State Patrol and complaints from some legislators with whom he was attempting to communicate. Following discussions about the complaint, the Attorney General's office, which represents the officers, it was determined that the case involves state risk management issues that apply to each legislator in his or her capacity as state officials. Accordingly, the Attorney General's Office agreed to defend the Representatives in addition to its State Patrol clients. On July 22, 2010, the Defendants moved to dismiss all of the plaintiff's claims on the

grounds that the court lacks subject matter jurisdiction and that the plaintiff has failed to assert a claim upon which relief can be granted. The matter is currently before the Court on this motion.

Senator Carroll asked what was the remedy or relief that the plaintiff was seeking? I'm reading between the lines and assuming he was removed for being a disturbance. I don't know if he was bordering on a threat or not. I'm also assuming that maybe he felt he had a right to be around. Mr. Lackner said I think, as far as I understand the basic factual scenario, that is correct. I may defer to Dan Cartin on more details on that.

11:54 a.m. -- Dan Cartin, Director, Office of Legislative Legal Services, testified before the Committee. He said I confess I haven't looked at the case for a while, but he has sought exemplary damages on the claims and a jury trial. I can certainly provide you a summary of what he has requested, but the main request is exemplary damages. My recollection is he hasn't sought permission to reenter the building or anything like that.

Mr. Lackner said the last case is *Hanks v. State of Colorado and Mike Mauer*. In September 2010, Plaintiffs Leslie Hanks and Gualberto Garcia Jones brought a complaint against the State and Mike Mauer as the Director of the Legislative Council alleging that the 2010 blue book contains language to which the Plaintiffs object. Specifically, they argued that the section of the blue book regarding Amendment 62, which deals with the term "person", includes language in the "arguments against" section that is unfair or unsupported, and that certain of Plaintiffs' preferred language is not included. Plaintiffs requested a preliminary injunction requiring the General Assembly to inform the public that the blue book was under judicial review. As part of the relief sought in their complaint, the plaintiffs asked that defendants be enjoined from printing or mailing blue books until the Court had ruled on their motion. Upon the conclusion of a hearing on the Plaintiffs' motion for a preliminary injunction on September 30, 2010, the Court denied the Plaintiffs' request. Specifically, the Court found, in reliance upon the case of *Polhill vs. Buckley*, which is a 1996 Colorado Supreme Court case, that, under the separation of powers doctrine, the judiciary lacks subject matter jurisdiction to review uniquely legislative functions such as the preparation of the blue book. In addition, statutory authority relied upon by the Plaintiffs for judicial review, which is a provision from the uniform election code, applies only to matters arising under the code. However, the legislative process in preparing the blue book is governed by the provisions of a different article, article 40 of title 1, and that article contains no provision for court review of the preparation of the blue book. Accordingly, there is no legislative authority

to review the legislative process at issue before the election. The Court also found the Plaintiffs' request to be moot because the blue books had already been printed and distributed to at least a majority of the state's citizens at the time the Plaintiffs filed their action. The Court held that no relief it was capable of granting would have any practical effect on the controversy. The Court subsequently invited Defendants to file a separate motion if the Defendants wished to recover payment of their attorney fees and costs. On October 15, 2010, Defendants moved for an award of their reasonable attorney fees from the Plaintiffs on the grounds that the Plaintiffs' claim lacked substantial justification and that they clearly knew or reasonably should have known that their claim lacked substantial justification. On or about October 25, 2010, Plaintiffs filed their response to the defendants' motion. Yesterday, the Defendants' filed a reply in support of their motion. That completes my presentation of these cases. I'm happy to try to address any questions you may have.

Representative Labuda said there are updates in the document on other cases that are currently pending that I guess haven't had any action recently. Mr. Lackner said just to clarify, the second half of the document is cases that the General Assembly is not a party but in which members may have an interest especially because they deal with in many cases legislation that's been challenged in the courts.

Senator Morse asked does that mean if it's not in this document that a suit has not yet been filed? With all the other bills we've done, no one has challenged those? Mr. Lackner said I believe that's correct. We try to follow cases and as you can see, basically, this involves a very large group in the Office that is responsible for monitoring cases based upon their subject matter expertise. I can't say that it's full-proof, but to the best of our knowledge, if it's around, it should be. If you're aware of something that isn't in there, let us know and we'll find out what's going on.

11:59 a.m. -- Jennifer Gilroy, Revisor of Statutes, Office of Legislative Legal Services, addressed the Committee. She said I come to you today to discuss and enlighten you all about how I intend to approach the publication of the one amendment that did pass this year. As you recall, Amendment Q did pass, it was the only amendment on the ballot that passed. Typically, we produce a special supplement right after the elections. This gets distributed to everyone who receives the Colorado Revised Statutes books. These are not inexpensive publications. The one that was published in 2008 was a 17-page supplement and it ran over $41,000. I actually considered not publishing it at all this year in order to save money and save trees. It also kind of kept me up

at night thinking about that because there are people like myself who still rely on books. This will be on-line and will be on the updated CD-ROM that will come out in January. It is actually published, because it's in our session laws since it was a referred measure, but there are a number of people who don't get the session laws that do get the Colorado Revised Statutes and there are a number of folks who rely on books. I was troubled about how to approach it and actually our publisher, Lexis Nexis, suggested that they could do essentially stick-on sheets that would stick on to our Colorado Revised Statutes and the state constitution, somewhat like errata sheets. They can actually squeeze in the three additional subsections to section 3 of article VIII of the state constitution in two pages. They can rearrange and use up a little bit more space and make it work into those two pages. They will only charge us $5.00 and no shipping or handling to do that. It reduces the cost by about 63%. I'm inclined to go ahead and proceed that way, but I wanted to advise you of my decision that there would not be a special supplement this year unless you direct me otherwise. The books would actually be updated for not only our consumers, and we have about 3,000 consumers in state and local government that we provide the statute books to, but also private consumers who actually purchase them through Lexis Nexis directly. The book owners will actually have something that shows the approved Amendment Q.

Representative Labuda said so Lexis Nexis is offering just to mail the revisions to everybody who has the books, like our local entities, so they can insert the pages? Ms. Gilroy said that is correct. They'll mail them directly with instructions on what pages to paste them on to. It will be just like we do with an errata sheet if there's a mistake in statute. They will send those out at a cost to us. This is a significantly reduced cost as opposed to producing the special supplement books.

Senator Carroll said I think that's a very good solution. I'm encouraged that you found a way to both save some money and still get it published effectively. Sounds to me like a good, creative win-win that gets it published and saves us money. I appreciate the fact that you brought it forward, but from my end, it sounds like a good idea.

Representative Kagan said my only question is that $5.00 sounds like quite a lot. Is that the result of heavy negotiations? Ms. Gilroy said that's about their cost to produce it and to mail it. It's significantly less. I was surprised when we last came out with the special supplement that it was $41,000. I also wanted to bring it to the Committee because I wanted you to see how we work together with the publisher that we have currently to come up with solutions. This was totally their idea, so I was encouraged by it.

12:05 p.m.

The Committee adjourned.