

JOINT COMMITTEE ON ADMINISTRATIVE RULES

ILLINOIS GENERAL ASSEMBLY

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REP. LOU LANG
REP. DAVID R. LEITCH
REP. ANDRÉ THAPEDI
REP. MIKE TRYON

MINUTES

August 11, 2015

MEETING CALLED TO ORDER

The Joint Committee on Administrative Rules met on August 11, 2015 at 11:00 a.m. in Room 600C of the Michael A. Bilandic Building, Chicago IL. Co-Chair Harmon called the meeting to order and announced that the policy of the Committee is to allow only representatives of State agencies to testify orally on any rule under consideration at Committee hearings. Other persons are encouraged to submit their comments to the JCAR office in writing.

ATTENDANCE ROLL CALL

X Senator Pamela Althoff	X Representative Greg Harris
Senator Bill Brady	X Representative Lou Lang
X Senator Don Harmon	Representative David Leitch
X Senator Karen McConnaughay	X Representative Ron Sandack
X Senator Tony Muñoz	X Representative André Thapedi
X Senator Ira Silverstein	X Representative Mike Tryon

APPROVAL OF THE MINUTES OF THE JULY 14, 2015 MEETING

Representative Tryon moved, seconded by Senator Althoff, that the minutes of the July 14, 2015 meeting be approved. The motion passed unanimously (10-0-0).

REVIEW OF AGENCY RULEMAKINGS

Board of Higher Education – Dual Credit Courses (23 Ill. Adm. Code 1009; 39 Ill. Reg. 5945)

Representative Lang moved, seconded by Senator Muñoz, that JCAR recommend that the Board of Higher Education be more timely in implementing new statute in its rules. PA 96-194, which is being implemented in this rulemaking, became effective 1/1/10. The motion passed unanimously (10-0-0).

AGENCY RESPONSE

Department of Public Health – Perinatal Mental Health Disorders Prevention and Treatment (77 Ill. Adm. Code 2110; 39 Ill. Reg. 1427)

Due to the appropriateness of the agency's response, no further action was taken.

CONSIDERATION OF OTHER RULEMAKINGS

Department of Public Health – Grade A Pasteurized Milk and Milk Products (77 Ill. Adm. Code 775; 38 Ill. Reg. 18346)

Senator Silverstein moved, seconded by Representative Harris, that JCAR object to and prohibit filing of this rulemaking because it has not achieved an adequate balance between the State's role in protecting the public health and its mission to avoid unduly burdensome restrictions on small business. JCAR finds that adoption of this rulemaking in its current form would not be in the public interest. The motion passed on a unanimous vote (10-0-0-2; Brady and Leitch absent).

Illinois Racing Board – Entries, Subscriptions, and Declarations (11 Ill. Adm. Code 1413; 39 Ill. Reg. 10465) (Emergency)

Senator Althoff expressed concern about the use of emergency rulemaking in this case and moved, seconded by Representative Tryon, that JCAR object to this rulemaking because the emergency rule can have a negative economic impact on Illinois businesses that own, breed and train thoroughbred horses, some of which are small businesses. The motion further stated that the Board should make every effort to avoid unnecessary use of emergency rulemaking. The motion passed unanimously (10-0-0-2; Brady and Leitch absent).

Department of Healthcare and Family Services – Medical Payment (89 Ill. Adm. Code 140; 39 Ill. Reg. 10427) (Emergency) and Hospital Services (89 Ill. Adm. Code 148; 39 Ill. Reg. 10453) (Emergency)

Department of Human Services – Child Care (89 Ill. Adm. Code 50; 39 Ill. Reg. 10072) (Emergency)

Illinois Labor Relations Board – General Procedures (80 Ill. Reg. 1200; 39 Ill. Reg. 10641) (Emergency)

Mollie Zito, General Counsel, and Teresa Hursey, Acting Medicaid Administrator, represented HFS. Corey-Anne Gulkewicz, Deputy General Counsel, and Linda Saterfield, Associate Director of the Bureau of Early Childhood Development, represented DHS. Sarah Kerley, Deputy General Counsel, represented ILRB.

Representative Thapedi asked the representatives of these 3 agencies if they were familiar with the 21 tests laid out in 1 Ill. Adm. Code 230.400 (Criteria for Review) governing whether use of emergency rulemaking is appropriate. The representatives accepted his offer of time to review that Section.

After a brief break, Representative Thapedi asked HFS, with respect to ambulance payments, whether a situation currently exists that reasonably constitutes a threat to the public interest, safety or welfare. Ms Zito: The current budget impasse threatens the public welfare. In the current fiscal climate, the public welfare is not served by paying ambulance providers the higher rate. Representative Thapedi: Where did HFS provide the necessary "clear and complete explanation in writing for why such a situation exists, as required by 1 Ill. Adm. Code 230? Ms. Zito read the one-sentence justification for the emergency rulemaking published in the *Illinois Register*. Representative Thapedi: A clear and complete explanation is required. Does HFS believe that the emergency had arisen through no fault of its own? Ms Zito: That is HFS' belief. HFS has no

authority to pass a budget. Representative Thapedi: What steps did HFS take to notify affected persons of the emergency rule? Ms Zito: The only notice that was provided was in the Governor's June 12 press release titled "Administration Initiates Additional Management Steps to Prepare for Madigan-Cullerton Budget". Representative Thapedi: Expressed skepticism that all affected parties actually read the Governor's press release.

Representative Thapedi: What steps did HFS take to notify the affected public of the hospital services rule? Ms Zito: Notice was published in an ad on June 29 in newspapers statewide. Representative Thapedi: Expressed doubt that running the ad for a single day would be adequate to reach all 5 affected hospitals. Representative Thapedi: What is the basis for the use of emergency rulemaking? Ms Zito: Without an approved budget for FY 2016, HFS must initiate steps to manage the State's finances. The emergency situation had arisen through no fault of HFS.

Co-Chair Harmon: Why was direct notice not provided to the affected hospitals, municipalities, and service providers through the mail? This seemed to be a very simple way to ensure notice was provided. Ms Hursey: It has always been HFS practice to provide notice as it did for these rulemakings. Co-Chair Harmon: Expressed skepticism that a press release met the legal requirements for notice. Ms Hursey: Insisted it did. Co-Chair Harmon: Asked her to provide a citation supporting her argument.

Representative Lang: Would this still be a crisis if the Governor had signed, rather than vetoed, the budget that was sent to him? Ms Zito initially declined to comment. When pressed, she argued that, even if the budget had been signed, HFS would have to manage its budget. Representative Lang: Did HFS consider the effect the rate changes would have on municipalities? Ms Zito: HFS considered the impact on everyone. Representative Lang: What are HFS' specific estimates of how this would impact municipalities and the availability of federal matching funds? Ms Zito and Ms Hursey: All this rule does is reduce the rates to SMART Act levels.

Representative Harris: Agreed that the State is facing real emergencies, but objected to the way the Administration was treating emergencies inconsistently. HFS has stated willingness to pay all Medicaid expenses under consent decree and \$30M in supplemental payments to safety net hospitals. Actions like the child care changes and the removal of funding from 5 safety net hospitals is picking winners and losers without coming close to fixing the budget. The real emergencies created by threatening the viability of some safety net hospitals and the availability of ambulance service, and forcing many parents to quit their jobs because they can no longer afford child care, are much more serious than the budgetary emergency these rules purport to fix.

Representative Tryon: That the State has no budget. HFS, like every other State agency, is in a very difficult position in attempting to serve Illinoisans' health, safety and welfare. Everyone loses if there is no agreement on a budget. Not having a budget at all is the same as having an insufficient appropriation and thus HFS had a legitimate emergency requiring emergency rulemaking. Even if the Governor had trimmed the budget the General Assembly passed into being balanced, he surely would have had to make cuts across the board. It is far from certain that the HFS appropriation would have been sufficient. Had the General Assembly so chosen, it could have already overridden the Governor's veto.

Co-Chair Sandack: Agreed with Representative Thapedi that emergency rulemaking must only occur when the criteria set forth in JCAR rules are met. All the criteria have been met. Lack of any appropriation constitutes an emergency and, in the absence of a budget agreement, State agencies must take emergency action to manage their funds.

Representative Thapedi: Asked the DHS representatives what steps had been taken to notify the affected public of the Child Care Assistance Program (CCAP) rule change. Ms Saterfield: DHS sent notices to all the parents and providers in the CCAP database and also sent e-mail notification to the subset of these with e-mail addresses. They also notified the Child Care Resource and Referral Agencies (the primary source of intake for the program) and posted the notification on the DHS website. Representative Thapedi: How many children are affected by this emergency rule? Ms Saterfield: The reduced eligibility applies only to new applicants. The 160,000 children currently in CCAP will remain unless they leave (through attrition), lose their eligibility, or come back after a greater than 30 day gap in service. The most immediate impact will be on new applicants. 1,149 applications have been rejected because they did not fall into one of the 4 target populations still eligible for CCAP: families receiving TANF, families with a special needs child, families earning less than 50% of the Federal Poverty Level, or teen parents.

Representative Thapedi: Has DHS considered any less costly alternatives than these emergency rules? Ms Gulkewicz: It has. Representative Thapedi: What is the basis for this emergency rule and the reason for this particular and apparently arbitrary cut-off point? Ms Gulkewicz: Section 9A-11(b) of the Public Aid Code specifically authorizes DHS to conduct emergency rulemaking. Representative Thapedi: DHS still has to meet the 21 criteria for emergency rulemaking. Ms Gulkewicz: It has.

Co-Chair Harmon: In light of that statute and the Administration's argument that the budget crisis constitutes a genuine emergency, if there is no appropriation for CCAP, eligibility would have to be eliminated entirely. DHS has reduced eligibility, but it is still spending money while there is no appropriation. He questioned the legality of this half-measure and asked Ms Gulkewicz if DHS had ensured that the amounts to be paid under this rulemaking did not exceed the appropriation. Ms Gulkewicz: While there is no current appropriation, DHS had to plan for what is ahead. Co-Chair Harmon: This is not what the statute empowers DHS to do. It lacks the authority for this rulemaking.

Co-Chair Harmon: What percentage of applications have been so far rejected as a result of the emergency rule? Ms Satterfield: Does not have that number, but will provide it to the Committee. Since July 1, 1,146 applications have been denied and 3,831 approved. However, most of these applications were received prior to July 1 and thus were subject to the more accommodating eligibility standards. It will take about 3 months for the full impact of the eligibility change to be felt. Co-Chair Harmon: Is there a seasonal cycle with these applications? Ms Saterfield: Yes. August is when many applications are submitted because of the new school year.

Representative Lang: Are the rejected CCAP applications confidential under the law? Ms Saterfield: The actual applications are not, but any personal identifying information would have to be redacted prior to release. Representative Lang: Has DHS studied the impact the denial of these applications will have on the affected families or the economy in general? Ms Saterfield: Yes, and the estimated impact is devastating. Representative Lang: Would some of the people who were rejected have to quit their jobs to care for their children? Ms Saterfield: Conceded that this was a possibility. Representative Lang: What impact would this have on the economy as a whole? Ms Saterfield: For every \$1 invested in CCAP, \$7 are saved. Representative Lang: Would the negative economic impact outweigh the savings? Ms Saterfield: Doubts there would be much impact from the 1,146 who had already been turned down, but one might occur once families currently in the program begin to lose their eligibility. Representative Lang: What impact on the State's healthcare budget will occur due to this rulemaking? Ms Saterfield: Most ex-CCAP participants would

probably continue to receive healthcare through Medicaid. Representative Lang: Would these Medicaid clients include people who had previously been employed? Ms Saterfield: This is possible. Representative Lang: How much extra would this cost the State? Ms Saterfield: Does not know.

Representative Thapedi asked Ms Kerley, of the Labor Relations Board, whether she believed the Board had met all 21 emergency rulemaking criteria. Ms Kerley: It has certainly met 20, but is weak on one of them – an issue with respect to ILRB's discretion in taking up the costs that would be borne by an individual charging party – that would be fixed in the companion permanent rulemaking.

Representative Thapedi, seconded by Representative Lang, moved that:

JCAR object to and suspend the DHS emergency rule titled Medical Payment because the Department has not shown the existence of any situation warranting the use of emergency rulemaking. Since HFS has not yet received its FY16 appropriation for medical transportation services, it cannot, at this time, know that those appropriations will be inadequate to fund medical transportation services at the rates that existed in the most recent appropriation for this program (FY15) or the extent of any such inadequacy. JCAR finds that this emergency rule poses a threat to the public interest and welfare because it adversely impacts local governments, nonprofit/volunteer ambulance service providers and for-profit ambulance service providers, all of whom are mandated to provide these services to medical assistance clients.

JCAR object to and suspend the DHS emergency rule titled Hospital Services because the Department has not shown the existence of any situation warranting the use of emergency rulemaking. Since HFS has not yet received its FY16 appropriation for transitional supplemental Medicaid payments to hospitals, which include the Medicaid Facilitation and Utilization Payments terminated by this emergency rule, it cannot, at this time, know that those appropriations will be inadequate to continue these payments. JCAR finds that this emergency rule poses a threat to the public interest and welfare because the elimination of these supplemental payments will cause severe economic hardship on those hospitals that are heavily utilized by medical assistance clients.

JCAR object to and suspend the DHS emergency rule titled Child Care because the Department has not demonstrated the existence of any situation that warrants the use of emergency rulemaking. As DHS has not yet received its FY16 appropriation for the Child Care Assistance Program, it cannot, at this time, know that those appropriations will be inadequate to serve all those who were eligible prior to the adoption of this emergency rule or the extent of any such inadequacy. JCAR finds that this emergency rule poses a threat to the public interest and welfare. The limitations on new enrollment in CCAP contained in this emergency rule will place an undue economic burden on citizens who need these services and on those small businesses that provide child care services.

JCAR object to and suspend the ILRB emergency rule titled General Procedures because the Department has not shown the existence of any situation warranting the use of emergency rulemaking. Since ILRB has not yet received its FY16 appropriation for court reporting services, it cannot, at this time, know that those appropriations will be inadequate to fund court reporting services. JCAR finds that this emergency rule poses a threat to the public interest.

Co-Chair Harmon indicated that these 4 Suspension motions would be considered on a single rollcall vote, and asked if there was any discussion on the motions.

Representative Lang reminded the Committee that he has spent much of his time on JCAR analyzing emergency rules because they are an opportunity for any governor of either party to overreach, and that he actively opposed many emergency rules from two governors of his own party. He agreed with Co-Chair Sandack and Representative Tryon that the State faces a grave emergency with respect to its budget, but this is not the kind of emergency that the IAPA considers to be an emergency; neither budget management nor shifting monies around and picking winners and losers by agency fiat are meat for emergency rulemaking. In fact, recent court cases are quite clear that budget management and money issues have no basis in determining whether something is an emergency. The Administration might have the power to do what these rules do through regular rulemaking, but the current debate is not about permanent rules but about emergency rules. The agency representatives have no good answers to the Committee's questions. In many cases, these emergencies were created by the Administration itself picking winners and losers. Simply shifting money around for the Administration's own benefit and list of priorities is not appropriate in an emergency rule. Emergency rules mean you've gone around the normal process for creating a rule with transparency, with public comment, with opportunity for a First Notice and a Second Notice, opportunities to have a public hearing, opportunities to make written comment, opportunities to be totally open and transparent, opportunities for the agency involved to make changes along the way and to adapt the rules to comments made by the general public. Emergency rules bypass all of that and, in effect, say to the general public "It's my way or the highway". He expressed his determination to vote for this motion because JCAR has a responsibility to protect the general public against overreaching emergency rules that bypass regular, open, transparent government. Representative Lang noted that, in all his years on JCAR, there hasn't been a clearly delineated partisan vote. If these rules had been promulgated through regular rulemaking, he might well have voted for them since JCAR can't stop an administration from doing what it is entitled to do under the law. But JCAR does have the power and the responsibility to insist on open and transparent government at all times, and to make sure that agencies and governors don't make choices that create emergencies. The ambulance rules will create emergencies. They'll create higher property taxes. The hospital rules create an emergency because they create winners and losers and hurt people in those communities. The child care rules create extreme emergencies for those who depend on this service, will result in unemployment, and will result in more people in emergency rooms, creating new emergencies. So to say we have emergencies and then to create new and worsening emergencies over our zeal to fix problems is irresponsible and poor government. Representative Lang urged the other members of the Committee to vote Yes.

Representative Tryon argued that these rulemakings are well within the executive branch's prerogative. This is not a case of picking winners and losers, but a case in which everyone in Illinois loses if there isn't a budget. Illinois is on fire, and we're arguing about what color the flames are; it's time to put the fire out. The judge who ordered the State to pay its employees clearly believed the fiscal crisis constituted an emergency, and the Governor would be remiss if he did not ask for some authority to manage his administration's finances. The Governor plans to reverse many of these cuts once there is a budget. This is an extraordinary time. We have an emergency from one end of the State to the other in which everyone is losing. This is not just picking winners or losers; it's managing through the crisis. And the Governor has to have the tools to do so.

Co-Chair Harmon commented that the General Assembly, under our Constitution, is vested with the sole authority to pass laws. As a matter of convenience and generally in the spirit of good

government, we delegate some of this legislative power to the Governor through the administrative rule process. JCAR is the check on that delegated authority. And it is our job, on behalf of the legislature, to provide that check against overreach by the Executive. I agree with what Representative Lang said about our fundamental role and the dangerous precedent this sets. I also agree that these emergency rules do not respond to a real emergency, but they will create emergencies all over the State for families who are deprived of healthcare, for families who call the Poison Center and find that it is closed, for folks who need access to hospitals, for folks who are billed by their ambulances. This is an emergency for people all across the State created by executive action. JCAR should have the will to stand up for the legislature and check this overreach by the executive. He directed that a rollcall on the Objection and Suspension motions be taken.

OBJECTION/SUSPENSION ROLLCALL

N	Senator Pamela Althoff	Y	Representative Greg Harris
A	Senator Bill Brady	Y	Representative Lou Lang
Y	Senator Don Harmon	A	Representative David Leitch
N	Senator Karen McConnaughay	N	Representative Ron Sandack
Y	Senator Tony Muñoz	Y	Representative André Thapedi
Y	Senator Ira Silverstein	N	Representative Mike Tryon

The motion failed on a 6-4-0-2 vote (8 votes are required for a Suspension).

Representative Thapedi, seconded by Representative Harris, moved that:

JCAR object to the HFS emergency rule titled Medical Payment because the Department has not shown the existence of any situation warranting the use of emergency rulemaking. Since HFS has not yet received its FY16 appropriation for medical transportation services, it cannot, at this time, know that those appropriations will be inadequate to fund medical transportation services at the rates that existed in the most recent appropriation for this program (FY15) or the extent of any such inadequacy.

JCAR object to the DHS emergency rule titled Hospital Services because the Department has not shown the existence of any situation warranting the use of emergency rulemaking. Since HFS has not yet received its FY16 appropriation for transitional supplemental Medicaid payments to hospitals, which include the Medicaid Facilitation and Utilization Payments terminated by this emergency rule, it cannot, at this time, know that those appropriations will be inadequate to continue these payments.

JCAR object to the DHS emergency rule titled Child Care because the Department has not demonstrated the existence of any situation that warrants the use of emergency rulemaking. As DHS has not yet received its FY16 appropriation for the Child Care Assistance Program, it cannot, at this time, know that those appropriations will be inadequate to serve all those who were eligible prior to the adoption of this emergency rule or the extent of any such inadequacy.

JCAR object to the ILRB emergency rule titled General Procedures because the Department has not shown the existence of any situation warranting the use of emergency rulemaking. Since ILRB has not yet received its FY16 appropriation for court reporting services, it cannot, at this time, know that those appropriations will be inadequate to fund court reporting services.

Representative Thapedi cited the following cases in support of the motion: *Champaign-Urbana Public Health District v. Illinois Labor Relations Board*, 354 Ill. App. 3d 482 (2004), *Senn Park Nursing Center v. Miller*, 104 Ill. 2d 169 (1984), and *Caro ex rel. State v. Blagojevich*, 385 Ill. App. 3rd 704 (2008).

Co-Chair Harmon announced that a voice vote would be taken on the motions.

OBJECTION ROLL CALL

N	Senator Pamela Althoff	Y	Representative Greg Harris
A	Senator Bill Brady	Y	Representative Lou Lang
Y	Senator Don Harmon	A	Representative David Leitch
N	Senator Karen McConnaughay	N	Representative Ron Sandack
Y	Senator Tony Muñoz	Y	Representative André Thapedi
Y	Senator Ira Silverstein	N	Representative Mike Tryon

The motion passed on a 6-4-0-2 vote.

CERTIFICATION OF NO OBJECTION

Senator McConnaughay moved, seconded by Representative Tryon, that the Committee inform the agencies to whose rulemakings (as of adjournment) the Committee did not vote an Objection or an Extension, or did not remove from the No Objection List, that the Committee considered their respective rulemakings at the monthly meeting and, based upon the Agreements for modification of the rulemakings made by the agencies, no Objections will be issued. The motion passed unanimously (10-0-0-2).

AUGUST MEETING DATE

Co-Chair Harmon announced that the next monthly meeting of JCAR is scheduled for 11:00 a.m. on Tuesday, September 15, 2015, at Room 600C of the Michael A. Bilandic Building, Chicago IL unless the legislative schedule dictates a change in venue.

ADJOURNMENT

Senator Althoff moved, seconded by Representative Lang, that the meeting stand adjourned. The motion passed unanimously (10-0-0-2).

Min:0815Aug