

MINUTES

Rules Review Committee



Representative Jon Hansen, Chair
Senator Jean Hunhoff, Vice Chair

Four hundred fourth meeting
Monday, December 27, 2021

Room 414 – State Capitol
Pierre, South Dakota

The four hundred fourth meeting of the Interim Rules Review Committee (IRRC) was called to order by Representative Jon Hansen, Chair, at 10:01 a.m. (CT) on December 27, 2021, via electronic conference and in Room 414 at the State Capitol, Pierre, South Dakota.

A quorum was determined with the following members present: Representatives Ryan Cwach, Jon Hansen, Chair, and Kevin Jensen; and Senators Troy Heinert, Jean Hunhoff, Vice Chair, and Timothy Johns. Staff members present were John McCullough, Code Counsel, Rachael Person, Administrative Specialist, and Hilary Carruthers, IT Support Specialist.

All material distributed at the meeting is attached to the original minutes on file in the Legislative Research Council (LRC). For continuity, these minutes are not necessarily in chronological order.

Approval of Minutes

Senator Johns moved, seconded by Representative Jensen, that the November 15, 2021, meeting minutes be approved. Motion prevailed on a roll call vote with 5 ayes and 1 excused. Voting aye: Hansen, Heinert, Hunhoff, Jensen, and Johns. Excused: Cwach.

Rules Reviewed

Department of Health: Amend rules to require that:

- No medical abortions by use of mifepristone and misoprostol be conducted except in a licensed abortion facility, with an observation period;
- The pregnant woman be informed that if she changes her mind and decides to carry the baby to term, the effects of the medications maybe reversable; and
- Abortion facilities collect and maintain certain information.

Ms. Ally Turnow and **Ms. Lynne Valenti, Department of Health**, reviewed the proposed rules, which the department testified were prompted in part by recent action by the federal Food and Drug Administration (FDA) and aligned with [Executive Order 2021-12](#), signed by Governor Noem, on September 7, 2021.

Public Testimony

Ms. Nancy Turbak, Planned Parenthood of the Northcentral States, testified in opposition to the proposed rules, saying that the FDA's action earlier this month did not change current South Dakota law regarding administering the two abortion drugs: the protocol requires mifepristone to be given in a clinic while misoprostol could be administered at home or at another appropriate location. Ms. Turbak stated the proposed rules set unnecessary restrictions on misoprostol, and the action by the department constitutes an overreach of government.

Written testimony in opposition to the proposed rules was provided to the committee members by [Ms. Jett Jonelis, ACLU of South Dakota](#), and [Mr. Jake Kammerer](#), testifying on behalf of himself.

In rebuttal, Ms. Turnow cited [SDCL 34-23A-51](#) as giving the department the authority to promulgate the rules and said the Executive Order stated the Department of Health was to begin rule-making in this area.

Representative Cwach responded that [SDCL 34-23A-56](#) specifies what must occur at the woman's first meeting with the doctor but nothing dictates how the second drug must be handled. He asked how the proposed rules implement laws the South Dakota Legislature has passed regarding abortion. Ms. Turnow responded that the department has the authority to set the minimum standards for abortion facilities, including how abortion drugs are handled. Ms. Valenti added that the statutes pertaining to abortion requirements in South Dakota show clear legislative intent in instructing the department to establish the minimum requirements. She said the department also wants to ensure women are protected and informed of their options through all stages of the process.

Senator Heinert asked if the second drug (misoprostol) is necessary for an abortion. Ms. Turnow answered the process involves a two-drug regimen.

In further response to Senator Heinert, Ms. Turbak said the first drug terminates the pregnancy while the second drug contracts the uterus and flushes out the contents.

Senator Hunhoff asked if the process for a regular abortion at a facility differs from a chemical abortion in terms of education and follow-up. Ms. Valenti said the process is the same in those areas.

Senator Hunhoff inquired how many chemical abortions were performed in South Dakota prior to the FDA changes of December 16, 2021. Ms. Turbak stated about 40 percent of abortions in the state are chemical and include two clinic visits; the proposed rules would add a third visit for chemical abortions.

Representative Hansen thanked the Department of Health and the Noem administration for their work on the rules, saying abortion is a serious medical event and the health and safety of pregnant mothers should be protected. Representative Jensen agreed. He said the opponents appear to be saying it is an inconvenience for a woman to have to go in for a third visit and that should never be a concern when it comes to health issues.

Representative Hansen moved, seconded by Representative Jensen, that the review of the rules proposed by the Department of Health is complete.

Senator Heinert urged members to resist the motion as the second drug does not induce the abortion but rather finishes the process. He said the discussion appears to be about putting into administrative rule, an Executive Order, and that is not how the process is intended to work.

Motion failed on a roll call vote with 3 ayes and 3 nays. Voting aye: Hansen, Hunhoff, and Jensen. Voting nay: Cwach, Heinert, and Johns.

Senator Johns commented that the rules could be reverted to address concerns from the committee, including patient safety and whether the proposed rules added an unnecessary burden in relation to minimum standards.

Representative Cwach moved, seconded by Senator Heinert, that the rules proposed by the Department of Health be reverted to a step prior under SDCL 1-26-4.7(4). Motion failed on a roll call vote with 2 ayes and 4 nays. Voting aye: Cwach and Heinert. Voting nay: Hansen, Hunhoff, Jensen, and Johns.

Senator Hunhoff told members that as two of the three actions the committee could take regarding administrative rules had failed, their only remaining option is to not approve and suspend the rules. She asked Code Counsel McCullough for clarification on that process.

Mr. McCullough explained that an agency could proceed with filing their proposed rules with the Office of the Secretary of State without the IRRC's approval, and should that happen, the committee could meet again and vote to suspend the rule. He said state law does not require the IRRC to do anything other than hear the rule.

Senator Hunhoff confirmed that during her tenure on the committee, rarely has an agency proceeded with filing rules without the IRRC's approval but it has happened. Representative Hansen said he had not contemplated an agency doing so without approval by the committee. Senator Heinert noted that as the members appeared to be at a stalemate and the 2022 Legislative Session begins in just a few weeks, it may be a good idea to revert the rules and determine if there is a legislative remedy for the situation.

Senator Hunhoff suggested the IRRC schedule another ad hoc meeting prior to the start of Session to rehear the rules. Members and the Department of Health agreed on Thursday, January 6, 2022, and directed that a meeting be so scheduled.

Office of the Attorney General: Adopt rules to provide the application and grant award process for the Heroes Wellness Grants program.

Ms. Amanda Miller and Mr. Brian Zeeb, Office of the Attorney General, reviewed the proposed rules, which resulted from the passage of [House Bill 1064](#) by the 2021 Legislature.

Public Testimony

Representative Rhonda Milstead, Chair, [Mental Health of First Responders Task Force](#), testified that the legislation was the result of a collaborative effort among first responders, and the proposed rules define the application and grant distribution process for the program. She said the program will help to ensure that first responders who need mental health support services will be able to receive them.

Senator Hunhoff asked how long an individual had to be in a leadership position before they could request a grant and if the costs of training are capped. Mr. Zeeb replied that there are no requirements regarding the length of employment and while there is no cap on training costs, there is a limited amount of funding available, which will have to be taken into consideration when decisions are made as to the amount awarded per grant.

Senator Hunhoff said she wanted some assurance in the passage of the proposed rules that the dollars will go as far and as long as possible. Mr. Zeeb responded that is their goal as well.

Senator Johns moved, seconded by Representative Jensen, that the review of the rules proposed by the Office of the Attorney General is complete. Motion prevailed on a roll call vote with 5 ayes and 1 excused. Voting aye: Hansen, Heinert, Hunhoff, Jensen, and Johns. Excused: Cwach.

Public Testimony

No public testimony was provided in addition to that offered on specific rules.

Adjournment

Representative Hansen moved, seconded by Senator Johns, that the meeting be adjourned. Motion prevailed on a roll call vote with 5 ayes and 1 excused. Voting aye: Hansen, Heinert, Hunhoff, Jensen, and Johns. Excused: Cwach.

Chair Hansen adjourned the meeting at 11:42 a.m.