

# MINUTES

## Rules Review Committee

Representative Jon Hansen, Chair  
Senator Jean Hunhoff, Vice Chair



Four hundred tenth meeting  
Tuesday, July 19, 2022

Room 414 – State Capitol  
Pierre, South Dakota

The four hundred tenth meeting of the Interim Rules Review Committee (IRRC) was called to order by Representative Jon Hansen, Chair, at 10:00 a.m. (CT) on July 19, 2022, in Room 414 at the State Capitol, Pierre, South Dakota.

A quorum was determined with the following members present: Representatives Jon Hansen, Chair, Ryan Cwach (remote), and Kevin Jensen; and Senators Red Dawn Foster (remote) and Jean Hunhoff, Vice Chair. Senator Timothy Johns was excused. Staff members present were Doug Decker, LRC Staff; Kelly Thompson, Supervisor of Text Editing Services; and Randy Stockwell, Network Administrator.

**NOTE:** For purpose of continuity, the following minutes are not necessarily in chronological order. All referenced documents distributed at the meeting are hyperlinked to the document on the Legislative Research Council website. This meeting was live streamed. The archived live stream is available at [sdlegislature.gov](https://sdlegislature.gov).

### Approval of Minutes

**Senator Hunhoff moved, seconded by Representative Jensen, that the June 14, 2022, meeting minutes be approved. Motion prevailed on a roll call vote with 5 AYES and 1 EXCUSED. Voting AYE: Cwach, Foster, Jensen, Hunhoff, and Hansen. EXCUSED: Johns.**

### Staff Report

**Mr. Doug Decker, LRC Staff,** advised members that he is assisting LRC with administrative rules on a temporary basis through September until a new Code Counsel is hired and begins employment.

### Rules Reviewed

**[South Dakota Board of Examiners in Optometry \(Department of Health\):](#)** Amend rules to:

- Reflect statutory changes made by the 2022 Legislature;
- Remove unnecessary barriers to licensure;
- Update language to reflect current terminology and practice; and
- Correct references to authority and legal references.

**Ms. Deni Amundson, Executive Director, and Ms. Angela Hase, Board President, South Dakota Board of Examiners in Optometry,** reviewed the proposed rules, which were prompted by the passage of House Bill [1028](#) by the 2022 Legislature.

### Public Testimony

**Ms. Deb Mortensen, South Dakota Optometric Society,** said her organization supported both the bill and the resulting rules, as well as the removal of the Current Procedural Terminology (CPT) code list from current rule.

According to Ms. Mortensen, clear scope language exists in codified law and no optometrists are working outside of their scope.

**Mr. Tim Engel, South Dakota State Medical Association**, expressed the organization's opposition to the proposed rules, citing concern over patient safety, and saying the rules do not conform with legislative intent. Mr. Engel testified that the CPT code list should not be repealed but instead be amended to include a definition for surgery to clarify what types of surgeries optometrists are authorized to perform.

**Dr. Ryan Geraets, South Dakota Academy of Ophthalmology**, also spoke in opposition to the elimination of the CPT codes in rule, citing patient safety as a concern. He said the lack of a definition of surgery could lead to a possible scope expansion for optometrists.

### Rebuttal

Ms. Amundson said the board discussed its options regarding the CPT code list and the scope of practice for optometrists and had reached out to the South Dakota State Medical Association, via letter, about the organization's concerns ([Document 1](#)).

Representative Hansen asked for an example of the type of surgery that cannot be performed by an optometrist. Ms. Hase, representing the Board of Examiners in Optometry, could not provide a specific example but said removal of the code list was an attempt to clean up the rules. Dr. Geraets said optometrists routinely perform some surgical procedures, and do them well, but he remains concerned that in the absence of a surgery definition, scope expansion could occur.

Senator Hunhoff asked how many complaints the board has received from patients and practitioners regarding surgical procedures being carried out by an optometrist. Ms. Amundson responded in her 17 years with the board, she has received no complaints regarding scope of practice.

Senator Hunhoff asked Dr. Geraets how many patients had been referred to him as the result of a surgical issue. He replied none because the CPT code list was in rule.

Representative Hansen inquired about the penalty for an optometrist who performs procedures outside the scope of practice. Ms. Amundson explained the investigative process and determination by the board; the penalty could include revocation of their license.

Senator Hunhoff asked why the board is proposing to remove the CPT code list from rule. Ms. Amundson said the codes were initially put into rule to help optometrists bill for services and it is difficult for the board to maintain the list and keep it current. The list is maintained and copyrighted by the American Medical Association and could still be used by optometrists in South Dakota without appearing in the administrative rules that regulate them.

Senator Hunhoff inquired as to whether there are other professions in South Dakota that have eliminated the code list from their rules. **Ms. Megan Borchert, Counsel, South Dakota Board of Examiners in Optometry**, said no other board under the jurisdiction of the Department of Health has the list in their laws or rules although they all use it.

Representative Cwach questioned whether the board has the authority to remove the code list from rule. Ms. Borchert said the codes were in place for billing purposes not to protect the public, and the board may not have the authority to maintain the list.

Representative Hansen said the language in current rule regarding scope of practice is permissive, as a licensed optometrist MAY perform clinical procedures, and their scope of practice is defined in law. Representative Cwach disagreed, saying if the board does not want the code list in their rules, they should have it removed legislatively.

***Representative Hansen moved, seconded by Representative Jensen, that the review of the rules proposed by the South Dakota Board of Examiners in Optometry (Department of Health) is complete. Motion prevailed on a roll call vote with 3 AYES, 2 NAYS, and 1 EXCUSED. Voting AYE: Jensen, Hunhoff, and Hansen. Voting NAY: Cwach and Foster. EXCUSED: Johns.***

**Department of Health:** Amend rules to:

- Add regulations on testing of medical cannabis, including creation of batches and collection of samples;
- Add specificity for the tracking system requirements for medical cannabis establishments; and
- Bring the rules into statutory compliance following the 2022 Legislative Session.

**Ms. Ali Tornow, Department of Health,** reviewed the proposed rules which implement changes resulting from the passage of Senate Bills [4](#), [10](#), [18](#), [19](#), [21](#), [23](#), [24](#), [26](#), and [118](#) by the 2022 Legislature.

#### Public Testimony

**Mr. Ned Horsted, Cannabis Industry Association of South Dakota,** voiced his organization's support for the proposed rules and said he looks forward to working with the department on future rules regarding medical cannabis.

Representative Jensen said he is pleased to see the department and the industry working together on the issue.

***Representative Jensen moved, seconded by Representative Hansen, that the review of the rules proposed by the Department of Health is complete. Motion prevailed on a roll call vote with 5 AYES and 1 EXCUSED. Voting AYE: Cwach, Foster, Jensen, Hunhoff, and Hansen. EXCUSED: Johns.***

**Department of Health:** Amend rules to add Glycogen Storage Disease Type II (POMPE) to South Dakota's newborn screening panel.

**Ms. Jennifer DeHueck and Ms. Beth Dokken, Department of Health,** reviewed the proposed rules. Ms. Dokken explained that POMPE is a rare genetic mutation that can lead to heart failure in infants during their first year. The department had discussed adding it to the state's newborn screening panel in 2021 but the laboratory under contract at that time was not able to provide the testing for it.

Senator Hunhoff asked about the cost of the test and how families who have no insurance will pay for it. Ms. Dokken responded that the test costs eight dollars, with the cost being rolled into the bundled costs paid to the hospital for the birth of the child.

Representative Jensen inquired if babies born at home would be required to get the test. Ms. Dokken replied that all babies born in South Dakota would be required to be tested for POMPE, and that parents may opt out of the testing, if they choose to do so. The department provides education to parents to ensure they are aware of what they are opting out of before making that decision.

***Representative Hansen moved, seconded by Representative Jensen, that the review of the rules proposed by the Department of Health is complete. Motion prevailed on a roll call vote with 5 AYES and 1 EXCUSED. Voting AYE: Cwach, Foster, Jensen, Hunhoff, and Hansen. EXCUSED: Johns.***

**South Dakota Board of Education Standards (Department of Education):** Amend rules to:

- Expand the age range for developmental delay;
- Revise criteria and title for emotional behavioral disability;
- Clarify graduation provisions; and
- Update language.

**Ms. Amanda LaCroix and Ms. Linda Turner, Director, Division of Special Education and Early Learning, Department of Education,** reviewed the proposed rules, which were reverted by the IRRC at its June 14, 2022, meeting. The proposed rules being considered at this meeting represent a single chapter from the original set heard in June, and the remaining rules from that packet will continue to be reviewed for possible future action.

Representative Jensen asked if the Department of Education has the authority to declare a disability. Ms. Turner replied that under federal regulations, states can determine categories and eligibility. Representative Jensen commented he was surprised states are moving away from the term emotional disturbance to emotional disability, as serious emotional disturbance is the federal term used in a Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition ([DSM-5](#)), diagnosis. He added that making it a disability could be more stigmatizing for patients.

Representative Jensen asked who defines "normal" when looking at inappropriate feelings under normal circumstances, in developing a special education plan (SEP). Ms. Turner responded that it is up to school officials to determine a child's eligibility for assistance and that to be eligible for an SEP, the feelings of the child must be significantly impacting their educational performance.

As most disabilities are physical and not mental, Representative Jensen wondered if the rules, as proposed, would more negatively impact smaller school districts. Ms. Turner replied that all districts and school district coops work with school psychologists in determining whether a child needs and is eligible for help.

Senator Hunhoff asked for clarification on several definitions contained in the proposed rules. Ms. Turner provided additional information on orthopedic impairments, psychiatric diagnoses, and voice disorders.

Representative Hansen requested examples of the type of behavior that would meet the criteria of emotional disturbance. Ms. Turner said refusing to do tasks and verbal outbursts are among the types of behavior. As for the process, if a child is deemed eligible, the teacher would work with the school committee to develop behavior strategies and if they do not work, a special ed assessment would be conducted to determine whether the child falls under the disability category and if so, a behavior plan is developed.

Representative Hansen asked if the rules change was being proposed purely because emotional disability is a more respectful term than disturbance. Ms. Turner acknowledged that disturbance is an uncomfortable word for families to hear and teachers may have a negative view of a child who is classified as such; overall, the term emotional disability is more widely accepted in the education community.

Senator Hunhoff said if timeliness is a factor and something needs to be in place in rule for the upcoming school year, the proposed rules should be approved. If statutory changes are needed, they can be made in the 2023 Legislative Session.

***Senator Hunhoff moved, seconded by Representative Hansen, that the review of the rules proposed by the South Dakota Board of Education Standards (Department of Education) is complete.***

Representative Jensen expressed his concern over the change in terminology, noting that disability denotes a long-term situation, and said he will resist the motion.

Representative Cwach commented that the board did not go beyond its authority in promulgating the rules, which is what the IRRC is tasked with determining.

***Motion prevailed on a roll call vote with 4 AYES, 1 NAY, and 1 EXCUSED. Voting AYE: Cwach, Foster, Hunhoff, and Hansen. Voting NAY: Jensen. EXCUSED: Johns.***

**Department of Game, Fish and Parks:** Amend rules to:

- Modify where a mentored antelope license is valid;
- Address an administrative rule clean-up that was overlooked when the cervid carcass transportation and disposal regulations were modified in May of 2021;
- Establish new rules within the Spring Turkey Hunting Season chapter that provides for mentored youth turkey recruitment licenses, including the areas that are open, who is eligible for the license, the number and types of licenses available, criteria to be considered when awarding licenses to non-governmental organizations, deadline for applications, and the requirement that the commission select awardees of the licenses;
- Change the number of turkey licenses available for the Fall Wild Turkey Hunting Season;
- Revise the Prairie Units for prairie fall turkey hunting;
- Correct and simplify deer units for archery and general muzzleloading deer hunting seasons and exclude Custer State Park from these seasons;
- Adjust the maximum number of one-tag "any antelope" licenses and two-tag antelope licenses;
- Modify units for the antelope hunting season;
- Modify the types of antelope tags available for the archery antelope season;
- Allow for mourning dove hunting at Shadehill State Recreation Park in Perkins County; and
- Simplify those deer units that are open for antlerless white-tailed deer licenses and exclude Custer State Park from the archery and muzzleloader deer hunting seasons.

**Mr. Tom Kirschenmann, Director, Wildlife Division, Department of Game, Fish and Parks,** reviewed the proposed rules.

Senator Hunhoff asked whether the mentored youth program for antelope was new and if it only applies to hunting on public land. Mr. Kirschenmann said the program has been available for eight to nine years on both public and private land. Responding to the Senator's request for data showing that private landowners are charging youth to hunt on their land, he responded that while hard data is not available, anecdotally from talking to landowners, nearly all of them allow youth to hunt on a mentor tag on their property.

Senator Hunhoff asked on what criteria the Game, Fish and Parks Commission bases its decision on whether an applicant can participate in a program. Mr. Kirschenmann explained that applicants must submit an application letter, provide proof of 501(c)(3) status, and detail their objectives including why they want to participate; other factors such as conservation efforts and mentor hunting are also taken into consideration. Senator Hunhoff commented that for a program to be successful, the criteria should be clearly spelled out to avoid any bias when members change on the commission. While she was disappointed at the lack of specific criteria, she said she would not make a motion to revert the rules but would like to see more defined criteria in future rules.

Representative Jensen asked in what hunting units are muzzleloading deer tags available. Mr. Kirschenmann said if antlerless deer licenses are issued in a unit, muzzleloading licenses would be valid there as well.

***Representative Hansen moved, seconded by Senator Hunhoff, that the review of the rules proposed by the Department of Game, Fish and Parks is complete. Motion prevailed on a roll call vote with 5 AYES and 1 EXCUSED. Voting AYE: Cwach, Foster, Jensen, Hunhoff, and Hansen. EXCUSED: Johns.***

**South Dakota Commission on Gaming (Department of Revenue):** Adopt and amend rules to:

- Update to and utilize the most current version of the medication schedule for racehorses;
- Adopt the most current version of the uniform classification guidelines for horseracing;
- Require licensees to keep the commission updated with the licensee's current contact information;
- Specify which licensees may play in poker games;
- Transfer rules regarding manned surveillance rooms to the rules chapter on security and surveillance;
- Put into place patron protection information for gaming and gaming integrity monitoring measures;
- Allow for voluntary self-exclusion plans for gaming;
- Remove the requirement for retention of video images; and
- Allow for round robin parlay bets.

**Mr. Doug Abraham and Mr. Mark Heltzel, South Dakota Commission on Gaming,** reviewed the proposed rules.

Senator Hunhoff asked for a definition of patron protection information. Mr. Abraham said that it would include information about the risks of excessive gambling, that underage gambling is illegal, and the availability of self-exclusion measures. The proposed rule would require a licensee to designate an individual within their organization who is responsible for ensuring the information is posted within the casino and provided to patrons upon demand.

Senator Hunhoff inquired about self-exclusion plans and what prompted their inclusion in the proposed rules. Mr. Abraham explained that under a self-exclusion plan, a recovering compulsive gambler can request to be added to a list of individuals who cannot gamble within a licensee's establishment. Mr. Heltzel noted the rules change was not the result of a specific situation in Deadwood but that self-exclusion plans are an industry standard in sports wagering operations across the United States.

***Senator Hunhoff moved, seconded by Representative Jensen, that the review of the rules proposed by the South Dakota Commission on Gaming (Department of Revenue) is complete. Motion prevailed on a roll call vote with 5 AYES and 1 EXCUSED. Voting AYE: Cwach, Foster, Jensen, Hunhoff, and Hansen. EXCUSED: Johns.***

**South Dakota Division of Insurance (Department of Labor and Regulation):** Amend rules to update the sources referenced in rule; and adopt rules to allow and clarify when an insurance company can claim credit for purchasing reinsurance.

**Ms. Lisa Harmon, Division of Insurance,** reviewed the proposed rules.

***Senator Hunhoff moved, seconded by Representative Jensen, that the review of the rules proposed by the South Dakota Division of Insurance (Department of Labor and Regulation) is complete. Motion prevailed on a roll call vote with 5 AYES and 1 EXCUSED. Voting AYE: Cwach, Foster, Jensen, Hunhoff, and Hansen. EXCUSED: Johns.***

#### **Public Testimony: General Purposes**

No public testimony was offered or received.

### **Adjournment**

***Representative Jensen moved, seconded by Senator Hunhoff, that the meeting be adjourned. Motion prevailed on a roll call vote with 5 AYES and 1 EXCUSED. Voting AYE: Cwach, Foster, Jensen, Hunhoff, and Hansen. EXCUSED: Johns.***

Chair Hansen adjourned the meeting at 12:58 p.m.