

MINUTES

Rules Review Committee



Senator Jean Hunhoff, Chair
Representative Jon Hansen, Vice Chair

Four hundred twenty-third meeting
Monday, April 15, 2024

Room 414 – State Capitol
Pierre, South Dakota

The four hundred twenty-third meeting of the Interim Rules Review Committee (IRRC) was called to order by Senator Jean Hunhoff, Chair, at 10:08 a.m. (CT) on April 15, 2024, in Room 414 at the State Capitol, Pierre, South Dakota.

A quorum was determined with the following members present: Senators Jean Hunhoff, Chair, Red Dawn Foster (remote), and Jim Mehlhaff; and Representatives Jon Hansen, Vice Chair, Roger DeGroot, and Erin Healy. Staff members present were Justin Goetz, Code Counsel; Kelly Thompson, Legislative Editor; and Hilary Carruthers, Legislative Systems Analyst.

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.

Approval of Minutes

Representative Healy moved, seconded by Representative Hansen, that the February 28, 2024, meeting minutes be approved. Motion prevailed on a unanimous voice vote.

Rules Reviewed

Department of Health: Amend a rule to add Newborn Hearing Screening to South Dakota's newborn screening panel.

Ms. Beth Dokken, Department of Health, reviewed the proposed rules and told committee members that three in every one thousand newborns nationwide experience hearing issues.

Representative Hansen requested an explanation of how the hearing screenings are conducted. Ms. Dokken said the screening is generally conducted in a hospital setting, and medical personnel use a simple instrument – a probe in the ear -- to perform the screening test. If the baby fails the test, the baby is referred to a pediatrician, thereby placing the baby into the system of care.

Senator Hunhoff asked about the follow-up procedures for treatment if a baby fails the hearing screening. Ms. Dokken responded that results of the screening are provided to the Department of Health in instances in which the newborn fails the initial screening test. The agency then follows up with the family and the baby's physician to make sure a second screening test is performed. A newborn who fails both screenings can be referred to the Department of Education's Birth to Three program.

Replying to Senator Hunhoff on how the agency ensures parents get a second screening for their baby, Ms. Dokken said both the department and the hospital conducting the screening contact parents directly to make sure the second test is conducted.

(Both the above and below rule revision proposals revised one section – the same section of the ARSD – and were therefore combined to be addressed in one motion by the Committee.)

Department of Health: Amend a rule to add X-linked adrenoleukodystrophy (X-ALD) to South Dakota's newborn screening panel.

Ms. Beth Dokken, Department of Health, reviewed the proposed rules, saying X-ALD has been recommended for inclusion on South Dakota's screening panel since 2016 and that one in every 17,000 newborns nationwide has the disorder. The cost of an X-ALD test is two dollars per test and is usually covered by insurance.

Senator Hunhoff asked how an X-ALD prognosis impacts the baby's life expectancy. Ms. Dokken explained that once a baby starts exhibiting symptoms of the disorder, the life expectancy is usually three years. Early screening for X-ALD allows the parents to have a conversation with the baby's doctor to determine treatment options before symptoms appear. Ms. Dokken also confirmed for Senator Hunhoff whether there is an automatic genetic counseling referral in these circumstances.

Representative DeGroot inquired as to whether the hearing and X-ALD screenings would be required and what the process is if parents do not want the tests performed on their child. Ms. Dokken said approval of the rules will make the tests required but parents can file a form to opt out of a screening, if they so choose. If an opt out is requested, the Department of Health follows up with the parents to ensure they understand the risks.

Representative Healy 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 6 AYES. Voting AYE: DeGroot, Foster, Healy, Mehlhaff, Hansen, and Hunhoff.

South Dakota State Board of Dentistry (Department of Health): Adopt rules to address maintenance, timelines, transfer, and destruction of records maintained by dentists and dental entities.

Ms. Brittany Novotny, South Dakota State Board of Dentistry, reviewed the proposed rules. Ms. Novotny indicated the rules were the result of a request from stakeholders who were asking for guidance on patient records.

Senator Hunhoff moved, seconded by Representative Healy, that the review of the rules proposed by the South Dakota State Board of Dentistry (Department of Health) is complete. Motion prevailed on a roll call vote with 6 AYES. Voting AYE: DeGroot, Foster, Healy, Mehlhaff, Hansen, and Hunhoff.

Department of Agriculture and Natural Resources: Amend rules to change the start date of the State Fair, adding an additional day, and increase admission, parking, and camping fees accordingly to reflect the added day.

Ms. Peggy Besch, South Dakota State Fair, reviewed the proposed rules and advised the committee that technical corrections recently received from the Legislative Research Council (LRC) would be addressed in the final version of the rules to be filed with the Secretary of State, if the rules are approved today. Ms. Besch indicated the revisions were necessary for stakeholders who show livestock at the fair and have too little time to perform and experience the rest of the fair, and to permit expansion of programming at the Dakota Events Complex (DEX).

Representative DeGroot moved, seconded by Representative Healy, that the review of the rules proposed by the Department of Agriculture and Natural Resources regarding the South Dakota State Fair is complete. Motion prevailed on a roll call vote with 6 AYES. Voting AYE: DeGroot, Foster, Healy, Mehlhaff, Hansen, and Hunhoff.

South Dakota Animal Industry Board (Department of Agriculture and Natural Resources): Adopt a rule to clarify that sales of retail meat products would occur only when the producing retail store has full control of the sanitation, storage, and transportation of the products until purchased by the consumer.

Dr. Beth Thompson, South Dakota Animal Industry Board, reviewed the proposed rule. Dr. Thompson indicated that there are only a limited number of businesses that are using this practice, but this rule change allows the Board greater oversight of these businesses.

Senator Hunhoff asked why the rule was needed. Dr. Thompson responded it was the result of Board inspectors going out and finding these few businesses. The new rule is necessary to accommodate those businesses who were interested in utilizing the process.

Senator Hunhoff moved, seconded by Senator Mehlhaff, that the review of the rules proposed by the South Dakota Animal Industry Board (Department of Agriculture and Natural Resources) is complete. Motion prevailed on a roll call vote with 6 AYES. Voting AYE: DeGroot, Foster, Healy, Mehlhaff, Hansen, and Hunhoff.

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

- Clarify where an individual could hunt on private lands leased for public hunting access;
- Modify methods used for identification on tree stands, platforms, and portable blinds;
- Alter where an individual could place bait stations;
- Change the options for placing owner identification information on unattended trail cameras;
- Clarify that permission must be obtained to use trail cameras on private land leased by the department for hunting access;
- Clarify that the Oahe Downstream Recreation Area, West Shore Lake Access Area, and other areas north of Fort Pierre observe the Central Time zone;
- Adjust counties for the August Management Take hunting season unit;
- Revise the number of available nonresident waterfowl licenses;
- Adjust the number of "any elk" and "antlerless elk" licenses for the Black Hills and Custer State Park elk hunting seasons;
- Modify the maximum number of "any elk" licenses and provide the option for "antlerless elk" licenses for the Custer State Park early archery elk hunting season;
- Modify the maximum number of "any elk" and "antlerless elk" licenses for the archery elk hunting season;
- Revamp unit boundary descriptions for Black Hills archery elk and Black Hills firearm elk hunting units;
- Adjust the number of "antlerless elk" licenses for the Special Custer State Park antlerless elk hunting season;
- Modify unit boundary descriptions for the bighorn sheep hunting season;
- Specify the maximum number of ram bighorn sheep licenses available;
- Modify the number of "any elk" and "antlerless elk" licenses for the prairie elk hunting season; and
- Adjust unit boundary descriptions for the prairie elk hunting season.

Mr. Tom Kirschenmann, Department of Game, Fish and Parks, reviewed the proposed rules which represent the first packet submitted under the department's new attorney, Mr. Nick Michels. Mr. Kirschenmann said of all of the subjects covered in the packet, the bulk of the public comments received by the department concerned nonresident waterfowl licenses.

Senator Hunhoff asked if the proposed increase impacted ten-day nonresident waterfowl licenses and what feedback was received from opponents on the rules change. Mr. Kirschenmann clarified that the increase applies only to three-day nonresident waterfowl licenses and that opponents representing a variety of organizations expressed concern over extending the increase to both three-day and ten-day licenses. The commission ultimately pulled back on the ten-day licenses.

Senator Hunhoff requested a breakdown on the number of nonresident licenses available in both categories. Mr. Kirschenmann reported for limited draw, nonresident licenses, there are 4,200 ten-day licenses and 2,100 three-day licenses available. The number of licenses is unlimited for resident hunters.

Responding to Senator Hunhoff regarding how current respiratory issues in bighorn sheep are impacting hunting licenses, Mr. Kirschenmann acknowledged that pneumonia is a concern in the sheep population and the commission reduced the number of licenses offered in impacted units from eight to two in response to the issue. Department biologists are looking at how the illness affects bighorn sheep management in South Dakota as well as how the situation is trending in other states.

Representative DeGroot inquired as to why the waterfowl take is being increased in northeastern South Dakota. Mr. Kirschenmann explained that the increase is to provide opportunities to hunt that reflect the waterfowl that exist in that part of the state, which includes the Prairie Pothole Region and is a high traffic area for migration, making it one of the best areas in the country for waterfowl hunting. He said the issue between residents and nonresidents regarding licenses for that region goes back to the 1940's.

Representative DeGroot asked if resident hunters in that area consider the waterfowl as South Dakota resources, thus meaning birds that are taken there should remain in the state. Mr. Kirschenmann responded that it is difficult to estimate what the potential harvest will be and most nonresident hunters hunt, on average, four hunting days a year. As the birds are migrating through South Dakota, they are harder to classify as a state resource as opposed to a resident wildlife species.

Senator Mehlhaff recalled that a similar conversation was held last year at which time the Department of Game, Fish and Parks did not recommend additional licenses. Mr. Kirschenmann confirmed that was the case and the commission nevertheless created a proposal to review the issue going forward.

Referencing public comments regarding decreasing mallard populations, Senator Mehlhaff asked whether commission members had the biology background to offer policy promoting an increase in license numbers. Mr. Kirschenmann said it was not a resource concern to add one hundred and five nonresident licenses. Waterfowl season structures are set by the U.S. Fish and Wildlife Service based on flyways and South Dakota's season is at the liberal level. According to Mr. Kirschenmann, the concerns raised by resident hunters involve social conversations about shortages of places to hunt. He noted the number of resident duck hunters has decreased by fifty percent in recent years.

Senator Mehlhaff asked where the pressure came from to increase nonresident waterfowl licenses if the department itself did not make that recommendation. Mr. Kirschenmann replied that the pressure always exists as South Dakota is the only state to have a lottery draw for these licenses.

Senator Hunhoff inquired as to where nonresidents do most of their hunting. Mr. Kirschenmann said while he could not provide an exact breakdown, generally it is a combination of private and public land, depending on the unit in which they are hunting.

Representative Hansen asked if the department is in favor of increasing the number of nonresident waterfowl hunting licenses. Mr. Kirschenmann explained that it was a commission proposal but the department believes there are enough resources available for people to hunt.

Senator Hunhoff requested an explanation of how the commission became focused on the issue if it was not proposed by the department. Mr. Kirschenmann responded that the proposal, prompted in part by requests from nonresident hunters, was brought forward by a commissioner who believed there were enough resources available to support the increase. Responding to Senator Hunhoff on whether there is a decrease in the duck population,

based on information provided by opponents, Mr. Kirschenmann said that while the department does not compile such numbers on its own, data received from the U.S. Fish and Wildlife Service appears to support that assertion.

Senator Foster asked how many licenses were available for nonresidents last year and how many were sold. Mr. Kirschenmann said of the 6,300 three-day and ten-day nonresident waterfowl hunting licenses available, three hundred remained unsold, all contained in one unit in central South Dakota.

Senator Hunhoff commented that the only rule within the department's packet with which she had concerns is that involving the waterfowl licenses. She noted that although there were three hundred responses in opposition to the proposed rule, the commission approved it anyway.

Representative DeGroot asked if it was possible to revert only that rule itself. **Mr. Justin Goetz, Code Counsel**, confirmed that the committee could take that action.

Senator Hunhoff moved, seconded by Representative Hansen, that rule 41:06:16:11 as proposed by the Department of Game, Fish and Parks be reverted to a step prior under SDCL 1-26-4.7. Motion prevailed on a roll call vote with 6 AYES. Voting AYE: DeGroot, Foster, Healy, Mehlhaff, Hansen, and Hunhoff.

Senator Mehlhaff moved, seconded by Representative Hansen, that the review of the remaining rules proposed by the Department of Game, Fish and Parks is complete. Motion prevailed on a roll call vote with 6 AYES. Voting AYE: DeGroot, Foster, Healy, Mehlhaff, Hansen, and Hunhoff.

South Dakota Board of Education Standards (Department of Education): Amend rules to make student learning objectives optional; revise outdated timelines; and clarify and update language.

Dr. Joseph Graves and Ms. Shannon Malone, Department of Education, reviewed the proposed rules. Ms. Malone advised members that a recent edit proposed by LRC will be made in the final version of the rules, if they are approved, before they are filed with the Secretary of State, and that an updated Form 5 – Fiscal Note was provided per LRC's request.

Representative Hansen requested an explanation of why student learning objectives would be made optional if the rules are approved. Dr. Graves explained that the objectives are part of an evaluation system that ranks teachers on a numerical basis for their success in meeting goals for their students. He said while some districts are using the process correctly, others are not. As an example, if a teacher sets a high bar and fails to meet it, their evaluation numbers will be low. So a teacher may then have an incentive to set a lower bar, one they can meet, which will result in better evaluation scores but not in better learning. Making the objectives optional could result in more accurate evaluations.

Representative Hansen asked who sets the student learning objectives and if the goal is a positive educational outcome for the students, is there another mechanism in the system that looks at the outcomes to determine if the teacher or school system is doing a good job. Dr. Graves replied that the learning objectives are determined by the teacher and school principal, and that the success of the objectives can also be determined by the type of students in the class. A teacher with a class of strong students may meet their objectives with no problems but a teacher with a difficult group of students may have trouble meeting their goals.

Senator Hunhoff inquired as to whether there is a timeframe already in administrative rule that specifies when the department needs to notify a school that it may proceed with alternative options. Dr. Graves said he is unaware of a specific timeframe in the rules but through the use of the Charlotte Danielson evaluation model, the decision is generally quick and easy. Senator Hunhoff suggested adding a timeframe to the rules in the future.

Representative DeGroot commented that he has not been in favor of student learning objectives because they can be easily manipulated and if accountability is removed, there is nothing to make a teacher want to move on and do a better job with their students. He said he supported the rule change, and that good teachers take students from where they are currently and move them forward to where they could be.

Senator Hunhoff moved, seconded by Senator Mehlhaff, that the review of the rules proposed by the South Dakota Board of Education Standards (Department of Education) is complete. Motion failed on a roll call vote with 3 AYES and 3 NAYS. Voting AYE: DeGroot, Mehlhaff, and Hunhoff. Voting NAY: Foster, Healy, and Hansen.

Senator Hunhoff asked members if any portion of the rules was sustainable or if the entire packet should be reverted, and what the unintended consequences could be if the entire package was reverted.

Representative Hansen stated his issue with the rules is in making the student learning objectives optional and perhaps the model is defective in the manner in which it allows objectives to be set up. His priority is the learning outcome for the students.

Representative Healy also expressed her concern over elimination of the student learning objectives and the lack of accountability in setting and meeting goals.

Representative DeGroot asked who holds the principal accountable if they allow a teacher's goals to be too easy to attain, and wondered if there would be no goals for the teacher to try to achieve if the learning objectives were removed. Dr. Graves stated the school superintendent would hold the principal accountable, and the current use of the objectives may penalize those teachers who set strong objectives by comparing them against teachers who have set easier-to-attain goals.

Noting the current model has been in use for fifteen years, Representative DeGroot inquired whether it was time to review the model and its effectiveness. Dr. Graves responded that when it was first brought to the Legislature, the Charlotte Danielson model was adopted as a means to make districts that were not evaluating themselves begin to do evaluations.

Representative Hansen moved, seconded by Senator Foster, that the rules as proposed by the South Dakota Board of Education Standards (Department of Education) be reverted to a step prior under SDCL 1-26-4.7. Motion prevailed on a roll call vote with 4 AYES and 2 NAYS. Voting AYE: Foster, Healy, Hansen, and Hunhoff. Voting NAY: DeGroot and Mehlhaff.

Representative Healy advised the Board of Education Standards to come back before the committee at its May meeting to provide a more comprehensive explanation on how the model is being used, how it works, and what could replace student learning objectives if districts decide not to use them.

South Dakota Public Utilities Commission: Repeal a rule for which the law implemented has been repealed, and amend rules to:

- Remove citations to statutes that have been repealed;
- Change the fiscal requirements for grain buyer licensees;
- Remove certain master meter notice and filing requirements;
- Amend a deadline for annual telecommunications filings;
- Update references to federal regulations for pipeline safety; and
- Update documentation required of transmission pipeline operators.

Ms. Kristie Fiegen, South Dakota Public Utilities Commission, reviewed the proposed rules.

Senator Mehlhaff asked if Class A grain buyers are required to provide annual financial statements or need to maintain a level of equity all year long. **Mr. Cody Chambliss, South Dakota Public Utilities Commission**, answered that Class A grain buyers provide quarterly financial statements that may be produced internally or without the services of a certified public accountant.

In response to Senator Mehlhaff, Mr. Chambliss said buyers who do not keep up with voluntary credit sales are required to sell those contracts with ten days of failure to be at the minimum.

Senator Mehlhaff asked whether commissioners have any latitude to allow a company to come into compliance or liquidate a company in the best way possible for the farmers on the other side of the credit sale contracts, if they have to pay off the contracts. Mr. Chambliss replied that if a company fell out of compliance, the case would be brought before the commission which would have some leeway to work with the company.

Senator Hunhoff requested clarification on what kind of flexibility the commission has in such situations. Mr. Chambliss said in the past, the commission has allowed staff to waive certain rules to resolve the matter.

Representative Hansen moved, seconded by Representative DeGroot, that the review of the rules proposed by the South Dakota Public Utilities Commission is complete. Motion prevailed on a roll call vote with 6 AYES. Voting AYE: DeGroot, Foster, Healy, Mehlhaff, Hansen, and Hunhoff.

South Dakota Commission on Gaming (Department of Revenue): Amend rules to correct errors and statutory references concerning authority due to the repeal of certain sections of the South Dakota Codified Laws, and to clarify that individuals are entitled to receive notice of administrative action.

Mr. Doug Abraham, South Dakota Commission on Gaming, reviewed the proposed rules which were prompted by suggested edits the agency received from the LRC through its statutory-authority-for-rules review project.

Representative Hansen moved, seconded by Representative Healy, 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 6 AYES. Voting AYE: DeGroot, Foster, Healy, Mehlhaff, Hansen, and Hunhoff.

South Dakota Commission on Gaming (Department of Revenue): Amend a rule to add an additional pay level to the TriLux Bonus Blackjack with Super 3 table game.

Mr. Doug Abraham, South Dakota Commission on Gaming, reviewed the proposed rules.

Representative Hansen moved, seconded by Representative Healy, 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 6 AYES. Voting AYE: DeGroot, Foster, Healy, Mehlhaff, Hansen, and Hunhoff.

Staff Report

Mr. Justin Goetz, Code Counsel, reported that prompted by a project begun with the Code Commission in which he is reviewing all titles of code for inconsistencies and outdated items, he has begun looking at items that could be potentially updated in [chapter 1-26](#), which governs administrative procedures and rules. Mr. Goetz provided members with a listing of recommended edits for the rulemaking portions of chapter 1-26 and the reasons behind the recommendations; the same information has been provided to the Governor's office and agency attorneys for their review. Mr. Goetz indicated that these recommendations are provided to the IRRC because statute specifies the IRRC is the body that makes recommendations to the Legislature regarding administrative law, per SDCL 1-26-1.2.

Senator Hunhoff asked committee members to review the information and be prepared to take action at the May meeting.

Mr. Goetz advised the committee that he has inquired with the Administrative Law Committee under the State Bar of South Dakota as to the possibility of them reviewing the contested case statutes in chapter 1-26 and reporting back to the Interim Rules Review Committee (IRRC) with any recommended revisions. The IRRC would need to be on board with the concept before any formal request is made.

Representative Hansen said he has run a few cases through the administrative hearings process and is not aware of any complaints about the process. He asked that Mr. Goetz make sure the Administrative Law Committee is aware that any recommendations they make during their review may or may not be adopted by the committee or the Legislature.

Senator Hunhoff agreed, noting they would just be providing feedback and the IRRC would determine what to do with them. She also requested that the Administrative Law Committee use plain language to explain their recommendations so the committee understands what they are being asked to consider.

Public Testimony: General Purposes

No public testimony unrelated to proposed rules was received.

Closing Comments

Senator Hunhoff stated the committee's next scheduled meeting is May 7; currently four packets of proposed rules will be considered at that time.

Adjournment

Representative Healy moved, seconded by Senator Mehlhaff, that the meeting be adjourned. Motion prevailed on a voice vote.

Chair Hunhoff adjourned the meeting at 12:53 p.m.