

# ADMINISTRATIVE REGULATION REVIEW SUBCOMMITTEE

## Minutes of the June Meeting

June 9, 2020

### Call to Order and Roll Call

The June meeting of the Administrative Regulation Review Subcommittee was held on Tuesday, June 9, 2020, at 1:00 PM, in Room 171 of the Capitol Annex. Representative David Hale, Chair, called the meeting to order, and the secretary called the roll.

### Present were:

Members: Senator Stephen West, Co-Chair; Representative David Hale, Co-Chair; Senators Julie Raque Adams, Alice Forgy Kerr, and Reginald Thomas; Representatives Deanna Frazier, Mary Lou Marzian, and Tommy Turner.

Guests: Johanna Ballinger, Mike Nickles, Michael Wilson, Secretary of State; Larry Hadley, Anthony Grey, Board of Pharmacy; Jeff Allen, Board of Dentistry, Morgan Ransdall, Board of Nursing; Chuck O'Neal, Jeffrey Walther, John Wood, Board of Emergency Medical Services; Clint Quarles, Department of Agriculture; Amy Cabbage, Kimberlee Perry, Chuck Stribling, Robin Maples, Kristi Lowry, Labor Cabinet; Kate Shanks; Mark Guifoil, Jamie Eads, Jennifer Wolsing, Bob Brady, Kentucky Harness Association, Joe Costa, Red Mile; Ken Jackson, Kentuckiana Farms; Mike Ziegler, Churchill Downs; Jim Avritt, Jr., Mike Meusser, Kentucky Harness Horseman's Association; Bruce Howard; Laura Begin, Elizabeth Caywood, Kara Daniel, Wesley Duke, Jason Dunn, Adam Mather, Wendy Morris, Kelli Rodman, Misty Sammons, Jonathan Scott, Donna Little, Cabinet for Health and Family Services; Wade Stone, Med Health Center; Mike Sherrod, Tristar Greenview Hospital; Erich Blackburn, Pikeville Medial Center; Janet Craig, Stites and Harbison; Betsy Johnson, Association of Health Care Facilities/ Centers for Assisted Living; Heidi Schissler Lanham; Department of Protection and Advocacy.

LRC Staff: Sarah Amburgey, Stacy Auterson, Emily Caudill, Ange Darnell, Emily Harkenrider, Karen Howard, Carrie Klaber, and Christy Young.

The Administrative Regulation Review Subcommittee met on Tuesday, June 9, 2020, and submits this report:

The subcommittee determined that the following administrative regulation was deficient pursuant to KRS 13A.030(2)(a):

LABOR CABINET: Department of Workplace Standards: Division of Occupational Safety and Health Compliance: Division of Occupational Safety and Health Education and Training

803 KAR 2:180. Recordkeeping, reporting, statistics. Amy Cabbage, general counsel; Kimberlee Perry, commissioner; and Chuck Stribling, occupational safety and health federal – state coordinator, represented the division. Kate Shanks, vice president, Kentucky Chamber of Commerce, appeared in opposition to this administrative regulation.

In response to questions by Senator Raque Adams, Ms. Perry stated that 803 KAR 2:180 was more stringent than federal requirements. Kentucky was a State Plan State, which required Kentucky to be at least as effective, or more protective, than federal OSHA requirements. This administrative regulation required an employer to report an incident that resulted in an employee hospitalization, including hospital admission for diagnostics or observation. The division needed this data for statistical and tracking purposes to determine trends. These trends were not statutorily required to be monitored, and a statistical survey service tracked these trends. Hospitalization tracking had been in place since 2006. The new requirements included hospital admission for diagnostics or observation. Senator Raque Adams stated that it might be advisable to work further with stakeholders.

Co-Chair West stated that prior to this amendment, employers were required to report employee hospitalizations related to work. The employer decided which incidents were work related. The amendment reversed that system, so that the division would determine which incidents were work related, not the employer. In response to questions by Co-Chair West, Ms. Perry stated that all incidents were now reportable to the division. A report would not necessarily cause an inspection to be performed. There had been incidents under the 2006 reporting system. An employer, for example, reported that an employee had experienced a fatal heart attack at work. Later, it was determined that the employee had not had a heart attack, but seemed to have died from a work-related incident. Ms. Cabbage stated that no public hearing was requested but that the division had received written public comments. Co-Chair West stated that more time for public input seemed prudent.

In response to a question by Co-Chair Hale, Ms. Shanks stated that the Kentucky Chamber of Commerce was opposed to this administrative regulation because this administrative regulation was more stringent than the federal requirements, and the reason for the increased stringency was unclear. Additional training for employers regarding these changes would be necessary; therefore, the chamber requested more time for this conversation.

In response to questions by Representative Marzian, Ms. Shanks stated that the Kentucky Chamber of Commerce commented during public comment period, along with

Greater Louisville Incorporated, Northern Kentucky Chamber of Commerce, and Commerce Lex. The division filed a Statement of Consideration in response to public comments but did not further amend this administrative regulation in response to public comments.

In response to a question by Co-Chair West, Mr. Stribling stated that an employer's requirement to report an employee's hospital admission for diagnostics or observation was added, because sometimes a formal hospitalization would continue as a response to diagnostics or observation. There was currently no reporting requirement for that situation. The division might miss statistics that would point to trends that needed to be addressed for employee safety. A report did not automatically result in an inspection being performed. Most employers reported out of an abundance of caution. Last year, the division inspected approximately forty-four (44) percent of facilities in response to a report. The data was necessary to track incidents, trends, and division response rates. A consultant, rather than a compliance officer, would be involved in the response to a report.

In response to a question by Senator Raque Adams, Mr. Stribling stated that there was a potential for a fine for an employer that did not report an incident. Failure to report an incident was usually determined by an employee filing a complaint.

In response to questions by Co-Chair West, Ms. Perry stated that the division respectfully declined to defer consideration of this administrative regulation to the July subcommittee meeting. Mr. Stribling stated that Section 2 of this administrative regulation included federal requirements that applied to several other administrative regulations in this package, which had to become effective within six (6) months. The federal deadline, which had already passed, made deferral difficult for the division. The previous administration did not wish to go forward with this administrative regulation until after the 2019 election; therefore, this change had been postponed and had missed the federal deadline.

In response to a question by Representative Frazier, Ms. Perry stated that the division respectfully declined to defer consideration of this administrative regulation, even if the deferral is for this administrative regulation only and separate from the other administrative regulations in this package, to the July subcommittee meeting.

In response to a question by Representative Marzian, Mr. Stribling stated that, after this subcommittee meeting, this administrative regulation would proceed on to the subject matter committee.

A motion was made and seconded to approve the following amendments: to amend Sections 1 and 2 to comply with the drafting and formatting requirements of KRS Chapter 13A. Without objection, and with agreement of the agency, the amendments were approved.

Co-Chair West made a motion, seconded by Senator Raque Adams to find this administrative regulation deficient. Co-Chair West withdrew his initial motion to clarify the motion. Co-Chair West made a clarified motion, seconded by Senator Raque Adams to find 803 KAR 2:180, as amended, deficient, while allowing the other administrative regulations in this package to continue through the process. A roll call vote was conducted, and with five (5) votes to find the administrative regulation deficient and three (3) votes against deficiency, this administrative regulation, as amended, was found deficient.

Senator Thomas explained his no vote. He stated that there seemed to be a discrepancy regarding the public comment period. Commerce Lex had not brought this concern to his attention, although they had been in close contact with him recently.

Representative Marzian explained her no vote. She stated that she agreed with the comments by Senator Thomas. Additionally, this was a very tepid worker-protection requirement that was needed for employee safety.

*Compiler's Note: Pursuant to KRS 13A.335(3)(a), a new Section 4 was added to this administrative regulation to reflect the finding of deficiency.*

#### Administrative Regulations Reviewed by the Subcommittee:

##### SECRETARY OF STATE: Notary Public

30 KAR 8:005 & E. Notary Public applications and electronic and online registrations. Mike Wilson, director of business services and deputy general counsel, represented the Secretary of State.

In response to a question by Co-Chair Hale, Mr. Wilson stated that this administrative regulation implemented changes commensurate with Senate Bill 114 from the 2019 Regular Session of the General Assembly. Social distancing requirements related to coronavirus (Covid 19) further necessitated this administrative regulation, which provided for remote and electronic notarization.

In response to questions by Co-Chair West, Mr. Wilson stated that “electronic notarization” meant notarizations for electronic records, while “remote on-line notarization” was a more general category, which included notarizations performed for a remotely located individual. These two (2) distinct categories were clarified by this administrative regulation. The authorizing statute did have ambiguities regarding this matter that might be clarified through future legislation.

A motion was made and seconded to approve the following amendments: to amend the NECESSITY, FUNCTION, AND CONFORMITY paragraph and Sections 1 through

8 to comply with the drafting and formatting requirements of KRS Chapter 13A. Without objection, and with agreement of the agency, the amendments were approved.

**BOARDS AND COMMISSIONS: Board of Pharmacy**

201 KAR 2:175. Emergency/Seventy-two (72) hour prescription refills. Anthony Gray, general counsel, and Larry Hadley, executive director, represented the board.

A motion was made and seconded to approve the following amendments: to amend the TITLE; the NECESSITY, FUNCTION, AND CONFORMITY paragraph; and Section 1 to comply with the drafting and formatting requirements of KRS Chapter 13A. Without objection, and with agreement of the agency, the amendments were approved.

201 KAR 2:230. Special limited pharmacy permit – Central Fill.

A motion was made and seconded to approve the following amendments: to amend the STATUTORY AUTHORITY and NECESSITY, FUNCTION, AND CONFORMITY paragraphs and Sections 1 and 3 to comply with the drafting requirements of KRS Chapter 13A. Without objection, and with agreement of the agency, the amendments were approved.

**Board of Dentistry**

201 KAR 8:550. Anesthesia and sedation. Jeff Allen, executive director, represented the board.

A motion was made and seconded to approve the following amendments: to amend Sections 1 and 4 through 6 to comply with the drafting and formatting requirements of KRS Chapter 13A. Without objection, and with agreement of the agency, the amendments were approved.

In response to a question by Co-Chair Hale, Mr. Allen stated that 201 KAR 8:550 was being amended in response to a sunset review and updates to the Americans with Disabilities Act. 201 KAR 8:590 was a new administrative regulation to implement teledentistry.

201 KAR 8:590. Teledentistry.

A motion was made and seconded to approve the following amendments: to amend the RELATES TO; STATUTORY AUTHORITY; and NECESSITY, FUNCTION, AND CONFORMITY paragraphs and Sections 1 through 6 to comply with the drafting and formatting requirements of KRS Chapter 13A. Without objection, and with agreement of the agency, the amendments were approved.

**Board of Nursing**

201 KAR 20:057 Scope and standards of practice of advanced practice registered nurses. Morgan Ransdell, general counsel, represented the board.

In response to a question by Co-Chair Hale, Mr. Ransdell stated that the most substantive changes in this package of administrative regulations were the amendments to 201 KAR 20:057. This administrative regulation established provisions related to self-prescribing controlled substances and prescribing of controlled substances to family members.

A motion was made and seconded to approve the following amendments: (1) to amend Section 1 to add a definition for “immediate family”; and (2) to amend the RELATES TO and NECESSITY, FUNCTION, AND CONFORMITY paragraphs and Sections 1, 2, 4 through 7, 9, and 10 to comply with the drafting and formatting requirements of KRS Chapter 13A. Without objection, and with agreement of the agency, the amendments were approved.

201 KAR 20:162. Disciplinary proceedings.

A motion was made and seconded to approve the following amendments: (1) to amend Section 2 to allow video recording in lieu of transcription by a court stenographer; (2) to amend Section 7 to delete provisions for financial hardship waiver of hearing costs; and (3) to amend the NECESSITY, FUNCTION, AND CONFORMITY paragraph and Sections 2, 5 through 7, and 10 to comply with the drafting and formatting requirements of KRS Chapter 13A. Without objection, and with agreement of the agency, the amendments were approved.

201 KAR 20:230. Renewal of licenses.

A motion was made and seconded to approve the following amendments: to amend the NECESSITY, FUNCTION, AND CONFORMITY paragraph and Sections 2 and 3 to comply with the drafting requirements of KRS Chapter 13A. Without objection, and with agreement of the agency, the amendments were approved.

201 KAR 20:370. Applications for licensure.

A motion was made and seconded to approve the following amendments: to amend the NECESSITY, FUNCTION, AND CONFORMITY paragraph and Sections 1 and 2 to comply with the drafting requirements of KRS Chapter 13A. Without objection, and with agreement of the agency, the amendments were approved.

201 KAR 20:410. Expungement of records.

A motion was made and seconded to approve the following amendments: to amend Sections 2 and 3 to comply with the drafting requirements of KRS Chapter 13A. Without objection, and with agreement of the agency, the amendments were approved.

COMMUNITY AND TECHNICAL COLLEGE SYSTEM: Board of Emergency Medical Services

202 KAR 7:555. Ground agencies. Chuck O'Neil, deputy executive director, and John Wood, counsel, represented the board.

DEPARTMENT OF AGRICULTURE: Office of the Consumer and Environmental Protection: Egg Marketing

302 KAR 10:011. Repeal of 302 KAR 010:010, 302 KAR 010:020, 302 KAR 010:030, 302 KAR 010:040, 302 KAR 010:050, 302 KAR 010:060, 302 KAR 010:070, 302 KAR 010:080, and 302 KAR 010:090. Clint Quarles, counsel, represented the department.

In response to a question by Co-Chair West, Mr. Quarles stated that the requirements for egg handling in 302 KAR Chapter 10 did not apply to small-scale egg producers.

302 KAR 10:015. Egg grading and classification.

A motion was made and seconded to approve the following amendments: to amend Sections 1 through 3 to comply with the drafting and formatting requirements of KRS Chapter 13A. Without objection, and with agreement of the agency, the amendments were approved.

302 KAR 10:025. License application, refusal, revocation, suspension, and appeals.

A motion was made and seconded to approve the following amendments: to amend the RELATES TO; STATUTORY AUTHORITY; and NECESSITY, FUNCTION, AND CONFORMITY paragraphs; Sections 2 through 7; and material incorporated by reference to comply with the drafting requirements of KRS Chapter 13A. Without objection, and with agreement of the agency, the amendments were approved.

302 KAR 10:100. Refrigeration of eggs and temperature requirements.

Office of the State Veterinarian: Livestock, Poultry, and Fish

302 KAR 22:050. Stockyards.

A motion was made and seconded to approve the following amendments: to amend the RELATES TO paragraph and Sections 1, 2, 4, 6, and 8 to comply with the drafting and formatting requirements of KRS Chapter 13A. Without objection, and with agreement of the agency, the amendments were approved.

LABOR CABINET: Department of Workplace Standards: Division of Occupational Safety and Health Compliance: Division of Occupational Safety and Health Education and Training

803 KAR 2:300. General. Amy Cubbage, general counsel; Kimberlee Perry, commissioner; and Chuck Stribling, occupational safety and health federal – state coordinator, represented the division.

803 KAR 2:320. Toxic and hazardous substances.

803 KAR 2:400. Adoption of 29 C.F.R. Part 1926 Subpart A.

803 KAR 2:403. Occupational health and environmental controls.

803 KAR 2:404. Personal protective and lifesaving equipment.

803 KAR 2:406. Signs, signals, and barricades.

A motion was made and seconded to approve the following amendments: to amend the NECESSITY, FUNCTION, AND CONFORMITY paragraph and Sections 1 and 2 to comply with the drafting requirements of KRS Chapter 13A. Without objection, and with agreement of the agency, the amendments were approved.

803 KAR 2:407. Materials handling, storage, use and disposal.

803 KAR 2:418. Underground construction, caissons, cofferdams, and compressed air.

A motion was made and seconded to approve the following amendments: to amend the RELATES TO and NECESSITY, FUNCTION, AND CONFORMITY paragraphs to comply with the drafting requirements of KRS Chapter 13A. Without objection, and with agreement of the agency, the amendments were approved.

803 KAR 2:422. Rollover protective structures; overhead protection.

803 KAR 2:425. Toxic and hazardous substances.

A motion was made and seconded to approve the following amendments: to amend Sections 1 and 2 to comply with the drafting requirements of KRS Chapter 13A. Without objection, and with agreement of the agency, the amendments were approved.

803 KAR 2:500. Maritime employment.

PUBLIC PROTECTION CABINET: Horse Racing Commission: Thoroughbred Racing

810 KAR 1:001. Definitions. Marc Guilfoil, executive director; Ken Jackson, owner, Kentuckiana Farms, and commission member; and Jennifer Wolsing, general counsel, represented the Horse Racing Commission. Bob Brady, Kentucky Harness Association, and Joe Costa, president and CEO, Red Mile, appeared in support of this package of administrative regulations. Jim Avritt, Jr., member, board of directors, Kentucky Harness Horsemen's Association, and Mike Meusser, attorney for the Kentucky Harness Horsemen's Association, appeared in opposition to 810 KAR 5:060, 810 KAR 5:070, 810 KAR 7:040, and 811 KAR 1:250.

In response to a question by Co-Chair West, Ms. Wolsing stated that 810 KAR 5:070, 810 KAR 7:040, and 811 KAR 1:250 established a new Kentucky Harness Association (KHA), as authorized by KRS 230.215. These three (3) administrative regulations passed the Horse Racing Commission in an eight (8) to zero vote. The new KHA would serve on the Sire Stakes Panel and would have authority to enter into contracts with racing associations in Kentucky. The goal of this package of administrative regulation was for consistency among administrative regulations within the commission in order to foster improvements to the standardbred industry. The thoroughbred industry in Kentucky had two (2) horsemen's groups. Having more than one (1) association achieved two (2) goals, including preventing a monopoly and giving the Horse Racing Commission options regarding with whom to contract. Neither thoroughbred association had been left out of the process. Other major racing jurisdictions in the US, including New York and Pennsylvania, had multiple associations. The commission's goal was for the standardbred industry to come to the same level of competency, cooperation, and diligence as was found in the thoroughbred industry, by representing a diverse array of interests.

In response to questions by Co-Chair Hale, Mr. Jackson stated that it was time for change in Kentucky regarding the standardbred industry. Three (3) racetracks: Thunder Ridge, Player's Bluegrass Downs, and Louisville Downs, had failed in this state during the last thirty (30) years. Thunder Ridge and Player's Bluegrass Downs both closed within the last four (4) years. These facilities closed due to lack of a viable product for fans. The purpose of the new KHA was to bring together the many components needed to support and advance the standardbred industry in Kentucky.

In response to questions by Representative Frazier, Mr. Jackson stated that the new KHA was formed in November 2019. There were three (3) original members, but more members were expected. The new KHA was developed methodically. Mr. Avritt stated that Mr. Jackson was the horsemen's representative to the commission during the discussion of the new KHA. He had a conflict of interest and did not abstain from voting on this matter.

In response to questions by Co-Chair Hale, Ms. Wolsing stated that New York and Pennsylvania both had multiple standardbred horsemen's representatives groups. Mr.

Guilfoil stated that New York had four (4) and Pennsylvania had two (2). Mr. Jackson stated that Ontario had more than one (1) association.

In response to a question by Co-Chair Hale, Mr. Avritt stated that, as a breeder, owner, racer, and trainer, he was opposed to establishing a second standardbred horsemen's association. In addition, he was a member of the board of directors for the existing KHHA. There were concerns regarding nepotism because Mr. Jackson was on the Horse Racing Commission and Mr. Jackson's brother-in-law, Bob Brady, was also involved in the new KHA. Mr. Jackson and his brother-in-law were also stakeholders in other horse businesses. The new KHA would establish contracts with these very entities. This was an obvious conflict of interest and a threat to members of the new association. The current association worked well to fulfill Kentucky's standardbred needs. New York and Pennsylvania did have multiple standardbred horsemen's associations; however, none competed against each other at the same tracks. The commission's Statement of Consideration stated that the new association could be used to take advantage of the members. The thoroughbred industry in Kentucky only had two (2) associations because, in the 1980s, Churchill Downs was having difficulty and decided to form its own negotiating association. Many sports teams did not have multiple associations because it was detrimental to members. It was a race to the bottom. There was nothing that required the new KHA to have more than three (3) members. Three (3) members was inadequate and put too much power in the hands of a small group. The existing association had been in existence for forty-seven (47) years. This matter was not adequately vetted by the Horse Racing Commission; very few questions were asked, and the new KHA's bylaws were not submitted. Rank-and-file horsemen were not included in the discussions. The three (3) facilities that failed did not fail because of the association. The association tried to keep those facilities open.

Senator Thomas stated that he had built his reputation on supporting the underdog and that he was therefore sensitive to Mr. Avritt's situation; however, the commission's statement from the Statement of Consideration seemed to have been taken out of context. The commission stated in the Statement of Consideration that the commission did not expect there to be a negative impact on the existing association's ability to contract with tracks and tracks would be able to contract with both associations simultaneously, which would be good for the racing industry as a whole. The Statement of Consideration also stated that racing might be improved and might not be sustainable otherwise. Kentucky's signature industries, such as bourbon and racing, should continue to be improved as much as possible. Mr. Avritt stated that the existing association had diligently supported racing for forty-seven (47) years in Kentucky. Thoroughbred and standardbred racing were not congruous, and what benefited the much larger thoroughbred industry would not necessarily benefit the smaller standardbred industry. Other states did not have competing associations with contracts at the same facilities because it was disadvantageous to the members.

In response to questions by Co-Chair West, Mr. Avritt stated that matters of contract for the associations included number of racing days, simulcast division, and division of wagers. Competition between associations would put members at a disadvantage in these matters. The simulcast and wager money was used to generate purses, which then flowed to the horsemen. Horsemen did not get money directly from the association. The money was also used to generate funding for the Sire Stakes Program. The new KHA was interested in money.

In response to a question by Co-Chair Hale, Ms. Wolsing stated that the Red Mile agreed in their letter that the existing association had worked hard to support the standardbred industry. The industry had become more diverse and could benefit from additional representation. Mr. Jackson stated that the industry had seen significant improvement and needed to be represented by professionals who supported the entire industry, rather than allowing more tracks to fail. The new KHA expected to have hundreds of members in the future. Mr. Avritt stated that the new KHA currently did not have enough members. The existing association was not responsible for track failures. The industry was not more diverse than in years past.

A motion was made and seconded to approve the following amendments: to amend the STATUTORY AUTHORITY and NECESSITY, FUNCTION, AND CONFORMITY paragraphs and Sections 1 and 2 to comply with the drafting and formatting requirements of KRS Chapter 13A. Without objection, and with agreement of the agency, the amendments were approved.

#### General

810 KAR 2:001. Definitions.

A motion was made and seconded to approve the following amendments: to amend the RELATES TO; STATUTORY AUTHORITY; and NECESSITY, FUNCTION, AND CONFORMITY paragraphs and Section 1 to comply with the drafting and formatting requirements of KRS Chapter 13A. Without objection, and with agreement of the agency, the amendments were approved.

#### Flat and Steeplechase Racing

810 KAR 4:030. Entries, subscriptions, and declarations.

A motion was made and seconded to approve the following amendments: to amend Sections 3 and 17 to comply with the drafting requirements of KRS Chapter 13A. Without objection, and with agreement of the agency, the amendments were approved.

#### Standardbred Racing

810 KAR 5:001. Definitions.

A motion was made and seconded to approve the following amendments: to amend the TITLE; the NECESSITY, FUNCTION, AND CONFORMITY paragraph; and Section 1 to comply with the drafting and formatting requirements of KRS Chapter 13A. Without objection, and with agreement of the agency, the amendments were approved.

810 KAR 5:060. Entries and starters.

810 KAR 5:070. Running of the race.

A motion was made and seconded to approve the following amendments: to amend the RELATES TO; STATUTORY AUTHORITY; and NECESSITY, FUNCTION, AND CONFORMITY paragraphs and Sections 1, 3 16, 26, 27, 39, 41, 43, 48, and 56 to comply with the drafting and formatting requirements of KRS Chapter 13A. Without objection, and with agreement of the agency, the amendments were approved.

#### Incentive and Development Funds

810 KAR 7:040. Kentucky Standardbred Development Fund and Kentucky Standardbred Breeders' Incentive Fund.

A motion was made and seconded to approve the following amendments: to amend the RELATES TO and NECESSITY, FUNCTION, AND CONFORMITY paragraph and Sections 1, 2, 5, 6, 12, 15, and 23 to comply with the drafting and formatting requirements of KRS Chapter 13A. Without objection, and with agreement of the agency, the amendments were approved.

#### Harness Racing

811 KAR 1:250. Exotic wagering.

A motion was made and seconded to approve the following amendments: to amend the RELATES TO; STATUTORY AUTHORITY; and NECESSITY, FUNCTION, AND CONFORMITY paragraph and Sections 2 through 7 to comply with the drafting requirements of KRS Chapter 13A. Without objection, and with agreement of the agency, the amendments were approved.

#### CABINET FOR HEALTH AND FAMILY SERVICES: Kentucky Health Program: Medicaid Services

895 KAR 1:002E. Repeal of 895 KAR 001:001, 895 KAR 001:010, 895 KAR 001:015, 895 KAR 001:020, 895 KAR 001:025, 895 KAR 001:030, 895 KAR 001:035, 895 KAR 001:040, 895 KAR 001:045, 895 KAR 001:050, and 895 KAR 001:055. Kelli

Rodman, executive director, and Jonathan Scott, regulatory and legislative advisor, represented the cabinet.

In response to questions by Co-Chair West, Mr. Scott stated that this administrative regulation was filed as an emergency because of concerns about on-going litigation costs. This situation complied with the statutory requirements for an emergency administrative regulation. Litigation was related to federal Medicaid laws. Co-Chair West stated that he was concerned about overuse of the emergency administrative regulation process and, in the future, more scrutiny would be placed on determining which administrative regulations truly were the result of an actual emergency.

#### Office of Inspector General: Division of Certificate of Need: Certificate of Need

900 KAR 6:075 & E. Certificate of need nonsubstantive review. Adam Mather, inspector general, and Kara Daniel, deputy inspector general, represented the office. Erich Blackburn, chief legal officer, Pikeville Medical Center; Janet Craig, attorney, Stites and Harbison; and Mike Sherrod, CEO, TriStar Greenview Hospital, appeared in opposition to this administrative regulation. Wade Stone, executive vice president, Medical Center Health, appeared in support of this administrative regulation.

In response to questions by Co-Chair West, Mr. Mather stated that this administrative regulation was filed as an emergency because the previous amendment to this administrative regulation resulted in specialty legislation, which only benefited one (1) provider in one (1) county. Originally, six (6) counties were expected to have providers affected by the amendment. Ms. Daniel stated that potential loss of state funds from the cost of on-going litigation was the stated reason for this administrative regulation. This emergency administrative regulation saved the cost of on-going litigation because that litigation stopped as the result of this filing. Co-Chair West stated that it was difficult to prove that litigation stopped as the result of an administrative regulation, and, in the future, more scrutiny would be placed on determining which administrative regulations truly were the result of an actual emergency.

In response to a question by Co-Chair Hale, Mr. Sherrod stated that Kentucky was one (1) of four (4) states with a Certificate of Need (CON) process. There were two (2) types of CON, substantive and nonsubstantive. The previous amendment to this administrative regulation changed EMS provider requirements to establish a nonsubstantive CON process. Patient care should always be the primary consideration. This change was a return to the substantive CON process. There was a lack of EMS access across Kentucky. For example, in Warren County, which was one (1) of the fastest-growing counties, there were two (2) hospitals, which were three (3) miles apart. The only EMS provider was directly affiliated with one (1) of the two hospitals. The EMS provider seemed to favor delivering patients to the ER of the hospital that was directly affiliated with the provider. Steering patients to the medically correct facility should be a high priority, which could better be accomplished with more than one (1) EMS provider in Warren County.

EMS providers should only go through nonsubstantive CON review in order to maintain patient choice. Lack of EMS access led to mortality and morbidity. Northern Kentucky had been hard-hit by coronavirus (Covid 19), which could impact EMS access, especially if there were EMS employee infections with only one (1) provider. Redundancy was going to be important regarding coronavirus (Covid 19.) Mr. Sherrod requested that the subcommittee move all EMS providers to nonsubstantive CON review or find this administrative regulation deficient.

In response to a question by Co-Chair Hale, Mr. Blackburn stated that Pikeville Medical Center was opposed to this administrative regulation. All EMS providers should be subject to only nonsubstantive CON review. Patients usually needed an EMS provider due to accident, illness, or transfer from one (1) medical facility to another or from a nursing home setting to a hospital and vice versa. Long wait times for any of these situations could result in death or long-lasting effects. Transfer delays affected bed turnover and could affect all patients “upstream.”

In response to a question by Co-Chair Hale, Ms. Craig stated that the cabinet has stated that all EMS providers cannot be classified for nonsubstantive CON review because the cabinet lacked statutory authority to do so. The cabinet did have the authority. EMS provider delays caused death and significant health effects. Coronavirus (Covid 19) created the need for redundancy in EMS providers in case of employee infections. The economic strain from coronavirus (Covid 19) created additional problems related to patient transport. Ms. Craig requested that the subcommittee move all EMS providers to nonsubstantive CON review.

In response to questions by Representative Frazier, Mr. Sherrod stated that taxes were not an issue. Service areas were assigned geographically by road.

In response to questions by Co-Chair Hale, Mr. Sherrod stated that there had been instances in which a patient requested to be transported to one (1) facility, but were instead transported to the hospital with which with EMS provider was directly affiliated. There were affidavits to that effect. Destination guidelines were often disregarded. Medical reasons could be a factor in determining which hospital a patient was taken; however, that was rarely the issue. Mr. Blackburn stated that Pikeville Medical Center applied for a CON in October 2019. A hearing was held with the opposition to the CON. The hearing was delayed due to coronavirus (Covid 19.) Judges in this matter had conflicts of interest because they sat on the board of directors.

In response to a question by Co-Chair Hale, Mr. Stone stated that Medical Center Health, a not-for-profit hospital, supported this administrative regulation because Medical Center Health had supported Warren County EMS for over forty (40) years. Warren County’s dispatch system was one (1) of only 250 accredited systems in the world. Warren County honored patient choice, and reports to the contrary were unsubstantiated. There did

not seem to be an emergency situation when this administrative regulation was last filed on an emergency basis. Surrounding EMS providers without affiliation with the hospital also brought patients to Medical Center Health. Medical Center Health accepted many patients with coronavirus (Covid 19,) not to benefit the hospital, but in the interest of public health.

A motion was made by Representative Frazier and seconded by Representative Turner to find this administrative regulation deficient. A roll call vote was conducted. There being two (2) votes to find this administrative regulation deficient and six (6) votes not to find this administrative regulation deficient, the motion failed.

Senator Thomas explained his no vote. There was no indication that Bowling Green had a public health crisis regarding EMS providers. The current EMS provider seemed adequate, and the CON process was in progress. If there was a need for a second EMS provider, that would be determined through the CON review process.

Department for Public Health: Division of Healthcare: Health Services and Facilities

902 KAR 20:036. Operation and services; personal care homes. Kara Daniel, deputy inspector general; Adam Mather, inspector general; and Wendy Morris, commissioner, represented the division. Betsy Johnson, president, Kentucky Association of Health Care Facilities – Kentucky Center for Assisted Living, appeared in opposition to this administrative regulation. Heidi Schissler, legal director, Kentucky Department of Protection and Advocacy, appeared for questions.

In response to a question by Co-Chair Hale, Mr. Mather stated that this administrative regulation included substantive changes that required Personal Care Home (PCH) staff to assist with a small number of clients transitioning to other living situations within the community. This assistance included helping clients learn Activities for Daily Living (ADLs) and Instrumental Activities for Daily Living (IADLs). Ms. Morris stated that there were federal requirements for state-funded supports for individuals who wished to live in the community, rather than in a congregate setting. In 2013, the cabinet first entered into an agreement with Kentucky Protection and Advocacy, as a response to the 1999 Olmstead decision. The settlement agreement had been amended twice since 2013. Staff of Community Mental Health Centers identified residents who wished to transition from congregate settings and worked with those individuals to develop a transition plan to establish which skills the individual needed to work on. PCH staff would then offer basic instruction on any identified ADL or IADL. Currently, there were seventeen (17) individuals in this situation across the state who were actively transitioning. This low number was unrelated to coronavirus (Covid 19.) The cabinet received feedback from PCHs and made changes to requirements based on that feedback. The training occurred during the normal workday. PCH staff were not responsible for identifying skills that

needed improvement and were not responsible for ensuring that the client mastered the skills. PCH staff were with clients on a daily basis and were already required by existing requirements to assist with ADLs. This amendment added IADLs to the assistance requirements. While there had not been an increase in funding for PCHs, the cabinet was working to address financial concerns.

In response to questions by Co-Chair Hale, Ms. Johnson stated that the Kentucky Association of Health Care Facilities – Kentucky Center for Assisted Living opposed this administrative regulation because the new requirements were burdensome and constituted an unfunded mandate. At the September 2019 meeting of this subcommittee, the subcommittee asked the cabinet to meet further with stakeholders on this matter. The cabinet had not met with the Kentucky Association of Health Care Facilities – Kentucky Center for Assisted Living to work on this administrative regulation but had met with Kentucky Protection and Advocacy. The subcommittee should ask the cabinet to defer consideration of this administrative regulation to the July meeting in order to meet further with stakeholders. While there were currently only seventeen (17) clients transitioning, there could be more in the future. PCHs were not a party to the settlement agreement but were subject to it. Bruce Linder checked on this administrative regulation every month, and the cabinet declined to meet with stakeholders every month.

In response to a question by Co-Chair Hale, Mr. Mather stated that the cabinet did meet with stakeholders. This was not an unfunded mandate. Coronavirus (Covid 19) had caused delays with this administrative regulation. Further deferral would likely not result in changes. Ms. Daniel stated that the cabinet made changes twice to this administrative regulation based on comments from stakeholders. The cabinet and stakeholders disagreed regarding the issue of ADLs and IADLs, and further deferral was not expected to result in additional changes. Ms. Morris stated that collaboration was very important for the clients trying to transition.

In response to a question by Senator Raque Adams, Ms. Johnson stated that there was a meeting with the cabinet last week; however, that discussion was focused on 921 KAR 2:015 & E, which was the next administrative regulation on the subcommittee's agenda.

In response to questions by Senator Thomas, Ms. Johnson stated that this situation was more complex than described. PCHs were not part of the settlement agreement. These requirements were intended for a higher level of professional, such as an occupational therapist. Most employees had high school diplomas. Senator Thomas stated that PCHs already taught some of these skills.

In response to a question by Co-Chair Hale, Ms. Morris stated that there had been a long process to establish the current version of the settlement agreement. This program was not occupational or other therapy. There had been a new appropriation of 2.2 million

dollars for the current seventeen (17) clients affected. Ms. Johnson stated that the General Assembly appropriated the 2.2 million dollars for all PCHs, regardless of transitioning clients.

*Further discussion of this matter is found in the section of these minutes regarding 921 KAR 2:015 & E, which is a companion administrative regulation to this one.*

At the September 16 meeting of the Administrative Regulation Review Subcommittee, a motion was made and seconded to approve the following amendments: to amend the NECESSITY, FUNCTION, AND CONFORMITY paragraph; Sections 1 through 4 and 7; and the SMI Screening Form to comply with the drafting and formatting requirements of KRS Chapter 13A. Without objection, and with agreement of the agency, the amendments were approved.

Department for Community Based Services: Division of Family Support: K-TAP, Kentucky Works, Welfare to Work, State Supplementation

921 KAR 2:015 & E. Supplemental programs for persons who are aged, blind, or have a disability. Laura Begin, regulation coordinator; Elizabeth Caywood, deputy commissioner; Kara Daniel, deputy inspector general; Adam Mather, inspector general; and Wendy Morris, commissioner, represented the division. Betsy Johnson, president, Kentucky Association of Health Care Facilities – Kentucky Center for Assisted Living, appeared in opposition to this administrative regulation. Heidi Schissler, legal director, Kentucky Department of Protection and Advocacy, appeared for questions.

In response to questions by Senator Raque Adams, Ms. Begin stated that the budget appropriation effective July 1, 2020, which established the 2.2 million dollars, was titled “Mental Illness or Intellectual Disability Supplemental Payments” and only specifically covered PCHs that served clients with mental illnesses or intellectual disabilities. Ms. Morris stated that there were currently seventeen (17) clients transitioning. The 2.2 million dollars was not solely for those seventeen (17) clients. Ms. Caywood stated that there were seventeen (17) PCHs that cared for up to 800 clients with mental illness or intellectual disabilities. PCHs also served clients such as the aged and blind. Senator Raque Adams stated that she preferred for these administrative regulations to be deferred to the July subcommittee meeting. Co-Chair West stated that he too preferred deferral to straighten out confusion.

In response to a question by Representative Frazier, Ms. Begin stated the cabinet recognized that it was frustrating that the budget language might not be as was intended.

Senator Thomas stated that these administrative regulations had already been delayed. The cabinet and stakeholders met last week without further resolution. It would be best for this matter to move forward.

In response to a question by Co-Chair West, Ms. Begin stated that there were forty (40) PCHs, but only seventeen (17) that were currently part of this program. Ms. Caywood stated that funding all forty (40) PCHs would represent an entirely new program, which could result in litigation. Ms. Schissler stated that the settlement agreement required ADLs and IADLs at all PCHs that served transitioning severely mentally ill clients. These requirements needed to move forward as part of the settlement agreement. Kentucky Department of Protection and Advocacy did not have a position regarding the funding component in the budget.

In response to questions by Co-Chair Hale, Ms. Johnson stated that the budget appropriation did not cite 902 KAR 20:036 or 921 KAR 2:015; therefore, funding was not limited as interpreted by the cabinet. PCHs were having difficulties finding adequate staff. These administrative regulations should be deferred to the July subcommittee. Mr. Mather stated that the cabinet would agree to defer 902 KAR 20:036. Ms. Begin stated that the cabinet would prefer not to defer 921 KAR 2:015 & E. Ms. Daniel stated that PCHs were already required to assist with ADLs and changes only added IADLs. The cabinet was not requiring specialty training.

A motion was made to approve the agency amendment, which proposed to amend Section 13 to allow a qualifying PCH to receive an increased per diem. Because there was not a second, the motion failed.

A motion was made and seconded to approve the following amendments: to amend Section 6 to comply with the drafting requirements of KRS Chapter 13A. Without objection, and with agreement of the agency, the amendments were approved.

Other Business: Co-Chair Hale introduced Senator Reginald Thomas who was appointed to the subcommittee to fill the senate vacancy previously held by Senator Perry Clark.

Co-Chair West stated that he was concerned about overuse of the emergency administrative regulation process and, in the future, more scrutiny would be placed on determining which administrative regulations truly were the result of an actual emergency.

The following administrative regulations were deferred or removed from the June 9, 2020, subcommittee agenda:

**BOARDS AND COMMISSIONS: Board of Pharmacy**

201 KAR 2:050. Licenses and permits; fees.

Board of Social Work

201 KAR 23:070. Qualifying education and clinical practice under supervision.

Real Estate Appraisers

201 KAR 30:130. Education provider, instructor, and course.

Office of Agricultural Marketing: Industrial Hemp

302 KAR 50:012. Repeal of 302 KAR 050:040 and 302 KAR 050:050.

302 KAR 50:020. Policies and procedures for hemp growers.

302 KAR 50:030. Policies and procedures for hemp processors and handlers.

302 KAR 50:055. Sampling and THC testing, post-testing actions, disposal of noncompliant harvests.

302 KAR 50:060. Fees for the Hemp Licensing Program and forms.

EDUCATION AND WORKFORCE DEVELOPMENT CABINET: Department for Libraries and Archives: Division of Library Services: Libraries

725 KAR 2:060. Certification of public librarians.

725 KAR 2:070. Certification renewal of public librarians.

LABOR CABINET: Department of Workers' Claims

803 KAR 25:010. Procedure for adjustments of claims.

PUBLIC PROTECTION CABINET: Horse Racing Commission: Medication Guidelines

810 KAR 8:010. Medication; testing procedures; prohibited practices.

810 KAR 8:030. Disciplinary measures and penalties.

810 KAR 8:070. Bisphosphonates.

Department for Medicaid Services: Division of Policy and Operations: Medicaid Services

907 KAR 1:604 & E. Recipient cost-sharing.

The subcommittee adjourned at 4:30 p.m. The next meeting of the subcommittee is tentatively scheduled for July 14, 2020, at 1 p.m.