

ADMINISTRATIVE REGULATION REVIEW SUBCOMMITTEE

Minutes of the June Meeting June 8, 2021

Call to Order and Roll Call

The June meeting of the Administrative Regulation Review Subcommittee was held on Tuesday, June 8, 2021, at 10:00 AM, in Room 149 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 and Alice Forgy Kerr; Representatives Randy Bridges and Deanna Frazier.

Guests: Richard Dobson, Bethany Rice, Department of Revenue; Eden Davis, Larry Hadley, Board of Pharmacy; Kelly Jenkins, Jeffrey Prather, Board of Nursing; Tim Cesario, Kevin Winstead, Board of Alcohol and Drug Counselors; Tony Hatton, Division of Waste Management; David Atha, Matthew Cole, Mary Cook, Virginia Day, Tiffany Duvall, Jon Johnson, Tom McDaniel, Larisa Plecha, Tristan Truesdell, John Smoot, Jason Siwula, Transportation Cabinet; Waqas Ahmed, Jamie Eads, Marc Guilfoil, Dr. Bruce Howard, Chad Thompson, Jennifer Wolsing, Kentucky Horse Racing Commission; Carrie Banahan, Edith Slone, Cabinet for Health and Family Services; Julie Brooks, Wes Duke, Paula Goff, Department for Public Health.

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

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

CABINET FOR HEALTH AND FAMILY SERVICES: Department for Public Health: Communicable Diseases

902 KAR 2:211E. Covering the face in response to declared national or state public health emergency. Julie Brooks, regulation coordinator, and Wes Duke, general counsel, represented the department.

In response to questions by Co-Chair West, Mr. Duke stated that the proposed agency amendments were to bring this administrative regulation, which was filed pursuant to the Executive Order in place prior to May 13, 2021, into compliance with the Governor's May 13, 2021 Executive Order, which was consistent with Centers for Disease Control

revisions to face covering requirements for members of the public who were vaccinated. The May 13, 2021 Executive Order would expire June 11, 2021, and the department expected action on this emergency administrative regulation on that date. The department expected future provisions to include face coverings for certain vulnerable populations, such as those in health care settings and long-term care facilities. The new measures should be consistent with statements by the Governor. Ms. Brooks stated that commenters during the public comment period expressed concerns regarding the lawfulness of this administrative regulation, actions by the department, a Centers for Disease Control study that commenters interpreted as demonstrating that face coverings were not effective, and religious conflicts. At the time that the department was developing the Statement of Consideration in response to the public comments, KRS Chapter 13A did not authorize amendments to emergency administrative regulations. Since that time, Senate Bill 2 from the 2021 Regular Session of the General Assembly has become effective, which now allowed the department to propose the agency amendments being considered by the subcommittee at this meeting. The proposed agency amendments did not revise provisions in response to any of the public comments received during the public comment period.

Co-Chair West stated that the current situation seemed to conflict with the Governor's statements that Kentucky would return to 100 percent capacity for all venues and events and the face covering measures would be lifted, including for the unvaccinated, with the exception of certain vulnerable populations. Mr. Duke stated that he expected this administrative regulation to be withdrawn on June 11, 2021.

In response to questions by Representative Frazier, Mr. Duke stated that the department requested to defer consideration of this emergency administrative regulation from this subcommittee meeting because the department expected to withdraw this administrative regulation on June 11, 2021. Co-Chair West stated that the subcommittee denied the department's request for deferral because it was important for the public to have information regarding the status of this administrative regulation in order for business and liability planning. Mr. Duke stated that this emergency administrative regulation did not reference KRS Chapter 13B; however, that was the due process system the department had been using for appeals pertaining to violations of this administrative regulation. Public Health Departments had the ability to cite businesses for failure to comply with the requirements of this administrative regulation. Approximately 320 violations had been issued to businesses. Most were first offenses that did not involve a fine. The first priority was to educate businesses, work with businesses on remedial measures, and assist businesses with compliance. Total fines that had been issued were under \$1,700 statewide for the duration of the requirements.

In response to a question by Senator Raque Adams, Mr. Duke stated that the proposed agency amendments were possible because Senate Bill 2 from the 2021 Regular Session of the General Assembly, authorized emergency administrative regulations to be

amended. Before Senate Bill 2, an emergency administrative regulation had to be withdrawn and refiled in order to make changes.

In response to questions by Co-Chair West, Mr. Duke stated that this administrative regulation might be clearer if it directly referenced KRS Chapter 13B for appeals provisions. Public Health Departments had authority in regular operations to utilize KRS Chapter 13B for hearings. Barring something unforeseen, the department planned to withdraw this administrative regulation June 11, 2021. In Mr. Duke's opinion, if a business asked a patron about vaccination status, that would probably not be a violation of HIPAA law; however, other laws such as the Americans with Disabilities Act, might be relevant. A business asking an employee about vaccination status was a different situation and different laws might be applicable. There was guidance available on this subject from the US Department of Labor. After June 11, 2021, the penalty of a business being closed for failure to comply would no longer apply. The department was unable to agree to withdraw this administrative regulation at this subcommittee meeting.

Co-Chair West stated that the administration had not built up a level of trust with the legislature. The legislature had, through legislation, made its intent regarding this topic clear during the 2021 Regular Session of the General Assembly. As the pandemic continued to abate, some of these administrative regulations seemed to be less about public health and more about control. It was dangerous for the government to use its power to influence very important individual, private medical decisions. Being allowed to go without a face covering established an incentive for vaccination if face coverings continued to be required for the unvaccinated. Some had made the conscious medical decision to remain unvaccinated because of the experimental nature of this vaccine. Remaining unvaccinated should be an individual, private medical decision.

A motion was made and seconded to approve the following amendments: to update provisions in compliance with the Executive Orders currently in place, including: (1) an exemption for a person who has received the final dose of a COVID-19 vaccine at least fourteen (14) days prior; (2) to delete outdated requirements; and (3) to add the current face covering provisions for unvaccinated individuals, which included public transportation, school, health care, long-term care, correctional, or homeless shelter settings; and those who are immunocompromised, those who are exhibiting symptoms of COVID-19, or those who have tested positive for COVID-19 in the prior ten (10) days. Without objection, and with agreement of the agency, the amendments were approved.

Co-Chair West made a motion, seconded by Representative Bridges, to find this emergency administrative regulation deficient. A roll call vote was conducted and, with six votes to find this emergency administrative regulation deficient, this emergency administrative regulation, as amended by the agency amendment, was found deficient.

Compiler's Note: Pursuant to KRS 13A.335(3)(a), a new Section 6 was added to this administrative regulation to reflect the finding of deficiency.

Administrative Regulations Reviewed by this Subcommittee:

FINANCE AND ADMINISTRATION CABINET: Department of Revenue: Sales and Use Tax; Service and Professional Occupations

103 KAR 26:131. Landscaping Services. Richard Dobson, executive director, and Bethany Rice, counsel, represented the department.

In response to a question by Co-Chair Hale, Mr. Dobson stated that this administrative regulation was being amended in response to statutory changes after consultation with stakeholders.

A motion was made and seconded to approve the following amendments: to amend Sections 1, 2, and 7 through 9 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 2:040. Registration of pharmacist interns. Eden Davis, general counsel, and Larry Hadley, executive director, represented the board.

A motion was made and seconded to approve the following amendments: to amend the RELATES TO and NECESSITY, FUNCTION, AND CONFORMITY paragraphs and Sections 3, 5, 6, and 11 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 2:171. Computerized recordkeeping.

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

201 KAR 2:205. Pharmacist-in-charge.

A motion was made and seconded to approve the following amendments: to amend the RELATES TO and NECESSITY, FUNCTION, AND CONFORMITY paragraphs 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 2:390. Requirements for third-party logistics providers.

A motion was made and seconded to approve the following amendments: (1) to amend the RELATES TO and STATUTORY AUTHORITY paragraphs and Sections 1 through 7 to comply with the drafting and formatting requirements of KRS Chapter 13A; and (2) to amend Section 1 to add definitions for “board,” “illegitimate product,” and “third-party logistics provider.” Without objection, and with agreement of the agency, the amendments were approved.

Board of Nursing

201 KAR 20:506. Nurse licensure compact. Kelly Jenkins, executive director, and Jeffrey Prather, general counsel, represented the board.

Board of Alcohol and Drug Counselors

201 KAR 35:010E. Definitions for 201 KAR Chapter 035. Tim Cesario, chair, and Kevin Winstead, commissioner, represented the board.

In response to questions by Co-Chair Hale, Mr. Winstead stated that these administrative regulations were filed both as emergency administrative regulations and as ordinary administrative regulations. Senate Bills 191 and 166 from 2021 Regular Session of the General Assembly created four new credential categories that became effective March 1, 2021; therefore, the board needed emergency administrative regulations that would take effect immediately upon filing. Additionally, these administrative regulations were filed as emergency administrative regulations to protect public safety, welfare, and health, because there was a shortage of counselors. Co-Chair Hale thanked the board for addressing the complex problems related to alcohol and drug abuse in Kentucky.

A motion was made and seconded to approve the following amendments: (1) to amend the NECESSITY, FUNCTION, AND CONFORMITY paragraph and Section 1 to delete references to “certified alcohol and drug counselor degreed” to comply with statutory authority; and (2) to amend 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 35:020E. Fees.

A motion was made and seconded to approve the following amendments: (1) to amend Section 1 to delete references to “certified alcohol and drug counselor degreed” to

comply with statutory authority; and (2) to revise material incorporated by reference. Without objection, and with agreement of the agency, the amendments were approved.

201 KAR 35:025E. Examinations.

201 KAR 35:040E. Continuing education requirements.

201 KAR 35:050E. Curriculum of study.

201 KAR 35:055E. Temporary registration or certification.

201 KAR 35:070E. Supervision experience.

201 KAR 35:075E. Substitution for work experience for an applicant for certification as an alcohol and drug counselor.

201 KAR 35:080E. Voluntary inactive and retired status.

ENERGY AND ENVIRONMENT CABINET: Department for Environmental Protection: Division of Waste Management: Hazardous Waste

401 KAR 39:060. General Requirements. Tony Hatton, commissioner, represented the division.

In response to a question by Co-Chair West, Mr. Hatton stated that chemical munitions stored at Bluegrass Army Depot included about two percent of the nation's stockpile of mustard nerve agents. These nerve agents were categorized as "hazardous wastes" under Kentucky law, but not under federal law. The US Army had specific requirements for the treatment, storage, and disposal of these nerve agents. Neutralization was required to be 99.999 percent effective, and secondary hazardous wastes were sometimes generated as part of the neutralization process. The US Army was moving away from neutralization because of the risk of exposure to hazardous wastes by personnel. Static detonation was now being used in lieu of neutralization, creating waste streams that were not envisioned when neutralization was used. The administrative regulation simplified the process of dealing with these wastes. The goal was to have most of these wastes addressed by 2023.

In response to a question by Co-Chair Hale, Mr. Hatton stated that, barring unforeseen circumstances, most of these wastes would be addressed by 2023.

Representative Frazier stated that Madison County was very appreciative of the work that the division did in dealing with these wastes and protecting citizens in the process.

TRANSPORTATION CABINET: Department of Vehicle Regulation: Motor Carriers

601 KAR 1:005. Safety administrative regulation. Mary Cook, assistant director; Tiffany Duvall, budget specialist; Jon Johnson, assistant general counsel; Tom McDaniel, assistant director; Larisa Plecha, staff attorney; Jason Siwula, assistant state highway engineer; and Tristan Truesdell, captain, Kentucky State Police; represented the department.

Administration

601 KAR 2:231. Repeal of 601 KAR 002:030.

601 KAR 2:233E. Kentucky Ignition Interlock Program; participants and device providers.

Horse Racing Commission: General

810 KAR 2:001E. Definitions for 810 KAR Chapter 002. Waqas Ahmed, pari-mutuel wagering director; Jamie Eads, deputy executive director; Marc Guilfoil, executive director; Dr. Bruce Howard, equine medical director; Chad Thompson, deputy general counsel; and Jennifer Wolsing, general counsel, represented the commission.

In response to questions by Co-Chair Hale, Ms. Wolsing stated that the public hearing on the pari-mutuel wagering administrative regulations in this package was canceled as statutorily authorized because no one expressed interest in attending; however, written comments were received from The Family Foundation. The commission filed a Statement of Consideration in response to those written comments. The pari-mutuel wagering administrative regulations were the only ones in this package that were filed as emergency administrative regulations. The emergency basis was due to several factors. Senate Bill 120 from the 2021 Regular Session of the General Assembly enacted several changes to pari-mutuel wagering, primarily related to historical horse racing. If statutory and regulatory provisions conflicted, the commission would be unable to regulate live or historical horse racing in Kentucky. Additionally, revisions were needed to prevent these administrative regulations from sunseting after certification and reorganization. State revenue and potentially jobs could be lost.

Co-Chair Hale requested to be recorded as voting in opposition to the pari-mutuel wagering administrative regulations in this package because the commission's reasons for filing these on an emergency basis was unsatisfactory.

Licensing

810 KAR 3:001E. Definitions for 810 KAR Chapter 003.

Flat and Steeplechase Racing

810 KAR 4:001E. Definitions for 810 KAR Chapter 004.

Standardbred Racing

810 KAR 5:001E. Definitions for 810 KAR Chapter 005.

810 KAR 5:080. Kentucky Proud Series.

A motion was made and seconded to approve the following amendments: to amend the NECESSITY, FUNCTION, AND CONFORMITY paragraph and Sections 1, 2, and 4 through 7 to comply with the drafting and formatting requirements of KRS Chapter 13A. Without objection, and with agreement of the agency, the amendments were approved.

Pari-Mutuel Wagering

810 KAR 6:001E. Definitions for 810 KAR Chapter 006.

810 KAR 6:010E. Exotic wagering.

810 KAR 6:030E. Pari-Mutuel wagering.

Medication Guidelines

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

A motion was made and seconded to approve the following amendments: to amend Sections 10, 13, and 20 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 8:020. Drug, medication, and substance classification schedule.

810 KAR 8:025. Drug, medication, and substance withdrawal guidelines.

A motion was made and seconded to approve the following amendments: (1) to amend the NECESSITY, FUNCTION, AND CONFORMITY paragraph and Section 1 to comply with the drafting requirements of KRS Chapter 13A; and (2) to amend Section 1(4)

to add administration specifications for clenbuterol in accordance with 810 KAR 8:010. Without objection, and with agreement of the agency, the amendments were approved.

810 KAR 8:030. Disciplinary measures and penalties.

A motion was made and seconded to approve the following amendment: to amend Section 4 to insert an existing provision that had been inadvertently omitted. Without objection, and with agreement of the agency, the amendment was approved.

810 KAR 8:040. Out-of-competition testing.

A motion was made and seconded to approve the following amendments: to amend the STATUTORY AUTHORITY and the NECESSITY, FUNCTION, AND CONFORMITY paragraphs and Sections 2, 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.

Harness Racing

811 KAR 1:251E. Repeal of 811 KAR 001:250.

CABINET FOR HEALTH AND FAMILY SERVICES: Office of Health Data and Analytics: Kentucky Health Benefit Exchange

900 KAR 10:111. Definitions for 900 KAR Chapter 010. Carrie Banahan, deputy secretary; Melea Rivera, assistant director; Kelli Rodman, executive director, Office of Legal Services; Edith Sloan, director; and David Varry, staff assistant represented the exchange.

In response to questions by Co-Chair West, Ms. Banahan stated that the statutory authority for the exchange was established in KRS 194A.099. Funding came from the Kentucky Access Assessment, an existing fund source that consisted of a one percent assessment on the premiums for large employer groups, small employer groups, association plans, and individual market plans. The previous Executive Branch administration opted to use the federal exchange in lieu of the state exchange. The exchange was unaware of anything in a budget bill that prohibited Kentucky from returning to a state-based exchange. The exchange anticipated a cost of \$2 million, which would be funded through the Kentucky Access Assessment, to restart the state-based exchange. The federal exchange included a user fee of approximately three percent. Plan year 2019 cost approximately \$15.2 million for Kentucky users of the federal exchange, which was in addition to the existing Kentucky Access Assessment. The state-based system would not include the user fee; therefore, reverting to the state-based system was expected to save Kentucky users of the exchange \$15 to \$20 million.

900 KAR 10:115. Exchange participation requirements and certification of qualified health plans and qualified stand-alone dental plans.

Kentucky Health Benefit Exchange

900 KAR 10:120. KHBE eligibility and enrollment in a qualified health plan, SHOP, and SHOP formal resolution process.

In response to a question by Co-Chair West, Mr. Varry stated that the proposed agency amendment authorized, rather than required notification of an employee's eligibility for an advanced payments of premium tax credit. This change was consistent with federal guidelines.

A motion was made and seconded to approve the following amendments: (1) to amend the RELATES TO and NECESSITY, FUNCTION, AND CONFORMITY paragraphs, and Section 1, 2, 4, 6, 7, 9, 11, 13, 15, and 17 to comply with the drafting requirements of KRS Chapter 13A; and (2) to amend Section 2 to provide that an employer may be notified of an employee's eligibility for an advanced payments of premium tax credit in accordance with 45 C.F.R 155.310(h). Without objection, and with agreement of the agency, the amendments were approved.

900 KAR 10:125. KHBE Consumer Assistance Program, kynector certification, and individual agent participation with the KHBE.

A motion was made and seconded to approve the following amendments: to amend the RELATES TO and NECESSITY, FUNCTION, AND CONFORMITY paragraphs and Sections 1, 3, 6, and 8 to comply with the drafting requirements of KRS Chapter 13A. Without objection, and with agreement of the agency, the amendments were approved.

900 KAR 10:130. Appeals of eligibility for KHBE participation and insurance affordability programs.

A motion was made and seconded to approve the following amendments: to amend the NECESSITY, FUNCTION, AND CONFORMITY paragraph and Sections 1, 3, 5, 6, 8 through 10, and 12 to comply with the drafting requirements of KRS Chapter 13A. Without objection, and with agreement of the agency, the amendments were approved.

Maternal and Child Health

902 KAR 4:150. Enhanced HANDS services in response to declared national or state public health emergency. Julie Brooks, regulation coordinator, and Paula Goff, branch manager, represented the department.

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

Kentucky Early Intervention System

902 KAR 30:210. Enhanced early intervention services in response to declared national or state public health emergency. Julie Brooks, regulation coordinator, and Paula Goff, branch manager, represented the department.

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

The following administrative regulations were deferred or removed from the June 8, 2021, subcommittee agenda:

BOARDS AND COMMISSIONS: Board of Examiners of Psychology

201 KAR 26:115. Definition of psychological testing.

201 KAR 26:121. Scope of practice and dual licensure.

201 KAR 26:125. Health service provider designation.

201 KAR 26:130. Grievances and administrative complaints.

201 KAR 26:155. Licensed psychologist: application procedures and temporary license.

201 KAR 26:171. Requirements for clinical supervision.

201 KAR 26:180. Requirements for granting licensures as a psychologist by reciprocity.

201 KAR 26:185. Requirements for granting licensure as a psychologist to an applicant licensed in another state.

201 KAR 26:190. Requirements for supervised professional experience.

201 KAR 26:200. Education requirements.

201 KAR 26:230. Examination and applications.

201 KAR 26:250. Employment of a psychological associate, a temporarily licensed psycho-logical associate, or a temporarily licensed psychologist.

201 KAR 26:280. Licensed psychological associate: application procedures and temporary license.

201 KAR 26:290. Licensed psychological practitioner: application procedures.

201 KAR 26:301. Repeal of 201 KAR 026:300.

201 KAR 26:310. Telehealth and telepsychology.

Board of Licensure of Marriage and Family Therapists

201 KAR 32:030. Fees.

201 KAR 32:035. Supervision of marriage and family therapy associates.

201 KAR 32:060. Continuing education requirements.

Board of Alcohol and Drug Counselors

201 KAR 35:010. Definitions for 201 KAR Chapter 035.

201 KAR 35:020. Fees.

201 KAR 35:025. Examinations.

201 KAR 35:040. Continuing education requirements.

201 KAR 35:050. Curriculum of study.

201 KAR 35:055. Temporary registration or certification.

201 KAR 35:070. Supervision experience.

201 KAR 35:075. Substitution for work experience for an applicant for certification as an alcohol and drug counselor.

201 KAR 35:080. Voluntary inactive and retired status.

LABOR CABINET: Department of Workers' Claims

803 KAR 25:015. Issuance of citations and procedure in workers' compensation enforcement hearings.

803 KAR 25:021. Individual self-insurers.

803 KAR 25:091. Workers' compensation hospital fee schedule.

803 KAR 25:170. Filing of claims information with the Office of Workers' Claims.

803 KAR 25:175. Filing of insurance coverage and notice of policy change or termination.

803 KAR 25:185. Procedure for E-mail notification of cancellation or removal of location of specific workers' compensation coverage.

803 KAR 25:190. Utilization review – Medical Bill Audit – Medical Director – Appeal of Utilization Review Decisions.

803 KAR 25:220. Guaranty funds.

PUBLIC PROTECTION CABINET: Department of Insurance: Agents, Consultants, Solicitors, and Adjustors

806 KAR 9:025. Licensing process.

Trade Practices and Frauds

806 KAR 12:120. Suitability in annuity transactions.

PUBLIC PROTECTION CABINET: Horse Racing Commission: General

810 KAR 2:001. Definitions for 810 KAR Chapter 002.

Licensing

810 KAR 3:001. Definitions for 810 KAR Chapter 003.

Flat and Steeplechase Racing

810 KAR 4:001. Definitions for 810 KAR Chapter 004.

Standardbred Racing

810 KAR 5:001. Definitions for 810 KAR Chapter 005.

Pari-Mutuel Wagering

810 KAR 6:001. Definitions for 810 KAR Chapter 006.

810 KAR 6:010. Exotic wagering.

810 KAR 6:020. Calculation of payouts and distribution of pools.

810 KAR 6:030. Pari-Mutuel wagering.

CABINET FOR HEALTH AND FAMILY SERVICES: Department for Medicaid Services: Payment and Services

907 KAR 3:005. Coverage of physicians' services.

907 KAR 3:010. Reimbursement for physicians' services.

Department for Behavioral Health, Developmental and Intellectual Disabilities: Sub-stance Abuse

908 KAR 1:390. Voluntary Employer Substance Use Program (VESUP).

Department for Community Based Services: Child Welfare

922 KAR 1:490. Background checks for foster and adoptive parents and relative and fictive kin caregivers.

The subcommittee adjourned at 11:35 a.m. The next meeting of this subcommittee is tentatively scheduled for July 8, 2021, at 3 p.m.