

ADMINISTRATIVE REGULATION REVIEW SUBCOMMITTEE

Minutes of the May Meeting

May 9, 2023

Call to Order and Roll Call

The May meeting of the Administrative Regulation Review Subcommittee was held on Tuesday, May 9, 2023, at 1:00 PM, in Room 149 of the Capitol Annex. Senator Stephen West, Chair, called the meeting to order, and the secretary called the roll.

Present were:

Members: Senator Stephen West, Co-Chair; Representative Derek Lewis, Co-Chair; Senators Julie Raque Adams, Damon Thayer, and David Yates; Representatives Randy Bridges, Deanna Frazier Gordon, and Daniel Grossberg.

Guests: Todd Allen, Education Professional Standards Board; Alison Chavies, Blake Christopher and Bryan Hubbard, Kentucky Opioid Abatement Advisory Commission; Jeff Allen, Board of Dentistry; Kelly Jenkins and Jeffrey Prather, Board of Nursing; Steven Fields and Rich Storm, Department of Fish and Wildlife Resources; Bill Bell, Jay Huber, and Jon Johnson, Department of Highways; Todd Allen, Department of Education; Lisa King and Marcus Roland, Workers' Compensation Funding Commission; Justin Burse, Gary Stephens, and Jessica Sullivan, Department of Financial Institutions; Stephanie Brammer-Barnes, Kara Daniel, and Adam Mather, Office of Inspector General; Victoria Elridge, Sarah Puttoff, and Beth Reardon, Department for Aging and Independent Living; Representative Steve Bratcher; and Wesley Duke, Lisa Lee, and Jonathan Scott, Department for Medicaid Services.

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

Administrative Regulations Reviewed by this Subcommittee:

EDUCATION AND LABOR CABINET: Education Professional Standards Board: Certification Procedures

016 KAR 004:060. Certificate renewals and teaching experience. Todd Allen, general counsel, represented the board.

In response to a question by Co-Chair West, Mr. Allen stated that this administrative regulation, which related to the renewal of teaching certifications, expanded opportunities

for meeting renewal standards. This administrative regulation was not anticipated to worsen Kentucky's teacher shortage.

DEPARTMENT OF LAW: Kentucky Opioid Abatement Advisory Commission

040 KAR 009:010E. General application procedure. Alison Chavies, executive staff advisor; Blake Christopher, general counsel; and Bryan Hubbard, chair and executive director, represented the commission.

In response to questions by Co-Chair Lewis, Mr. Christopher stated that the recourse for misappropriation of funds would depend upon the type of misappropriation involved. Options included debiting the misappropriated amount toward future funding, precluding future funding, and reimbursing the misappropriated amount. The commission had statutory provisions to refer cases of misappropriation to the Attorney General for investigation and further action. The commission may tier reporting requirements in the future, so that entities receiving smaller funding amounts have fewer reporting requirements. There were already statutory provisions that allowed a city to rely on the county for reporting purposes if the city's funding allotment was de minimis.

In response to questions by Co-Chair West, Mr. Christopher stated that the settlement would provide approximately \$842 million to be disbursed over the next 15 to 20 years of scheduled payments, with 50 percent going directly to cities and counties and 50 percent going to the commission. More settlements from other companies could be added to the overall fund in the future.

040 KAR 009:010. General application procedure.

A motion was made and seconded to approve the following amendments: to amend the STATUTORY AUTHORITY and NECESSITY, FUNCTION, AND AUTHORITY paragraphs and Sections 1 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.

040 KAR 009:020E. Local government application procedure.

040 KAR 009:020. Local government application procedure.

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

BOARDS AND COMMISSIONS: Board of Dentistry

201 KAR 008:533. Licensure of dentists. Jeff Allen, executive director, represented the board.

A motion was made and seconded to approve the following amendments: to amend the RELATES TO and STATUTORY AUTHORITY paragraphs; Sections 2, 7, 9, and 16; and incorporated material 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 008:563. Licensure of dental hygienists.

A motion was made and seconded to approve the following amendments: to amend the RELATES TO and STATUTORY AUTHORITY paragraphs; Sections 1, 2, 4 through 10, 15, and 17; and incorporated material to comply with the drafting requirements of KRS Chapter 13A. Without objection, and with agreement of the agency, the amendments were approved.

Board of Nursing

201 KAR 020:360. Continuing approval and periodic evaluation of prelicensure registered nursing and licensed practical nursing programs. Kelly Jenkins, executive director, and Jeffrey Prather, general counsel, represented the board.

In response to questions by Senator Yates, Ms. Jenkins stated that calculation changes had made it difficult to accurately determine the number of students in nursing programs. This “snapshot” approach aligned with the national association’s system of calculation, as well as with many other states’ methods.

In response to a question by Co-Chair West, Ms. Jenkins stated that many Kentucky universities had increased enrollment in nursing programs.

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

201 KAR 020:390. Nursing Incentive Scholarship Fund.

A motion was made and seconded to approve the following amendments: to amend Sections 3, 6, 8, and 10 to comply with the drafting requirements of KRS Chapter 13A. Without objection, and with agreement of the agency, the amendments were approved.

TOURISM, ARTS AND HERITAGE CABINET: Department of Fish and Wildlife Resources: Game

301 KAR 002:015. Feeding of wildlife. Steven Fields, staff attorney, and Rich Storm, commissioner, represented the department.

In response to a question by Co-Chair West, Mr. Storm stated that Kentucky was experiencing a 10-year high pertaining to turkey harvesting.

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

301 KAR 002:090. Means by which migratory game birds may be taken.

Wildlife

301 KAR 004:110. Administration of drugs to wildlife.

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

TRANSPORTATION CABINET: Department of Highways: Motorcycle and Bicycle Safety

601 KAR 014:050. Motorcycle Safety Education Program. Jay Huber, administrator, RideSMART Kentucky Program, and Jon Johnson, assistant general counsel, represented the department.

EDUCATION AND LABOR CABINET: Department of Education: Academic Standards

704 KAR 008:060. Required academic standards for social studies. Todd Allen, general counsel, represented the department.

Workers' Compensation Funding Commission

803 KAR 030:010. Special fund assessments. Lisa King, executive director, and Marcus Roland, general counsel, represented the commission.

In response to questions by Co-Chair West, Ms. King stated that this administrative regulation was not related to payment of claims. This administrative regulation was clarifying Kentucky written Workers' Compensation premium assessment provisions for transparency purposes.

A motion was made and seconded to approve the following amendments: to amend Sections 1, 2, 4, 5, 11, and 13 to comply with the drafting requirements of KRS Chapter 13A. Without objection, and with agreement of the agency, the amendments were approved.

PUBLIC PROTECTION CABINET: Department of Financial Institutions: General Provisions

808 KAR 001:170. Licensing and registration. Justin Burse, acting commissioner; Gary Stephens, assistant general counsel; and Jessica Sullivan, assistant director, Nondepository Division, represented the department.

In response to questions by Co-Chair West, Mr. Burse stated that the fee system was being reorganized to be based on loan volume and calculated within a minimum and maximum amount. Brokers and mortgage companies would now have one yearly fee, rather than several separate fees. This change was statutorily driven and would increase fees for most brokers and mortgage companies. Fees had not been raised for almost 30 years.

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 through 9 and 11 to comply with the drafting requirements of KRS Chapter 13A; to amend Section 5 to clarify that branches do not have to pay the registration renewal fee individually; to amend Section 11 to insert a reference to KRS 12.357, which exempted military spouses from licensure fees under certain circumstances; and to amend Section 4(2)(c) to revise the date to submit third quarter Mortgage Call Reports from November 1 to November 14, which was the date required by the NMLS data system. Without objection, and with agreement of the agency, the amendments were approved.

CABINET FOR HEALTH AND FAMILY SERVICES: Office of Inspector General: Health Services and Facilities

902 KAR 020:480. Assisted living communities. Stephanie Brammer-Barnes, regulation coordinator; Kara Daniel, assistant inspector general; and Adam Mather, inspector general, represented the office. Representative Steve Bratcher appeared in support of this administrative regulation.

In response to a question by Co-Chair West, Representative Bratcher stated that Senate Bill 11 from the 2022 Regular Session of the General Assembly reorganized assisted living category provisions with the goal of allowing residents to more easily age in place, rather than moving from facility to facility based on medical needs. This administrative regulation also allowed certified medication aides to administer preloaded insulin. The Kentucky Board of Nursing supported this change.

A motion was made and seconded to approve the following amendments: to amend the NECESSITY, FUNCTION, AND CONFORMITY paragraph and Sections 1 through 5, 7 through 10, and 12 through 18 to comply with the drafting and formatting requirements of KRS Chapter 13A; and to amend Section 15(7) to comply with new credentialing requirements and Senate Bills 110 and 111 from the 2023 Regular Session of the General Assembly. Without objection, and with agreement of the agency, the amendments were approved.

902 KAR 020:490. Rural emergency hospitals.

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, 2, 5, 7, and 8 to comply with the drafting requirements of KRS Chapter 13A. Without objection, and with agreement of the agency, the amendments were approved.

Department for Aging and Independent Living: Children with Special Health Care Needs Services

910 KAR 001:180. Homecare program for the elderly. Victoria Elridge, commissioner; Sarah Puttoff, regulation coordinator; and Beth Rearden, social services specialist, represented the department.

A motion was made and seconded to approve the following amendments: to amend Sections 1 through 9 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.

Other Business: Co-Chair Lewis introduced Commissioner Rich Storm's daughter, Avery, who was in fifth grade and had recently harvested her first white-tailed deer. The subcommittee welcomed Avery.

Co-Chair West stated that several members had concerns about some emergency administrative regulations that had been filed by the Department for Medicaid Services. This subcommittee considered these emergency administrative regulations.

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

CABINET FOR HEALTH AND FAMILY SERVICES: Department for Medicaid Services

907 KAR 001:038E. Hearing Program coverage and requirements. Wesley Duke, general counsel; Lisa Lee, commissioner; and Jonathan Scott, regulation coordinator, represented the department.

In response to questions by Senator Thayer, Mr. Duke stated that these emergency administrative regulations were in compliance with Senate Bill 65 from the 2023 Regular Session of the General Assembly because these versions were substantially different from those previously found deficient. Each program revised reimbursement rates, services covered, and services provided. Ms. Lee stated that the adult fee schedule incorporated in 907 KAR 1:126E was significantly revised from the previous version. 907 KAR 1:126E was intended to provide preventative dental care and to help recipients return to the workforce. 907 KAR 1:632E was revised to update the fee schedule, increasing reimbursement rates and adding services, and to increase the quality of frames. 907 KAR 1:038E was revised to update the fee schedule, increase reimbursement rates for hearing instruments, and allow for hearing instrument batteries to be replaced if cost effective. Mr. Duke stated that all revisions were done in concert with the applicable Technical Advisory Committees. Senator Thayer stated that this executive branch administration had worked less with the General Assembly than any administration in modern history.

In response to questions by Co-Chair West, Ms. Lee stated that reimbursement rates were increased pertaining to 907 KAR 1:038E, 1:126E, and 1:632E. The department did not consult with members of the Senate Standing Committee on Health Services during the development of this version of these emergency administrative regulations.

This program would be federally funded \$31 million and \$5.6 million would be from the agency's current appropriation, including savings from Senate Bill 50 from the 2020 Regular Session of the General Assembly. Mr. Duke stated that the department expected to absorb any difference between the cost of the previous version of these administrative regulations and this version within the current appropriation.

Ms. Lee stated that 90 percent of Medicaid recipients were affiliated with a Managed Care Organization (MCO). With MCO capitation rates based on a per-member-per-month basis, no increase in appropriations was anticipated. Ms. Lee stated that the department would follow up with information on the process for rebasing Medicaid nursing facility rates and the current status. Nurses were not currently satisfied with those rates, and the department was working with nursing facility organizations to address those concerns.

In response to House Joint Resolution 38 from the 2023 Regular Session of the General Assembly, the department had increased some reimbursement rates for ambulance related services and was in the process of developing additional related revisions. The department was working with CMS to determine if a Medicaid waiver could apply or if a state plan amendment would be a better alternative to establish ambulance treatment services that did not result in hospital visits.

The department continued to examine the Michelle P. Waiver Program and how to better assist those individuals. Funding prioritization needed to be a joint effort between the department and the legislature. Ms. Lee invited legislators to attend meetings of the Medicaid Advisory Council. There were cabinet officials who spoke with legislators during the 2023 Regular Session of the General Assembly; however, Ms. Lee did not meet directly with Senator Meredith as was recommended by Co-Chair West. Mr. Duke stated that he believed a cabinet official met with Senator Meredith, but he was not certain.

In response to questions by Senator Yates, Ms. Lee stated that some of the changes to these emergency administrative regulations were for compliance with federal law. Specifically, balance billing to Medicaid recipients was prohibited. Preliminary indications were that, because of expanded services, 37,157 adults now had glasses, and 1,390 recipients had dentures. Ms. Lee read an email from a Medicaid recipient who had dental problems, had surmounted addiction issues, and was hoping to get a job. Her dental issues were a salient obstacle in attaining employment. The Technical Advisory Committees were comprised of dental, hearing, and vision practitioners. The federal government was providing funding for these programs at a ratio of approximately six-to-one.

In response to questions by Senator Raque Adams, Ms. Lee stated that reimbursement rates were not increased across the board. There were slight increases for specific services, and the department did not anticipate a significant increase in the fiscal projections from the previous versions of these administrative regulations. Many Medicaid rates were based on Medicare rates. Medicare had reduced some reimbursement rates in the area of behavioral healthcare, and Medicaid therefore combined in-patient and out-patient behavioral health reimbursement rates, thus minimally reducing some rates for specific codes within that program. The department agreed to follow up with the subcommittee to provide the specific projected savings amount for this reduction. Kentucky's Medicaid administrative regulation pertaining to behavioral health specifically referenced the Medicare fee schedule. CMS required the department to provide sound methodology for establishing reimbursement rates. One methodology was linking Medicaid and Medicare rates. The department would need to revise the Medicaid behavioral health administrative regulation in order to change the methodology.

The department was in routine meetings to address children's behavioral healthcare issues. Children were not coming from out-of-state into Kentucky for behavioral healthcare services, which was indicative that Kentucky did not have the array of services necessary.

Kentucky was currently sending approximately 30 children out-of-state for behavioral healthcare. The department would follow up with the subcommittee with information regarding how many Medicaid dental providers served rural communities. Senator Raque Adams stated that she had not gotten responses from the cabinet regarding a letter that she had sent.

In response to questions by Co-Chair Lewis, Ms. Lee stated that poor oral health led to other health problems, such as heart disease and diabetes, which were widespread in Kentucky. Preterm deliveries could also be related to poor oral health. These programs were also vital to getting adults back into the workforce. In 2022, Kentucky ranked 43rd in overall health, but 49th in oral healthcare. Mr. Duke stated that Senate Bill 65 from the 2023 Regular Session allowed for continued payment for services that had already been initiated. These emergency administrative regulations were, in part, to cover the gap.

The department would follow up with the subcommittee and provide minutes from the Technical Advisory Committee meetings that pertained to these emergency administrative regulations. Co-Chair Lewis stated that there were many things in these emergency administrative regulations that would benefit his constituents; however, the process mattered.

Representative Grossberg stated that these emergency administrative regulations seemed substantially different from the versions previously found deficient by this subcommittee, including substantial fee increases. Potential costs could be absorbed without further appropriation. Eighty-six percent of the funding would come from the federal government. Kentucky would receive \$36 million at a state cost of only \$5.8 million. Through these programs, approximately 60,000 adult Medicaid recipients had received glasses, 932 dentists had received reimbursements for crowns for more than 5,600 recipients, nearly 1,200 recipients had received dentures, and providers had received over \$11 million. None of these things would have happened without the changes to these emergency administrative regulations, and these emergency administrative regulations should continue through the process, if for the benefits of the dental care provisions alone. Oral health affected physical and economic health. The first thing a potential employer noticed was a person's smile. Additionally, Kentucky was currently experiencing an opioid abuse crisis. The primary cause of opioid addiction was a person who had not received proper dental care being legally prescribed opioids for dental pain. Preventative dentistry could prevent some of the addiction and lives lost.

Representative Frazier thanked the department for adjusting the fee schedule pertaining to 907 KAR 1:038E. Audiology was a medical profession, with practitioners with expertise in the services provided. The department should consider removing the medical referral requirement for audiology services and consider establishing an electronic claims submission system.

Representative Bridges stated that these emergency administrative regulations did not seem significantly different than those previously found deficient by this subcommittee. It was important to bring healthcare to all Kentuckians; however, there were other, core programs that needed funding and were not getting the necessary attention while this program was expanding to provide new services. This seemed to be a move in opposition to clearly expressed legislative intent.

In response to questions by Co-Chair West, Ms. Lee stated that the federal match for Michelle P. Waiver Program funding was approximately 70 to 75 percent, depending on the services provided. The federal match for nursing facilities funding was complicated to determine because the Medicaid reimbursement rate system itself was complex, but typically the match was approximately 70 percent. The department was being very strategic by funding services that would offset other expenses, such as emergency room visits related to lack of dental care. Every service facilitated by the department constituted a core service.

Senator Thayer stated that Kentucky had 1.7 million citizens who were recipients of Medicaid and one of the lowest workforce participation rates in the nation. Medicaid should provide services to those individuals who truly needed healthcare assistance and to those individuals who were transitioning into the workforce. Kentucky was unable to afford its current Medicaid Program; therefore, expanding services was irresponsible.

In response, Representative Grossberg stated that Kentucky could not afford not to fund these services. Senator Yates stated that public safety and public health were prime concerns regarding funding priorities and represented the moral character of Kentucky's budgeting process. There would be a negative economic impact if these services were not provided. While the process was important, maintaining legislative power should not be at the expense of the health of constituents.

Representative Bridges stated that more data was necessary to demonstrate that these emergency administrative regulations would have a positive impact on workforce participation. Ms. Lee stated that the department would follow up with the subcommittee to provide data and surveys demonstrating that these emergency administrative regulations would have a positive impact on workforce participation. There was relevant data, especially pertaining to dental care.

Senator Raque Adams stated that the department was expanding services at the same time that behavioral health rates were being cut. The department was sending children out-of-state for care that Kentucky should be providing. Co-Chair Lewis stated that the documentation justifying these emergency administrative regulations included three reports from 2018 and three reports from 2011 through 2015, which did not seem like an emergency because these reports were dated. These emergency administrative regulations seemed to be creating an appropriation that was not established by the General Assembly.

Many of these provisions seemed beneficial, but the department and the legislature needed to work together on this matter.

Co-Chair West stated that this vote regarding deficiency was not about the subject matter of these emergency administrative regulations. Expanding dental services was a good idea. Kentucky had a mental health crisis, including addiction, but the department was cutting reimbursement rates for mental health. The problem was that the department was not cooperating with the legislature, and it was incumbent upon this subcommittee to protect the legislative roll in the administrative regulation process.

Senator Thayer made a motion, seconded by Senator Raque Adams, to find these emergency administrative regulations deficient. A roll call vote was conducted, and with five votes to find these emergency administrative regulations deficient, two votes against finding these emergency administrative regulations deficient, and one pass vote, these emergency administrative regulations were found deficient.

Senator Yates explained his vote against finding these emergency administrative regulations deficient. He hoped that the department and the legislators would work together to reach an agreement to raise reimbursement rates and address the other issues from these emergency administrative regulations. Without these expansions, many Kentuckians would be hurt.

Representative Bridges explained his vote to find these emergency administrative regulations deficient. He supported providing healthcare, but it was necessary to maintain the administrative regulation process. He encouraged the department to follow the process and consider the intent of the General Assembly. Some people would be hurt by this, but others were being hurt by being overlooked by other programs.

Representative Grossberg explained his vote against finding these emergency administrative regulations deficient. The consequences of finding these emergency administrative regulations deficient would hurt many. He hoped that both sides of this issue were sincere in a desire to work together toward a common goal.

Co-Chair West explained his vote to find these emergency administrative regulations deficient. The previous versions of these administrative regulations were found deficient by this subcommittee, and Senate Bill 65 from the 2023 Regular Session of the General Assembly rendered those versions void. The legislature had made its intent on this matter clear. If the department moved forward with these provisions by implementing these emergency administrative regulations, any harm that resulted from limiting these provisions in the future would be the responsibility of the department and this executive branch administration.

Compiler's Note: Pursuant to KRS 13A.335(3)(a), a new Section 12 was added to this administrative regulation to reflect the finding of deficiency.

907 KAR 001:126E. Dental services' coverage provisions and requirements.

Compiler's Note: Pursuant to KRS 13A.335(3)(a), a new Section 23 was added to this administrative regulation to reflect the finding of deficiency.

907 KAR 001:632E. Vision program coverage provisions and requirements.

Compiler's Note: Pursuant to KRS 13A.335(3)(a), a new Section 15 was added to this administrative regulation to reflect the finding of deficiency.

The following administrative regulations were deferred or removed from the May 9, 2023, subcommittee agenda:

BOARDS AND COMMISSIONS: Board of Licensure for Long-term Care Administrators

201 KAR 006:060. Fees.

Board of Nursing

201 KAR 020:478. Dialysis technician scope of practice, discipline, and miscellaneous requirements.

Board of Social Work

201 KAR 023:016. Temporary permission to practice.

JUSTICE AND PUBLIC SAFETY CABINET: Department of Corrections: Office of the Secretary

501 KAR 006:150. Eastern Kentucky Correctional Complex policies and procedures.

Department of Juvenile Justice: Child Welfare

505 KAR 001:120. Department of Juvenile Justice Policies and Procedures Manual: Health and Safety Services.

505 KAR 001:140. Department of Juvenile Justice Policies and Procedures Manual: Detention Services.

CABINET FOR HEALTH AND FAMILY SERVICES: Office of Inspector
General: State Health Plan

900 KAR 005:020E. State Health Plan for facilities and services.

Certificate of Need

900 KAR 006:075E. Certificate of need nonsubstantive review.

Payment and Services

907 KAR 003:190. Reimbursement for treatment related to clinical trials.

Department for Community Based Services: Child Welfare

922 KAR 001:100. Public agency adoptions.

922 KAR 001:330. Child protective services.

The subcommittee adjourned at 2:35 p.m. The next meeting of this subcommittee was tentatively scheduled for June 13, 2023, at 1 p.m.