

MINUTES OF THE LEGISLATIVE COMMISSION'S SUBCOMMITTEE TO REVIEW REGULATIONS

JULY 21, 2010

The meeting of the Legislative Commission's Subcommittee to Review Regulations was called to order by Chair Marcus L. Conklin at 2:16 p.m. on July 21, 2010, at the Grant Sawyer State Office Building, Room 4401, 555 East Washington Avenue, Las Vegas, Nevada, and via simultaneous videoconference at the Legislative Building, Room 4100, 401 South Carson Street, Carson City, Nevada, and at the Great Basin College, Room 137, High Tech Center, 1500 College Parkway, Elko, Nevada. The Agenda is included as [Exhibit A](#) and the Attendance Roster is included as [Exhibit B](#). All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

COMMISSION MEMBERS PRESENT (LAS VEGAS):

Assemblyman Marcus L. Conklin, Chair, Assembly District No. 37
Senator Maggie Carlton, Clark County Senate District No. 2
Senator Steven A. Horsford, Clark County Senate District No. 4
Assemblywoman Marilyn Kirkpatrick, Assembly District No. 1
Senator Joyce L. Woodhouse, Clark County Senate District No. 5

COMMISSION MEMBERS PRESENT (CARSON CITY):

Senator Mike McGinness, Central Nevada Senatorial District
Senator Maurice E. Washington, Washoe County Senate District No. 2

COMMISSION MEMBERS ABSENT:

Assemblyman John C. Carpenter, Assembly District No. 33

STAFF MEMBERS PRESENT:

Brenda Erdoes, Legislative Counsel
Risa B. Lang, Chief Deputy Legislative Counsel
Angela Clark, Deputy Administrator, Legal Division, Legislative Counsel Bureau
Olivia Lodato, Interim Secretary, Legal Division, Legislative Counsel Bureau

OTHERS PRESENT:

Carolyn Cramer, General Counsel, Nevada Board of Pharmacy
Mary McElhone, Deputy Administrator, Nevada Unclaimed Property
Fred Olmsted, Legal Counsel, Nevada State Board of Nursing

Rorie Fitzpatrick, Director, Special Education, Nevada Department of Education
Sam Crano, Administrative Attorney, Public Utilities Commission
Kyle Nagy, Director, CommCap Advisors

Chair Conklin opened the meeting of the Subcommittee to Review Regulations at 2:16 p.m. He requested that Ms. Clark call the roll of members present.

Ms. Angela Clark called the roll. A quorum was present.

Chair Conklin opened the meeting by listing the regulation items on the Agenda. He said the regulations the members wanted to discuss would be pulled from the consent vote for discussion.

Chair Conklin listed the regulations submitted for consideration by the Subcommittee. The regulations included R170-09, R179-09, R197-09, R203-09, R211-09, R010-10, R017-10, R018-10, R022-10, R023-10, R024-10, R035.-10, R038-10, R040-10, R045-10, and R061-10, [Exhibit C](#).

Chair Conklin stated the regulations being pulled for comment and discussion included R033-09, R162-09, R002-10, R031-10 and R042-10. He took a motion for consent for the remaining regulations.

SENATOR CARLTON MOVED TO ACCEPT BY CONSENT ALL THE REGULATIONS NOT HELD BY THE SUBCOMMITTEE.

SENATOR HORSFORD SECONDED THE MOTION.

THE MOTION CARRIED.

Chair Conklin opened discussion on R033-09, the State Board of Pharmacy.

Assemblywomen Kirkpatrick said she needed clarification on what prompted the changes on deciding who was qualified to sell the products and why that criteria worked better than what the Pharmacy Board had before this regulation.

Carolyn Cramer, General Counsel, Nevada Board of Pharmacy, said little criteria existed before the regulations. She said entities were coming to the State with facility administrators who had little or no qualifications for the job. Their job experience included being go-go dancers and fast food servers, businesses that had nothing to do with health care related fields. She said the Board was frustrated because many of the people did not have the qualifications to be able to help patients, answer patients' questions, or operate the machinery correctly.

Members of the industry thought it would be beneficial to have minimum qualifications to ensure that people could assist the patients.

Ms. Kirkpatrick said her concern was for medical internships across the State. She asked if it precluded the interns from being part of the process. She said in subsection 2 it stated an Associate of Arts (AA) degree was required. She did not want the interns denied the work experience. Ms. Kirkpatrick asked if the devices being used were somehow certified or if they were certifying the sales person selling the product.

Ms. Cramer replied the AA or higher degree related to patient care, with a background in health care, could be utilized when people selling the machines and servicing the patients were more than just sales staff. She said they were the people actually running the facilities and the machines. The Board wanted qualified people with a background in health care.

Ms. Kirkpatrick asked if the manufacturer's representative meant people in internship programs could not qualify for the job.

Ms. Cramer said she was confused by the term "internship." She said she thought internships were associated with universities or colleges. She said that was why they had another option, including verifiable work experience. There were two ways to be qualified, either through education or work experience.

Ms. Kirkpatrick said her question had not been answered. Her concern was that all the studies showed one of the faster growing job areas was the medical field. She said people in college often graduated without work experience. She added that successful colleges allowed hands-on experience.

Chair Conklin said he thought the regulation used the word "administrator" to mean a manufacturer's representative, but asked if it meant an administrator of the company in the State. He asked what the definition of an administrator was in this industry.

Ms. Cramer said the regulation concerned a facility administrator for the end-day providers, not the manufacturer. She said it would license someone opening a shop in Nevada and servicing patients.

Chair Conklin asked if she meant somebody who was an administrator for a prosthetic company where the doctor wrote a prescription and the company fitted the patient with the device.

Ms. Cramer said to think of the example of someone buying a wheelchair. She said that person also had a prescription for suppression hose. The hose had to

be purchased from a Medical Devices Equipment Group provider (MDEG). She said the facility administrator should have the 1500 hours of verifiable work experience or an AA degree or higher from an accredited college or university.

Chair Conklin said a person with an AA degree in nursing would be eligible for the job.

Ms. Cramer said an AA degree or higher in a health care field was the goal.

Chair Conklin asked if there was a definition of "health care field," or did the Board have discretion over what it meant.

Ms. Cramer said the Board had the discretion. She said the Board was looking for people with health care experience or training.

Senator Carlton said the administrator was the person in charge of the facility. She stated the requirements were not applied to the hourly employees working at the facility.

Ms. Cramer said Senator Carlton was correct. It was just the facility administrator.

Senator Carlton said it appeared a conflict occurred when the regulation stated the provider or wholesaler of the place of business had to be employed by the medical products provider or wholesaler at least 40 hours a week, and be approved by the Board. She asked which occurred first, approval of the person hired or hiring a person and then trying to get them approved. She was uncomfortable with a regulatory board giving approval to an employee chosen to work in this type of facility when it was not a licensed profession. She said it was an administrator running a store that sold medical products and the company usually trained their representatives.

Senator Horsford asked what the need was for the regulation. He asked if it was developed by the Board or was it a legislative question.

Ms. Cramer said the Board was approached by other State regulators because of the waste, fraud, and misuse of Medicare and Medicaid. The Board was seeing people without any qualifications, and the Board wondered if the people had honorable intentions concerning the patients. She said it was an area of growth in criminal activity and the Board tried to eliminate people who were not qualified.

Senator Horsford asked if there was evidence of fraud by someone who was an administrator of a facility.

Ms. Cramer said there were people who had been licensed by the Board who were convicted.

Senator Horsford asked if they were administrators who fell under the regulation.

Ms. Cramer replied a pharmacist who had an MDEG administrator license appeared before the last Board meeting and was convicted of federal Medicaid fraud.

Senator Horsford asked for non-occupational professional licensees who were convicted of fraud.

Ms. Cramer replied she did not know of anyone, but they had instances reported to them that it was happening.

Senator Horsford asked why the Board did not choose to have a registration process so they could track individuals rather than adding to the number of hours of work experience or the requirement for an AA or higher degree.

Ms. Cramer said they did not license the administrator, rather they licensed the facility.

Senator Horsford asked if they could have a registration process just for the administrator. He said, at the minimum, he saw a value for a registration process for all the administrators and that process was not in place.

Ms. Cramer replied that he was correct. The Board licensed the facility, but not the individuals.

Senator Horsford asked how the regulation applied to a CVS or Walgreens.

Ms. Cramer replied that it did not apply to them.

Senator Horsford asked why it did not apply because they were a medical products provider.

Ms. Cramer said they can provide durable medical products, but they have a separate license for MDEG.

Senator Horsford said in the event they pursued a license, the local Walgreens would have to meet the qualifications.

Ms. Cramer said if they chose to do so, they would have to receive the license.

Senator Horsford said he believed the regulation was too far reaching. He said there were other ways to achieve the goals of the Board.

Ms. Kirkpatrick added that the Attorney General's Office with the Consumer Affairs Office had a Medicaid fraud case at this time. She said the Subcommittee needed to be working on this in the future. She was also concerned about a tax issue.

MS. KIRKPATRICK MOVED TO REJECT R033-09, STATE BOARD OF PHARMACY REGULATION.

SENATOR CARLTON SECONDED THE MOTION.

THE MOTION CARRIED.

Chair Conklin opened discussion on R162-09, Administrator of Unclaimed Property regulation. He said he was holding the regulation due to section 6, page 3 of the regulation concerning audits conducted during each audit cycle. The administrator offered two options. He said five percent of the audits were conducted randomly and the other ninety-five percent were to be conducted of the records of persons selected by the administrator using an objective method. Chair Conklin was concerned about the balance between an objective method the department used and what was shared with people as to what they used to determine who was audited. He said the objective was to have less unclaimed property and to encourage people to give back the unclaimed property so the Division did not have to audit. He said he was concerned businesses were not given all the information needed.

Mary McElhone, Deputy Administrator, Nevada Unclaimed Property, said one of the reasons the regulation was written was due to a Legislative Counsel Bureau audit. She said one item they were written-up for was a lack of written policies and procedures in regard to the audit selection process. They stated they used a risk-based approach, but they did not have actual written information. She said they wrote new internal controls and procedures. They talked about the risk factors they analyzed when they did their audits. They also discussed the weighted criteria. She said points were assigned to an entity before they determined whether they would be audited. The weighted criteria might depend on whether they reported anything to the Unclaimed Property Division, how many employees they had, and their gross revenue.

Chair Conklin said the sentence that said: "... the method may include...and the terminology is without limitation," meant they could use any method they chose

without discussing what the methods included. He said it was problematic. He checked on what the requirements of the regulation were, and he thought a procedure had to be put in regulation and could not be hidden. He said they were obligated to do the audits, but if they were going to regulate them it had to be clearly defined.

Ms. McElhone said the wording was added by the bill drafter in the Legal Division of the LCB. She said a consensus could occur about the wording. There was an NRS that precluded the Unclaimed Property concerning how they did their audits with the general public.

Chair Conklin asked to hold the regulation until he, legal staff, and Ms. McElhone reviewed the language in the regulations.

Ms. McElhone agreed to withhold the regulation for review at the next meeting.

Chair Conklin said they had two options: they could defer the regulation, or Ms. McElhone could withdraw the regulation and bring it back to the Subcommittee in its current form or alter it for the next meeting.

Ms. McElhone withdrew R162-10 until the next Subcommittee meeting.

Chair Conklin opened R002-10, State Board of Nursing.

Senator Carlton said she had a logistical question concerning the regulation. She understood the provisions in the regulation dealing with school nurses. She said the advanced practice nursing criteria discussed something that went into effect in 2014. There were two Legislative Sessions between now and 2014. She asked what the need was for the regulation, and why was it not being discussed within the Legislative Session. She needed to understand why the criteria were being changed again for advanced practice nursing.

Fred Olmstead, Legal Counsel, Nevada State Board of Nursing, said the Board's responsibility was to protect the public and the Board was responding to a national standard. Many states had the requirement that all APNs be nationally certified. He said the Board believed it allowed for greater mobility for the APNs. The date of 2014 was so people not yet nationally certified would not be shut out of their job. He said if the APNs graduated after 2014, they were required to get certified.

Senator Carlton said usually the national certification debate and the question surrounding such a debate was done in a Legislative Session. She said passing a regulation in July 2010, dealing with the issue was premature. She added there were going to be several BDRs next session dealing with APNs and autonomous

practice. She said a debate was occurring among several of the professions over the scope of practice. It was much more complicated than just being nationally certified. Senator Carlton was apprehensive about putting something in regulation that was going into effect in four years. She reiterated the debate should be during the next Legislative session.

Ms. Kirkpatrick said she also had questions concerning the Board being able to accept the national standards. She asked if the Board of Nursing had more leeway than some of the other boards.

Mr. Olmstead said the Board did not have more leeway than anybody else. He said the APNs came to the committee and said the national trend was toward national certification. They asked the Board to make it a requirement for all future APNs. He said they were looking to the future to pass regulations to protect the public as far in advance as possible.

Ms. Kirkpatrick said her concern was what other states' standards were for APNs. She wanted to be sure she could explain to her constituents what the standards included. She was concerned that there needed to be more public information and discussion on the topic. She asked if the APNs could receive the national certification within their schooling or if it was something not offered by the schools unless the Board approved it.

Mr. Olmstead said the school nurses came to the Board of Nursing and asked for a definition of "school nurse." The school nurses were asking for the regulation. The national certification can be received now, but the Board did not want to say they could not be an APN if they did not have the certification. He said earlier there was a requirement of a bachelor's degree or national certification to be an APN. There was added language stating after 2005 a master's degree was required. He said the goal was by 2014 to have all APNs nationally certified.

Ms. Kirkpatrick used the school nurse as an example. She said more dialog was required concerning whether the State wanted to follow the national standards. She asked for more time to study what the requirements were in other states.

Senator Carlton said the time frame was one of her biggest problems. However, she was concerned about changing the language on page 2 from: "...accompanied by proof"... to a requirement that "the requirement of continuing education is met..." She believed it was the Board's responsibility to make sure that someone had complied with their continuing education. She said documentation was needed confirming the education. She was not in favor of the regulation. She said she was ready to make a motion to reject the regulation or offer the Board the opportunity to withdraw the regulation and reevaluate their position and resubmit at a later time.

Chair Conklin asked Ms. Kirkpatrick about her concerns with the regulation.

Ms. Kirkpatrick said she was willing to let the Board withdraw the regulation. She said there was an opportunity to meet with other groups. She added the national standards were a policy issue requiring further discussion.

Mr. Olmstead said they would withdraw the regulation and rewrite it. He said the committees were requested to make changes by the practitioners. The requests went to the Board meeting for approval, were then sent to the LCB, and then workshops and hearings were held. He said the people who requested the changes did not necessarily attend the workshops because they had already received what they requested. The workshops concerning the regulation were widely broadcasted so everyone knew what the Board was doing. He reiterated they would withdraw the regulation and review the national certification issue.

Chair Conklin said the Subcommittee granted the withdrawal of the regulation. He said the Legislative members wanted to assert their ability over the policy area. He said it was not a "knock" on the Board, but rather the regulatory policy was too broad.

Mr. Olmstead said the Board had no intention of going around the Legislature.

Chair Conklin opened the discussion on R031-10, State Board of Education.

Senator Washington asked the intent of the regulation. He said his concern was that after the three-year mark of a school not improving, the third or fourth year they requested an auditor of a non-public school professional to audit the plan. He asked if they were targeting charter schools, and if it was a public school, were they targeting the individual school or the district.

Rorie Fitzpatrick, Director, Special Education, Nevada Department of Education, said the regulations came about as a change to NRS 385. She said in the 2009 Legislative Session, the statute was revised. Ms. Fitzpatrick said before the revision, every school in the State, Title 1, non-Title 1, and Charter schools had the same consequence when they reached their fifth year of failure to make adequate yearly progress. She said prior to the revisions, every school received a school support team with a team leader. The Legislature decided not every school needed the same thing. The intent was to target the needs a school had based upon the school's data.

Senator Washington said the language in the regulation allowed for flexibility of plans based on the individual needs of each school.

Ms. Fitzpatrick replied that he was correct. The needs of each school were established through the completion of the audit. The term "audit" often implied a financial term. She said this audit was of three different content areas. They developed a comprehensive curriculum audit tool for schools. It looked at curriculum and instruction, assessment and accountability, and leadership which were primarily the administrative functions of the school. She said the audit was a set of indicators and elements completed by the individual school. The audit was a self-assessment after year three. Ms. Fitzpatrick said part of the change to NRS 385 was the requirement of the development of the audit. She said every school in the State that got to the third year of needing improvement had to undertake the audit.

Senator Washington said the self-audit was exemplified by the language that indicated the auditor must be an independent, non-school personnel.

Ms. Fitzpatrick said one of the consequences that may be applied was if a school went through a self-audit in year three, and they had no challenges, the outside audit assisted in defining possible problems.

Senator Washington asked if in the three areas she mentioned, were there provisions to consider the student population or the make-up of the school based on demographics, ethnicity, or economic status.

Ms. Fitzpatrick replied that it was essential to look at the student population and the students' needs. The research showed students from the most challenging backgrounds improved and did exceptional things if the adults in the school provided high quality instruction that met the needs of those students. She said the audit looked at the culture of the school. She offered an example of a school with a high percentage of students from poverty or with limited English proficiency and asked what the climate in the school was and if it met the needs of those students. She said the audit might target some professional development training for the teachers to help them change their behavior so the students could learn.

Senator Washington asked what occurred based on the corrective action plan put together after the audit, or the consequences or sanctions imposed on the public school. He asked what happened after the fourth year or fifth year.

Ms. Fitzpatrick said an increasing amount of support and assistance happened. She said over time, if the school proved they were unable to improve, more assistance was provided.

Senator Washington asked if the regulations provided for the State Board to make the necessary changes whether it was in staff or administrative changes or the curriculum.

Ms. Fitzpatrick said the Board was able to enact changes if necessary. She said she thought the LCB legal agreed also.

Senator Washington asked for a definition of public schools.

Ms. Fitzpatrick said a public school was one which met the definition under the NRS and was essentially not a private school. A public school was any school receiving funds through a school district.

Senator Washington asked Ms. Fitzpatrick if it was the individual school itself, or the district working beside the state school board putting together the comprehensive plan.

Ms. Fitzpatrick said the consequences were applied directly to the school. It was the responsibility of the school district to make sure the curriculum audit was done and the consequences implemented. She added there were monitoring and accountability pieces by the State to ensure the district and school did what they were supposed to do.

Senator Horsford said he fully supported the regulation. He asked if the audit was an independent audit, meaning it was not a person or staff person from either the State Department of Education or the school district.

Ms. Fitzpatrick said in a year three, the audit was a self-assessment. She said the school could do it entirely independently or with some support from the school district. There were a number of school districts that had to undergo the implementation of the Curriculum Audit Tool this past year. She said the year after the third year, one of the possible consequences was to demand and hold the district accountable for having external support to the school to implement the assessment.

Senator Horsford said year four was when the Department could force certain types of corrective actions on the school. He said if they failed, the Department ultimately had the responsibility for the school.

Ms. Fitzpatrick said once the school reached a point where they had to implement their corrective action, the Department held them accountable through the requirement of two reports per year. One report was due in the middle of the school year and the second at the end of the year. She said they increased their direct relationship in terms of technical assistance to districts. The regulatory

requirement was for reporting two times per year. The conversation and technical assistance ensuring accountability happened much more frequently than twice a year.

Senator Horsford said there were schools in his district that had not met adequate yearly progress within the four year period. He said rather than taking certain approaches, the District implemented new curriculum programs. The programs changed each year, but the yearly progress of the students did not change. He said technically the school was in compliance because they made adjustments to their curriculum. He asked how the regulation would differ from the process in the past.

Ms. Fitzpatrick said Senator Horsford was describing programs that had more to do with the federal regulations for No Child Left Behind. She said under NRS 385 the only latitude the State Board of Education had over schools that failed to make adequate yearly progress was to demand a school support team be provided. The school support team leader guided the work. The changes and the regulations were closer to data-based analysis and data-based solutions. She said the ability to differentiate the consequences and be more firm in demanding things allowed the State Board of Education to further compel the district to do what the data suggested was required.

Senator Horsford commended Ms. Fitzpatrick on the approach she was taking for education. He said accountability and enforcement were required. Ultimately, if students were not learning, it was a problem that needed fixing. He asked about the on-site visits. He said the Department was under-resourced. He asked if after the audit was performed, the Department of Education relied on the reports from the school or were there on-site observations.

Ms. Fitzpatrick replied that through the reports, they would receive indications the schools were doing what they said they would do. She said the challenge was for Title 1 schools. They had resources from the federal dollars and an expectation of increased on-site visits to those schools because they had the travel dollars to support the visits. However, for schools that were non-Title 1 schools, it was more of a challenge. She said all the school districts in Nevada were eligible for Title 1 services. The Department of Education was trying to think proactively as a department in order to take advantage of the federal funds. She said they were trying to leverage the federal dollars they had to maximize change at both Title 1 and non-Title 1 schools. She said they always obeyed Title 1 rules.

Chair Conklin asked if there were additional questions. He asked for a motion on the regulation.

SENATOR HORSFORD MOVED TO ADOPT REGULATION R031-10.

SENATOR WOODHOUSE SECONDED THE MOTION.

THE MOTION CARRIED.

Chair Conklin opened the discussion on R042-10, Public Utilities Commission of Nevada.

Senator Carlton said the Subcommittee was looking for a statement that did not use the term "decoupling." She was unsure what the new term should be, but they did not want time-of-use meters included in the definition of "energy efficiency."

Sam Crano, Administrative Attorney, Public Utilities Commission, said he spoke with Senator Carlton yesterday: "... as far as the Commission was concerned, the ASD program is not eligible for lost revenue recovery under the proposed regulations. I pulled some transcripts, both from the workshop and the present rule-making docket and from the IRP, Integrated Resource Plan docket, that we had recently, and there are a number of representations in there both by the companies, by the Commission, by the Attorney General's Bureau of Consumer Protection that all agree the ASD is not eligible for lost revenue recovery."

Senator Carlton said: "...and with that Mr. Chairman, I would be happy to support the regulation."

Chair Conklin asked if there were further questions by the Subcommittee. He said he would accept a motion from Senator Carlton.

SENATOR CARLTON MOVED TO ADOPT R042-10.

MS. KIRKPATRICK SECONDED THE MOTION.

THE MOTION CARRIED.

Chair Conklin opened discussion for public comment.

Kyle Nagy, Director, CommCap Advisors, said he was a founder of CommCap Advisors, a commercial mortgage banking firm. He said his company had maintained a mortgage banking license and their lenders were federally

regulated life insurance companies and investment banks. They arranged financing for high net worth and commercial investors. He said there was a group that did strictly commercial mortgage banking and brokering who would be negatively impacted by R038-10 and R035-10. The approved regulations specifically dealt with the federally created Safe Act, which was designed to monitor and regulate residential loan originations. He said they complied with the regulations as best as possible, but they hoped the elected officers of the State and the Mortgage Lending Division recognized the difference between residential and commercial loan originators. He asked the Subcommittee to remember they did no residential loans of any sort. He said the regulations being applied to them were in excess of what they normally did.

Chair Conklin said Mr. Nagy had spoken with him several times prior to the meeting and there was a legitimate concern with the statute when drafted as the Safe Act Compliance Law last cycle. They tried to do everything they could so they did not lose control over the Mortgage Lending Division. He said the current statutes did not delineate the difference between commercial and residential lending. He said all commercial brokers, who do no residential business, were now caught up in the federal Safe Act Compliance bill due to lack of delineation. He said it was a simple ideological fix, but not a simple legal fix. Chair Conklin was putting a bill in for next session to address the problem. He said they could not fix the regulation without violating the current statute.

Mr. Nagy said they understood the greater good. The regulations were set to protect the consumers. He said they were a small group of mortgage bankers. He appreciated any assistance available.

Chair Conklin asked if there were further questions. As there were none, he adjourned the meeting at 3:34 p.m.

Submitted by:

Olivia Lodato, Interim Secretary

APPROVED:

Marcus L. Conklin, Chair

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EXHIBITS

Committee Name: Legislative Commission's Subcommittee to Review Regulations

Date: July 21, 2010

Time of Meeting: 2:00 p.m.

	Exhibit	Witness/Agency	Description
	A		Agenda
	B		Attendance Roster
	C		Regulations to be Reviewed by the Legislative Commission's Subcommittee to Review Regulations