



**NEVADA LEGISLATURE
SUNSET SUBCOMMITTEE OF THE
LEGISLATIVE COMMISSION**
(Nevada Revised Statutes [NRS] 232B.210)

SUMMARY MINUTES AND ACTION REPORT

The sixth meeting of the Nevada Legislature's Sunset Subcommittee of the Legislative Commission was held on Thursday, April 21, 2016, at 9 a.m. in Room 4412 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. The meeting was videoconferenced to Room 3137 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. A copy of this set of "Summary Minutes and Action Report," including the "Meeting Notice and Agenda" ([Exhibit A](#)) and other substantive exhibits, is available on the Nevada Legislature's website at <http://www.leg.state.nv.us/interim/78th2015/committee/>. In addition, copies of the audio or video record are available through the Legislative Counsel Bureau's Publications Office (e-mail: publications@lcb.state.nv.us; telephone: 775/684-6835) and may be available online at <http://www.leg.state.nv.us/Granicus/>.

COMMITTEE MEMBERS PRESENT IN LAS VEGAS:

Senator James A. Settelmeyer, Chair
Assemblyman Glenn E. Trowbridge, Vice Chair
Senator David R. Parks
Assemblywoman Irene Bustamante Adams
Assemblyman Chris Edwards
Carmen Amen

COMMITTEE MEMBERS PRESENT IN CARSON CITY:

Senator Donald G. Gustavson
William "Buzz" Harris
Teresa Rankin

ADDITIONAL LEGISLATOR PRESENT:

Assemblyman Randy Kirner, Assembly District No. 26

LEGISLATIVE COUNSEL BUREAU STAFF PRESENT:

Carol M. Stonefield, Chief Principal Research Analyst, Research Division

Michael K. Morton, Deputy Legislative Counsel, Legal Division

Janet Coons, Principal Administrative Assistant, Research Division

Items taken out of sequence during the meeting have been placed in agenda order.

AGENDA ITEM I—OPENING REMARKS

Chair Settlemeyer called the meeting to order; he announced that Assemblyman Chris Edwards and Carmen Amen have been appointed to the Subcommittee.

AGENDA ITEM II—PUBLIC COMMENT

Chair Settlemeyer called for public comment.

Adrian R. Ruiz, D.D.S., Henderson, Nevada, requested fair and due process for health care providers in Nevada. He submitted written testimony ([Exhibit B](#)) and letters from various State agencies ([Exhibit B-1](#)).

Michael D. Bell, D.D.S., The Bell Center for Biological Dentistry, Las Vegas, Nevada, shared his experience appearing before the Board of Dental Examiners of Nevada (BDEN). He requested oversight of the Board for its unfair processes and exorbitant fees.

Michael Kelly, former employee of the Taxicab Authority (TA), Department of Business and Industry (DBI), testified in favor of abolishing the TA and merging its responsibilities with the Nevada Transportation Authority (NTA), DBI. He recommended removing the NTA from the DBI and identifying it as an independent board. Mr. Kelly submitted written testimony ([Exhibit C](#)) and informational items regarding the TA to support his recommendations ([Exhibit C-1](#)).

Ervin Calvo, D.D.S., Las Vegas, Nevada, stated that even though he has not had any problems with the BDEN, he offered his support for the necessary changes needed to create a fair environment for all health providers ([Exhibit D](#)).

Mina Abalos, D.D.S., said that she, too, has not experienced any problems with the BDEN, but she requested the Subcommittee put forth changes to ensure a fair process.

Andrea Smith, Dental Assistant, Las Vegas, Nevada, shared her experience with the BDEN's investigative process and testified in support of statutory changes for the supervision of the BDEN.

Tina W. Tsou, Secretary, Las Vegas Dental Association, provided written testimony regarding complaints about the BDEN's private attorney and excessive investigative costs ([Exhibit E](#)).

L. Scott Brooksby, D.D.S., D.I.C.O.I., Las Vegas, Nevada, submitted written testimony regarding his experience with the BDEN's investigative process ([Exhibit F](#)).

Chair Settlemeyer remarked that an audit is being conducted of the BDEN's investigative fees, and a review is being conducted on the previous audit of the TA performed by the Division of Internal Audits, Office of Finance, Office of the Governor; recommendations will be made based on the findings of the audits.

AGENDA ITEM III—APPROVAL OF MINUTES OF THE MEETING HELD ON MARCH 15, 2016, IN CARSON CITY, NEVADA

MOTION: Vice Chair Trowbridge moved to approve the minutes of the meeting held on March 15, 2016, in Carson City, Nevada. The motion was seconded by Senator Parks and passed unanimously.

AGENDA ITEM IV—BRIEFING ON THE DECISION IN *NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS V. FEDERAL TRADE COMMISSION*, 135 S. CT. 1101 (2015)

(This agenda item was taken out of order.)

Kevin C. Powers, Chief Litigation Counsel, Legal Division, Legislative Counsel Bureau (LCB), stated the Legal Division is a nonpartisan agency; it does not support or oppose any particular legislation, policy, or viewpoint, but it does provide the Legislature with legal counsel and advice regarding the effects and consequences of legislation and developments in the law. He provided an explanation of how the United States Supreme Court's decision in the *North Carolina State Board of Dental Examiners v. Federal Trade Commission* (FTC) case is important to the Sunset Subcommittee. Mr. Powers stated:

It involved a state board on which a controlling number of the members of the state board were active market participants in the occupation being regulated, in that case, a dental board. That is typical in Nevada and many other jurisdictions. Often, professional state licensing boards have members who practice in the profession being regulated. In this case of the North Carolina board, of the eight members, six were required to be practicing dentists; one was required to be a practicing dental hygienist; and the final member of the eight-member board had to be a member of the public, who represented consumers using dental services.

At issue in the North Carolina Dental Board case was state action antitrust immunity. I know this sounds like an arcane concept, but it actually is important in relation to federal antitrust laws. Before the U.S. Supreme Court, the question was whether the NC Dental Board was immune from liability under a federal antitrust enforcement action because it was carrying out policies of the state. In reviewing that issue, it is important to take a historical look at the background underlying state action antitrust immunity. Before I get into the

facts of the case and the Court's holding, it is necessary to provide that historical and legal background.

In the late 1800s and early 1900s, Congress enacted the Sherman Act and the Clayton Act. Those were significant acts that promoted competition and free markets and prohibited any conspiracy or combination in restraint of trade. The restraints of trade would include items such as price-fixing, monopolies, or market-entry restrictions trying to prevent competition in a market and trying to keep prices inflated and ensure that other market participants could not compete and thereby reduce prices in a certain market. The Sherman Act and the Clayton Act provided for private enforcement actions in federal court where a private party could sue another party claiming that they violated the federal antitrust laws. Following the enactment of those two acts, Congress then enacted the Federal Trade Commission Act that allowed the FTC to bring administrative enforcement actions against businesses to try to stop them from engaging in anticompetitive conduct.

At the time the federal antitrust laws were enacted beginning in the late 1800s, states were already actively regulating professional occupations, like the medical practice and the dental practice. As those early state concepts formed, as far as regulation of those practices, state boards typically had a majority of members who were participants in that occupation being regulated. The theory being that licensed dentists are the most experienced, have the most knowledge, and are best to regulate their industry because they understand how dentistry should be practiced, or in the case of the medical field, how doctors should practice. We know that has expanded to many more industries throughout the years. For example, in Title 54 of the NRS, we know there is a significant number of boards that regulate professions and occupations, including athletic trainers, veterinarians, and massage therapists; the list goes on and on. We know there is a considerable amount of those boards. Early on, states created those boards, and those boards were made up of active market participants because they were considered to be the best qualified to regulate their industry.

Case law from the U.S. Supreme Court has shown that early on, the view was that this was traditional state regulation, and Congress did not intend for the federal antitrust laws to supplant traditional state regulation. The U.S. Supreme Court finally addressed that issue, specifically in 1943, in the case of *Parker v. Brown*. At issue, there was a California statute that created an agricultural commission that could regulate the prices and commodities involving agricultural products. In that case, specifically, an agricultural commission was created to regulate raisins and their production and distribution. The point of the regulation was to ensure that there was not a glut of raisins on the market, thereby lowering the price of raisins. What the commission did was create a system of surplus supply of raisins and setting price standards so that

there was price stability in the market for raisins. Now, obviously, on its face, that is anticompetitive conduct. It is regulation for a public interest beyond simply competition; it is to ensure there is a stable market for raisins and to ensure that the agricultural crop continues to be developed and maintains some level of profitability for the private producers.

Although that was clearly anticompetitive conduct, the question was, because the state legislature specifically decided to displace competition with regulation, whether the state could be held liable under the federal antitrust laws for anticompetitive conduct. The U.S. Supreme Court held and developed what is now known as the state action antitrust immunity so that state legislation, which displaces competition with regulation, does not violate the federal antitrust laws because according to the U.S. Supreme Court, Congress did not intend for the federal antitrust laws to interfere with traditional state regulatory power.

As I go along, I will use either state action antitrust immunity, Parker immunity, or state antitrust exemption. All of those terms are used by the Court, but they all mean the same thing; they refer back to the Parker decision. As Parker immunity was developed in case law, different situations had to be addressed to determine the extent of that immunity. One of the first questions that arose was, Does that state action immunity apply to cities and political subdivisions when they exercise authority pursuant to state law? The U.S. Supreme Court concluded that municipalities are entitled to state action antitrust immunity if they are acting according to a clearly articulated and specifically expressed state policy to displace competition with regulation. In order to have that immunity, the municipality has to point to some type of state legislation that authorizes their action.

Another question that arose under state action antitrust immunity is, What is the effect of state legislation that authorizes private parties, such as trade associations, to engage in certain anticompetitive conduct? Oftentimes, state legislation will involve rate setting. For example, in the context of utilities or motor transportation companies, some state legislation has allowed private companies to get together and present to state agencies joint applications for rate setting. So essentially, those private companies are collectively deciding how they want to set their rates. From a pure free market standpoint, that is anticompetitive—the market is not setting the rates, but the producers are setting the rates and then asking that rate to be approved by state agencies.

The question became for the U.S. Supreme Court, Is that protected by state action antitrust immunity? The U.S. Supreme Court said that it is but only in certain circumstances. In order for that type of anticompetitive conduct to be protected by the immunity, it has to meet a two-part test. First, it has to meet the same test for the municipalities; there has to be a clearly articulated state

policy allowing the anticompetitive conduct—typically state legislation. But, unlike municipalities who only had to meet that standard, the trade associations had to meet a second requirement beyond the clearly articulated standard. There also had to be active state supervision of the anticompetitive conduct. In some of the cases, for example with motor transportation companies, as long as those joint applications for rate setting were submitted to a state agency that reviewed the applications and determined the rates were reasonable, the U.S. Supreme Court said that was a sufficient amount of active state supervision to justify exemption from the federal antitrust laws.

That brings us to the question before the Court in “NC Dental.” With regard to NC Dental, you have a state board. It is clearly a state agency. However, it is also made up of members who are active market participants who have a private incentive to protect certain of their own business interests. The question before the Court was, Does the one-part test that applies only to municipalities also apply to state boards with active market participants, or, are those state boards with active market participants more similar to the private trade associations and therefore, do they have to meet the two-part test that involves a clear articulation and active state supervision?

The U.S. Supreme Court decided that simply the fact that an agency is a state agency is not sufficient to give it state action antitrust immunity. Instead, because there are active market participants on these types of boards, there also must be active state supervision. According to the U.S. Supreme Court, active state supervision requires a state official or state agency that does not have market participants on it to review the decision of the state regulatory board and have the power to modify or veto that decision. That was the basic holding—that the two-part test that seemed to only apply to private trade associations now applies to state boards with active market participants. Keep in mind that if a state board does not have active market participants, the belief is that the one-part test that applies to municipalities is the controlling test.

With that in mind, we need to turn to the facts of the case of NC Dental because all case law is dependent upon its facts, and it has to be read in the context of those facts. North Carolina Dental involves teeth whitening services. In the 1990s, North Carolina dentists started providing teeth whitening services. Under the North Carolina Dental Practice Act, there was no indication whether or not providing teeth whitening services was the practice of dentistry. There was no specific reference in the statute, and according to the Court’s decision, it was not addressed at all by the North Carolina Dental Practice Act.

In the 2000s, nondentists started providing teeth whitening services in North Carolina. What the U.S. Supreme Court emphasized is first, the NC Dental Board did not ask for state legislation making teeth whitening

services the practice of dentistry and thereby prohibiting nondentists from providing teeth whitening services. The NC Dental Board could have gone to the state legislature and asked for that state legislation. If the legislature had passed that state legislation, then because the policy making body of the state had acted and displaced competition with regulation, there would be no antitrust action. If the state legislature authorizes the anticompetitive conduct through legislation, then the immunity applies, but the NC Dental Board did not ask for state legislation. In addition, under North Carolina law, the Dental Board had regulatory authority. If the Dental Board were to adopt a regulation, it had to go through an independent review commission, whose members were appointed by the legislature. The Board did not have absolute regulatory authority; it had to get approval from a separate independent body. The NC Dental Board, however, did not follow the regulatory process. It did not seek to have a regulation, and that regulation, of course, was not reviewed by an independent regulatory body.

The next thing the NC Dental Board could have done under state law is file an action in state court seeking to enjoin nondentists from doing teeth whitening services. If it had taken that route, it would have been entitled to immunity from federal antitrust laws because if a state board uses the judicial process to enforce the state statute, then that is state action that is exempt from the antitrust laws. However, the NC Dental Board did not take that action either. Instead, the NC Dental Board started a program of sending cease and desist letters to the nondentists who were providing the teeth whitening services saying, You are violating state law, and if you do not stop, we will take enforcement actions against you. Eventually, this procedure worked; they sent out over 50 cease and desist letters over a certain period of time; it could have been more, but the record referred to 50. Eventually, nondentists stopped doing teeth whitening services in North Carolina.

The FTC became aware of what was going on with the NC Dental Board and brought an enforcement action under the FTC Act to enforce the federal antitrust laws. In defense, the NC Dental Board argued that it was entitled to state action antitrust immunity. The FTC rejected that defense; it said because the Board had active market participants, it needed active state supervision and that the Board's issuance of the cease and desist letters was not subject to any active state supervision. Therefore, the FTC found that the Board had committed anticompetitive conduct; an injunction was issued by the Board that was upheld by the courts later to stop the Board from engaging in that anticompetitive conduct. That is the issue that came before the Supreme Court. The Supreme Court decided that in the context of state boards where a controlling number of decision makers are active market participants, in order to get that state action antitrust immunity, the state board must meet the two-part test. There has to be a clearly articulated state policy, usually in state

legislation, and the state board's anticompetitive conduct must be subject to active state supervision.

The next thing is, What are the actual potential consequences of the NC Dental Board case? There is a lot of confusion out there. It has been subject to a lot of discussion, debate, and controversy. One thing that is clear is that under the facts of NC Dental, if the Dental Board had sought statutory approval from the legislature, then there would have been no antitrust issue. One lesson for state regulatory boards, on which there are active market participants, is that if there is any doubt as to the authority of the dental board to regulate a certain area, or any other board, then the board should go to the legislature and seek legislative change. If the board is unable to get legislative change, then that is a state policy decision saying that you cannot regulate that area of practice. If the board achieves that legislative change, then the state policy is in favor of anticompetitive conduct, and the board can engage in that conduct. The first lesson is, state boards that have active market participants need to seek legislative approval if there are doubts about the scope of their authority.

The next issue is regulation-making. Article III, Section 1 of the *Nevada Constitution*, specifically gives the legislative branch the power to review through veto and modification of State administrative regulations. It is not a violation of separation of powers in this State for the Legislature to review regulations. Under that constitutional provision, the Legislature can create a body made up of members of both houses of the Legislature to review those proposed regulations and determine whether they are consistent with statutory authority and carry out legislative intent. Through that power in Article III, Section 1 of the *Nevada Constitution*, the Legislature has passed provisions in the Nevada Administrative Procedure Act (APA) that provide for the review of regulations by the Legislative Commission or the Subcommittee to Review Regulations. Both the Legislative Commission and the Subcommittee to Review Regulations have the power to determine whether or not regulations comply with statutory authority and carry out legislative intent. We believe that power would be considered active state supervision because the State's policy makers in the Legislature can actively reject a regulation that they believe does not carry out State policy. From the regulation standpoint, we believe in jurisdictions, like Nevada, that have an independent review of regulations, that there is sufficient active state supervision to provide the necessary component to achieve state action antitrust immunity.

Finally, agencies that have active market participants, because they are regulating professionals or other occupations, have the power to license, suspend and revoke licenses, and impose administrative penalties in the disciplinary process. The NC Dental Board case said nothing about the disciplinary process. It did not say what standard would apply to such a state

board when it takes disciplinary action and whether or not the state board would be entitled to state action antitrust immunity when it is taking disciplinary action. That is an area that is not decided by NC Dental Board.

That brings me to the FTC Staff guidance. In 2015, because of the many questions from the states that were directed to the FTC about the impact of NC Dental, the FTC staff put out a guidance document. However, the FTC staff clearly put a disclaimer in the document that the Staff guidance is not necessarily the views of the actual FTC, and the Staff guidance was subject to review, modification, and change at any time if it was in the public's interest. The Staff guidance takes a very strict approach to applying state action antitrust immunity under the belief that such immunity should be disfavored. Although the Staff guidance seems to have additional requirements beyond what is clear from NC Dental, the question remains whether that Staff guidance will be adopted by the FTC, and after that, approved by courts when it is eventually litigated at some point in the future, which it most likely will be.

Before I get into the Staff guidance, I want to make clear that this is just Staff guidance; it is not the views of the FTC. And in the context of regulation-making, this office actually disagrees with that FTC Staff guidance.

What the FTC Staff guidance says with regard to regulation-making, is that active state supervision certainly requires that the review body for the regulations has the power to modify or veto regulations. And, we believe the Legislative Commission and Subcommittee to Review Regulations have that power. The FTC Staff guidance goes on though, saying that in order for there to be active state supervision, the procedures used by the review body have to meet certain requirements. There has to be significant review of facts, figures, investigations, and scientific data; there has to be public hearings and the receipt of testimony; and there has to be a written decision by the review body explaining how the regulation meets state policy. There is nothing in NC Dental that requires all of those procedures in order for there to be active state supervision. Those are added on by the FTC staff, under what we believe is their view, which is a strict interpretation of the active state supervision requirement. It is our belief that the Legislative Commission, which is made up of legislators who make the State policy, is actively supervising its agencies when it reviews regulations and has the power to veto or modify them. I have to say, because the FTC staff is suggesting that there are greater requirements for active state supervision, it is an open question. Although it is the opinion of this office that Nevada's APA provides active state supervision through the Legislative Commission, it has not been finally determined if that is the case.

Finally, the FTC Staff guidance states that in order for an agency taking disciplinary actions to have active state supervision, the state regulatory board's

action must be actively supervised by a state official who is not an active market participant. In the context of revoking or suspending a license, the FTC Staff guidance suggests that the independent state official conducts a *de novo*, or a new review, independent of what the state regulatory body did, which would require the review body to essentially go over the evidence again, review it, and determine whether or not the regulatory board was acting according to state policy. Then the review body would have to issue a written decision supporting its view that the state board had engaged in conduct that was consistent with state policy. Again, this is FTC Staff guidance; it is not the law. It is their interpretation of the law, and it has not been adopted by the full FTC. It is guidance and opinion, but it is not binding legal authority. It is FTC Staff guidance, I believe, that has created most of the concern.

The NC Dental Board case created a new standard for state regulatory boards with active market participants. They must meet the two-part test when people believed in the past they only had to meet the one-part test. By going through the state legislature or going through a state regulatory process where regulations are reviewed by a legislative body, we believe that state agencies can meet that standard. It is the FTC Staff guidance that has added these additional requirements that have caused even greater concern. Because that is not binding legal authority yet, there is obviously confusion as to whether that will ultimately be the standard that agencies will have to follow, particularly in the disciplinary action process. That would be a considerable burden on state boards to go through an entire disciplinary process and then have the entire process reviewed by another agency before you could go to court and get judicial review. That is a significant concern. If you had to have an independent body review your state board, then it sets you at another level of administrative review. There are costs and time and burden on both the practitioner and the boards. Ultimately, if the view prevails that disciplinary actions are subject to the active state supervision requirement, that could have a significant impact on state regulatory boards. However, because that is not binding legal precedent, but only FTC Staff guidance, that is an issue that has yet to be resolved. We cannot conclusively say one way or another how courts would ultimately resolve that issue.

Mr. Chair, that is an overview of the NC Dental Board case. I am certainly open to any questions that members of the Committee have. Thank you.

Assemblyman Edwards asked the following questions:

- What is the remedy for a business harmed by a board?
- What is done to a board if it is not performing its job correctly?

- Does the Nevada Legislature have veto authority over the decisions of a board? and
- Does the Nevada Legislature's part-time status allow for effective oversight of any board?

Mr. Powers said Assemblyman Edwards' questions are broader than the issues contained in the NC Dental case. He stated:

We must divide between regulation-making and adjudication of disciplinary action. State regulatory boards perform different functions. Regulation-making is a quasi-legislative function, and adjudication of disciplinary actions is a quasi-judicial function. They are two different types of functions and they have to be addressed separately.

With regard to the scope of a board's authority and what it can do through its regulations, the Legislature, through its regulation-making review process under the APA, maintains review of the regulation-making authority of those administrative bodies. It has the power under Article III, Section 1 of the *Nevada Constitution* to review, modify, and veto administrative regulations. In the context of adjudicatory proceedings, disciplinary actions, and the like, where the boards are acting in a quasi-judicial capacity, the Legislature does not have immediate review of those disciplinary proceedings. The reason for that is separation of powers. Article III, Section 1 of the *Nevada Constitution* separates the State government into executive, judicial, and legislative powers. Because Article III, Section 1 has the exception for regulation-making that allows the Legislature to review regulations, the Legislature's review, veto, and modification of administrative regulations from the executive branch does not violate separation of powers. However, separation of powers does not allow the Legislature to review individual disciplinary decisions by State regulatory boards. That review is done by the judicial branch.

If someone believes a regulatory board has violated their constitutional or statutory rights or exercises unreasonable arbitrary or discriminatory decision-making, those persons in that proceeding, under the APA, can then seek judicial review and have those issues decided by the court. Individual disciplinary actions are not subject to direct legislative review; they are only subject to judicial review under the APA, and that is due to the separation of powers. However, the procedures the boards follow during a disciplinary process and the standards the boards apply are derived through legislation. By enacting general legislation controlling the substantive standards for the boards and the procedures the boards must follow, that is how the Legislature ultimately determines and controls the actions of the boards in a rule of general applicability that applies across the board. The Legislature cannot control individual disciplinary proceedings by the boards; that is subject to judicial review. In a broad scope, that would cover some of your concerns.

Let us now fold that into the NC Dental case. The NC Dental case involves state antitrust immunity. It is possible under NC Dental that now that boards must meet a higher standard to get antitrust immunity, more individuals will be bringing private enforcement actions under the federal antitrust laws against state regulatory boards. If state regulatory boards take an action deemed anticompetitive, it is possible that private persons will bring actions for damages in federal court seeking remedies under the federal antitrust laws. In order to have immunity from the federal antitrust laws, those boards would then have to meet the two-part test from NC Dental.

It should be noted that the federal antitrust laws have a trebled damages provision so that if you prove damages, it is tripled; that is a requirement under federal antitrust laws. However, in NC Dental, the U.S. Supreme Court was careful to say that it was not dealing with issues of damages, and there may be a possibility for additional immunities from damages in federal court under antitrust actions against state entities. However, that is an open question. There are other immunities recognized by law, too, that could be applicable to protect state board members from individual liability and federal court antitrust actions. Those are all unsettled questions at the moment.

This is beyond the scope of what I think the Committee needs to consider today, but in the general scope, just to recap, regulation-making is subject to immediate legislative review in this State through the Legislative Commission and the Subcommittee to Review Regulations under the APA. Disciplinary proceedings are not subject to immediate legislative review but they are subject to immediate judicial review. However, the Legislature has the power to change the law governing the substantive standards and the procedures followed by boards. And finally, it is possible under NC Dental that state boards that take anticompetitive action could be subject to potential antitrust liability under the federal antitrust laws. I hope that answers your questions.

Assemblyman Edwards asked whether Nevada's judiciary branch has adequate resources to perform the necessary review and oversight so that dentists involved in a case do not go out of business and lose their livelihood because they cannot get into a court.

Mr. Powers commented that is a question for the judicial branch to answer, but he suggested it is a matter of caseload. Even though the APA grants everyone the right to challenge actions of agencies in courts, Mr. Powers stressed litigation is a slow, costly process. He further stated:

There is a significant cost to judicial review of State administrative disciplinary action, which dovetails into some of the comments made by the public earlier. Again, this agency is nonpartisan and does not support or oppose any particular view of the comments made earlier that State law in NRS Chapter 622 provides for State boards to recover administrative costs, investigative costs, and attorney

fees in disciplinary actions. That is a policy for the Legislature to review and to determine whether that policy is favorable or unfavorable to the whole administrative process. That is something the Legislature can consider to address and remedy the issue of the costs involved in disciplinary proceedings.

Senator Parks questioned when the FTC Staff guidance might be approved by the FTC.

Mr. Powers said he checked to see whether the FTC had opened a regulatory docket on this issue, but he could not find one. He stated it is possible that the FTC may adopt regulations in this context or it may do so on a case-by-case basis as it adjudicates potential complaints against state regulatory boards. Mr. Powers commented this could take a considerable amount of time through the federal administrative agency process, and then the federal courts must determine what standards would be applied to state regulatory boards and whether FTC Staff guidance would ultimately be adopted by the entire FTC.

Chair Settlemeyer questioned the difference between an individual action and an entire class, such as teeth whitening services.

Using NC Dental Board as an illustration, Mr. Powers explained:

Because the dental board was going after unlicensed persons—nondentists—who were engaged in teeth whitening, they could not bring a disciplinary process against those persons because those persons did not have a license, and therefore you cannot suspend, revoke, or take away that license. Instead, the board chose to issue cease and desist letters with the threat that they would ultimately seek court action against those nondentists engaged in the teeth whitening process. In that case, the board chose to go against all nondentists in a broad attack under cease and desist letters because they did not have the regulatory authority to bring individual disciplinary actions against unlicensed individuals.

I want to make a point that in this State, for some of our boards, for example, the State Contractors' Board, we have given those boards the power to issue administrative citations against unlicensed persons for engaging in unlicensed activity. Under that kind of statutory scheme, the board issues an administrative citation; that citation goes through the individualized disciplinary process; and that person would be entitled to judicial review after that disciplinary process. There are ways through statutes to create an individualized disciplinary process for unlicensed activity. It does not appear from the NC Dental Board case that that was an option for the NC Dental Board under those circumstances.

The difference between individualized action against particular persons and going after an entire group is a choice of administrative remedies that are available to the board under the state statute.

Responding to Chair Settlemeyer's concern regarding emergency regulations, Mr. Powers said the general authority of the Legislative Commission and the Subcommittee to Review Regulations is to review permanent regulations, which is active supervision. He explained:

The APA does provide for the issuance of emergency and temporary regulations, particularly during the period of the legislative session when the Legislative Commission is not performing that review function. Those regulations can become effective without approval or review by the Legislative Commission or the Subcommittee to Review Regulations. In that context, it may be possible that there is not active State supervision that would grant state action antitrust immunity. The absence of state action antitrust immunity does not automatically result in antitrust liability. You still have to prove an antitrust case. All immunity did was remove you from having to litigate the issue; if you do not have that immunity, then the board would have to litigate the issue, but it does not mean they necessarily would be liable. That gives you an idea of what would happen if an emergency or temporary regulation was challenged under federal antitrust action.

The Legislature could consider changes to the APA to determine whether to allow emergency and temporary regulations or to require those emergency and temporary regulations to go through some sort of legislative review process. The Legislature does have the opportunity to do that; it is a matter of legislative policy whether it does. The agencies may be in favor of that legislative review only to ensure that there is active State supervision of that emergency and temporary regulation process. But you do make a good point that the emergency and temporary regulation process is not now subject to the type of legislative review that permanent regulations are; therefore, it may be something the Legislature may want to consider this next legislative session.

Chair Settlemeyer said he would follow up with Mr. Powers regarding the emergency and temporary regulations.

AGENDA ITEM V—REPORT FROM THE NEVADA COMMISSION FOR WOMEN (NRS 233I.020), PREVIOUSLY REVIEWED DURING THE 2013–2014 INTERIM

Richann Bender, Board Member and Vice Chair, Nevada Commission for Women, provided an update on the Commission, which covered board appointments, meeting information, topics for future discussion, and possible legislation ([Exhibit G](#)).

Assemblywoman Bustamante Adams cautioned the Commission about wavering away from the focus of female issues, which has happened in the past.

AGENDA ITEM VI—PUBLIC HEARING CONCERNING THE TERMINATION, MODIFICATION, CONSOLIDATION, OR CONTINUED OPERATION OF CERTAIN ENTITIES PURSUANT TO NRS 232B.240

A. State Board of Education (NRS 385.021) ([Exhibit H](#))

Steve Canavero, Ph.D., Superintendent of Public Instruction, Nevada's Department of Education (NDE), introduced Mark Newburn, Vice President, State Board of Education. Addressing the information submitted to the Subcommittee ([Exhibit H](#)), Dr. Canavero stated there are no recommendations for changes to the State Board.

Chair Settlemeyer and Mr. Newburn discussed the current makeup of the State Board. Mr. Newburn opined the membership works well and is adequately diverse; he explained the process for developing standards for the fields represented on the State Board. Mr. Newburn noted the State Board is advisory in nature.

Per a request by Assemblyman Edwards, Mr. Newburn identified the last three recommendations put forth by the State Board for consideration and implementation:

- Assigning scholarships to attract new teachers;
- Transitioning to end-of-course examinations; and
- Providing alternate evaluations for graduation.

Assemblywoman Bustamante Adams suggested she would like to see more business-related individuals on the Board to help ensure high-level success for job readiness.

B. Advisory Council on Parental Involvement and Family Engagement (NRS 385.610), NDE ([Exhibit I](#))

Jennifer Hoy, Vice Chair, Advisory Council on Parental Involvement and Family Engagement, NDE, and teacher, Washoe County School District, shared a presentation highlighting the history of the Advisory Council and its membership, responsibilities, accomplishments, and plans for 2016 ([Exhibit J](#)). She explained there were no meetings in 2009 and 2011 due to a lack of funding, but the newly reconstituted Advisory Council is dedicated to promoting parental involvement. Ms. Hoy discussed how the Council shares its information with the school districts and the community.

Cynthia Santos, Education Programs Professional, Office of Parental Involvement and Family Engagement, NDE, said she works closely with the Advisory Council by providing technical assistance for Council meetings, facilitating communication between Council members and family engagement liaisons in the schools, and reviewing and evaluating annual accountability reports relating to effective family engagement strategies and practices.

Ms. Amen, Ms. Hoy, and Ms. Santos discussed how the Advisory Council handles diversity in the communities and schools and how it measures any disparities in parental involvement. Ms. Amen suggested there be designated representatives in various communities who could present ideas to the teachers and principals, who could then report to the Advisory Council. Ms. Santos noted there are two teacher seats on the Council, and a PTA seat was added in 2015.

C. State Board for Career and Technical Education (NRS 388.330) ([Exhibit K](#))

(This agenda item was taken out of order.)

Dr. Canavero confirmed the makeup of the State Board for Career and Technical Education (CTE) is the same as the State Board of Education pursuant to the Carl D. Perkins CTE Act of 2006.

Michael Raponi, Director, Office of Career Readiness, Adult Learning, and Education Options, NDE, clarified that current federal legislation under the Perkins Act requires the establishment of a sole state agency under the jurisdiction of a governing board to manage and administer CTE funding. He explained one board carries a dual name—State Board of Education/State Board for CTE. Mr. Raponi said the board membership and meeting cycles are the same; dual meetings are not held; and the meeting calendar encompasses the minimum requirements as stated in NRS.

Responding to questions from Subcommittee members regarding which Board members represent CTE, labor, and agriculture, Dr. Canavero replied that when the State Board reviews regulations for adoption, representatives from the State's industry and CTE sectors provide the necessary information through the normal regulatory process. He said it is the responsibility of Mr. Raponi and NDE to collaboratively work with outreach programs and various stakeholders when establishing new CTE programs or revising current CTE programs.

Vice Chair Trowbridge suggested the boards are suitable for consolidation and a further review of the State Board's composition might be necessary to include representatives from agriculture, trade sectors, and community colleges involved in work-ready technical programs.

Subcommittee members raised questions regarding why there are two boards and whether CTE might be lost if the boards merged. Noting the line between CTE and traditional education has disappeared, Mr. Newburn said he does not see the need for two boards any longer, barring any federal or legal reason.

Dr. Canavero commented that federal funding would not be jeopardized if a particular body were designated to carry forward certain duties and responsibilities under the Perkins Act. He cautioned against adding a new, distinct body as the intention is to bring career readiness into the conversation, not separate it from other programs.

Chair Settlemeyer shared Dr. Canavero's concern about creating a separate board; he questioned whether the Subcommittee might consider retasking some appointments to be more specific within certain fields.

D. Commission on Educational Technology (NRS 388.790), NDE ([Exhibit L](#))

(This agenda item was taken out of order.)

Dr. Canavero introduced Kim Vidoni, Education Program Professional, Commission on Educational Technology (CET), NDE, and David Flatt, Parent Representative, CET, NDE. He mentioned the materials submitted to the Subcommittee included recommendations for statutory changes necessary for the Commission to carry out its objectives and programs ([Exhibit L](#)).

Assemblywoman Bustamante Adams requested verification regarding a past recommendation for the elimination of the CET.

Carol M. Stonefield, previously identified, verified that the Legislative Commission's Committee to Study the Governance and Oversight of the System of K-12 Public Education of the 2009–2010 Interim recommended transferring the duties of the Commission to the NDE, but the recommendation was not acted upon.

Chair Settlemeyer requested staff to find out why the recommendation was not carried out.

E. State Council for the Coordination of the Interstate Compact on Educational Opportunity for Military Children (NRS 392C.020), NDE ([Exhibit M](#))

(This agenda item was taken out of order.)

Assemblyman Randy Kirner, previously identified; State Assembly Member, Interstate Compact on Educational Opportunity for Military Children; and Legislative Member, State Council for the Coordination of the Interstate Compact on Educational Opportunity for Military Children, introduced J. Scott Bensing, Nevada State Commissioner, Interstate Compact on Educational Opportunity for Military Children, and Chair, State Council for the Coordination of the Interstate Compact on Educational Opportunity for Military Children.

Mr. Bensing provided a brief history of the Interstate Compact, noting that Nevada adopted the Compact in June 2009. He discussed the meeting dates of the Compact and the services it provides for military families. Mr. Bensing recommended that Nevada's continued participation in the Compact is vitally important to more than 6,000 active duty military children living in the State.

Assemblywoman Bustamante Adams and Mr. Bensing discussed the following: (1) how the success of the Compact is measured; (2) the assessment and use of dues; and (3) potential ways to expand the membership. Assemblywoman Bustamante Adams suggested it would be helpful to have a tangible measurement of how Nevada taxes are spent other than anecdotal records.

Mr. Bensing added the Compact is fully implemented according to statutory requirements of the State Council.

F. Board of Trustees of the Fund for Hospital Care to Indigent Persons (NRS 428.195) ([Exhibit N](#))

Jeffrey Fontaine, Executive Director, Nevada Association of Counties (NACO), presented a legislative history of the Board, and he discussed the following aspects of the Board: (1) its duties; (2) its use of Medicaid funds; (3) projections for Fiscal Year 2017; (4) core programs where hospitals submit claims for care of the indigent; and (5) staffing. He reported the Board has taken over the duties of the Board of Trustees of the Fund for the Institutional Care of the Medically Indigent (NRS 428.470), which the Sunset Subcommittee recommended for termination during the 2013–2014 Interim.

G. State 4-H Camp Advisory Council (NRS 550.035), Public Service Division, Board of Regents, Nevada System of Higher Education ([Exhibit O](#))

Carrie Stark, 4-H Youth Development Director, University of Nevada Cooperative Extension, University of Nevada, Reno, discussed the 4-H camp in Stateline, Nevada. She shared the responsibilities of the Advisory Council, how often it meets, and its objectives. Ms. Stark proposed one statutory change to implement term limits for the Advisory Council members, which she noted is contingent upon a strategic planning session scheduled for next week.

Barbara Byington, Chair, State 4-H Camp Advisory Council, Public Service Division, Board of Regents, Nevada System of Higher Education, stated the Advisory Council has not discussed the proposed change for term limits, and she suggested more conversation is needed on this topic.

Discussion ensued regarding the number of applications submitted for two current vacancies.

H. Nevada Junior Livestock Show Board (NRS 563.010), State Department of Agriculture ([Exhibit P](#))

Matt McKinney, President, Nevada Junior Livestock Show Board (NJLSB), State Department of Agriculture (SDA), commented the Board has presented shows for 77 years. He discussed the changes the Board has experienced over the years and the added responsibilities it has incurred.

Dennis Hellwinkel, Outside Treasurer and Custodian of Accounts, NJLSB, SDA, emphasized that by statute, the Show Board is the only State entity allowed to have accounts outside State government. He said he is accountable to the Office of the State Controller and the Office of the State Treasurer. Mr. Hellwinkel discussed the scholarship accounts, the show and sale account, and he explained why some invoices have not been paid.

Mr. McKinney said the Board has no requests for statutory changes at this time. He noted it is working with the SDA to bring back the State fair. Mr. McKinney commented the Show Board has a relationship with all livestock shows and fairs in Nevada, and its rules are the overall arching rules of the State.

AGENDA ITEM VII—WORK SESSION—DISCUSSION AND POSSIBLE ACTIONS ON RECOMMENDATIONS RELATING TO:

A. Advisory Committee on Participatory Democracy (NRS 225.240), Office of the Secretary of State

(This item was taken out of order.)

Chair Settlemeyer directed the Subcommittee's attention to the Work Session Document (WSD) ([Exhibit Q](#)). He reviewed the proposed recommendations submitted by the Office of the Secretary of State (SOS).

Wayne Thorley, Deputy for Elections, Office of the SOS, stated there were no additional recommendations to those identified in the WSD.

MOTION: Assemblywoman Bustamante Adams moved to recommend continuation of the Advisory Committee on Participatory Democracy with the proposed changes submitted by the SOS: (1) amend NRS to revise existing provisions that require ten members (including the SOS and nine appointees) by providing that the SOS may appoint up to nine members, giving consideration to political, geographical, and demographical factors; (2) amend NRS to stipulate that the term of office shall be two years rather than three years as currently provided; (3) amend NRS to revise existing provisions requiring the Advisory Committee to meet at least once per calendar quarter by providing that the Advisory Committee shall hold at least one meeting, but no more than four meetings, per calendar year; and (4) provide that a majority of the members currently appointed constitute a quorum. The motion was seconded by Senator Parks and passed unanimously.

B. Committee on Catastrophic Leave (NRS 284.3627), Division of Human Resource Management, Department of Administration

MOTION: Assemblyman Edwards moved continuation of the Committee on Catastrophic Leave with no recommendations. The motion was seconded by Vice Chair Trowbridge and passed. Senator Gustavson and Assemblywoman Bustamante Adams were absent for the vote.

C. Board for the Administration of the Subsequent Injury Account for Self-Insured Employers (NRS 616B.548), Division of Industrial Relations (DIR), DBI

MOTION: Assemblyman Edwards moved continuation of the Board for the Administration of the Subsequent Injury Account for Self-Insured Employers with no recommendations. The motion was seconded by Senator Parks and passed. Assemblywoman Bustamante Adams was absent for the vote.

D. Board for the Administration of the Subsequent Injury Account for Associations of Self-Insured Public or Private Employers (NRS 616B.569), DIR, DBI

MOTION: Assemblyman Edwards moved continuation of the Board for the Administration of the Subsequent Injury Account for Associations of Self-Insured Public or Private Employers with no recommendations. The motion was seconded by Senator Parks and passed. Assemblywoman Bustamante Adams was absent for the vote.

E. Appeals Panel for Industrial Insurance (NRS 616B.760), Division of Insurance, DBI

MOTION: Vice Chair Trowbridge moved continuation of the Appeals Panel for Industrial Insurance with no recommendations. The motion was seconded by Senator Parks and passed. Assemblywoman Bustamante Adams was absent for the vote.

F. Occupational Safety and Health Review Board (NRS 618.565), DIR, DBI

MOTION: Senator Parks moved continuation of the Occupational Safety and Health Review Board with no recommendations. The motion was seconded by Assemblyman Edwards and passed. Assemblywoman Bustamante Adams was absent for the vote.

AGENDA ITEM VIII—PUBLIC COMMENT

Chair Settlemeyer called for public comment; however, no testimony was presented.

Delana J. Cardenas, C.T.R., Lead Coordinator, Child and Youth Program, Nevada National Guard, submitted a letter of support for the State Council for the Coordination of the Interstate Compact on Educational Opportunity for Military Children ([Exhibit R](#)).

AGENDA ITEM IX—ADJOURNMENT

There being no further business to come before the Committee, the meeting was adjourned at 12:04 p.m.

Respectfully submitted,

Janet Coons
Principal Administrative Assistant

Carol M. Stonefield
Chief Principal Research Analyst

APPROVED BY:

Senator James A. Settelmeyer, Chair

Date: _____

EXHIBITS

EXHIBIT	WITNESS/ENTITY	DESCRIPTION
Exhibit A	Carol M. Stonefield, Chief Principal Research Analyst, Research Division, Legislative Counsel Bureau (LCB)	Agenda
Exhibit B	Adrian R. Ruiz, D.D.S., Henderson, Nevada	Written testimony
Exhibit B-1	Adrian R. Ruiz, D.D.S., Henderson, Nevada	Letters
Exhibit C	Michael Kelly, former employee of the Taxicab Authority (TA), Department of Business and Industry (DBI)	Written testimony
Exhibit C-1	Michael Kelly, former employee of the TA, DBI	Information on the TA
Exhibit D	Ervin Calvo, D.D.S., Las Vegas, Nevada	Written testimony
Exhibit E	Tina W. Tsou, Secretary, Las Vegas Dental Association	Written testimony
Exhibit F	L. Scott Brooksby, D.D.S., D.I.C.O.I., Las Vegas, Nevada	Written testimony
Exhibit G	Richann Bender, Board Member and Vice Chair, Nevada Commission for Women	Report
Exhibit H	Carol M. Stonefield, Chief Principal Research Analyst, Research Division, LCB	Information regarding the State Board of Education
Exhibit I	Carol M. Stonefield, Chief Principal Research Analyst, Research Division, LCB	Information regarding the Advisory Council on Parental Involvement and Family Engagement
Exhibit J	Jennifer Hoy, Vice Chair, Advisory Council on Parental Involvement and Family Engagement, Nevada's Department of Education	Microsoft PowerPoint presentation
Exhibit K	Carol M. Stonefield, Chief Principal Research Analyst, Research Division, LCB	Information regarding the State Board for Career and Technical Education
Exhibit L	Carol M. Stonefield, Chief Principal Research Analyst, Research Division, LCB	Information regarding the Commission on Educational Technology

Exhibit M	Carol M. Stonefield, Chief Principal Research Analyst, Research Division, LCB	Information regarding the State Council for the Coordination of the Interstate Compact on Educational Opportunity for Military Children
Exhibit N	Carol M. Stonefield, Chief Principal Research Analyst, Research Division, LCB	Information regarding the Board of Trustees of the Fund for Hospital Care of Indigent Persons
Exhibit O	Carol M. Stonefield, Chief Principal Research Analyst, Research Division, LCB	Information regarding the State 4-H Camp Advisory Council
Exhibit P	Carol M. Stonefield, Chief Principal Research Analyst, Research Division, LCB	Information regarding the Nevada Junior Livestock Show Board
Exhibit Q	Carol M. Stonefield, Chief Principal Research Analyst, Research Division, LCB	Work Session Document
Exhibit R	Delana J. Cardenas, C.T.R., Lead Coordinator, Child and Youth Program, Nevada National Guard	Letter

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