

MINUTES
SENATE STATE AFFAIRS COMMITTEE

DATE: Monday, January 14, 2013
TIME: 8:00 A.M.
PLACE: Room WW55
MEMBERS PRESENT: Chairman McKenzie, Senators Davis, Fulcher, Hill, Winder, Lodge, Siddoway and Werk
ABSENT/EXCUSED: Senator Stennett
NOTE: The sign-in sheet, testimonies and other related materials will be retained with the minutes in the committee's office until the end of the session and will then be located on file with the minutes in the Legislative Services Library.

CONVENED: **Chairman McKenzie** convened the meeting at 8:00 a.m., Monday, January 14, 2013, with a quorum present and noted that Senator Stennett was excused. **Chairman McKenzie** introduced **Mattison (Matti) McDaniel**, who is serving as Committee page for the first half of this session. **Matti** was asked to describe some of her current activities and future plans. She will be completing an Emergency Medical Technician (EMT) class and will be a certified EMT in February. She is a Senior at Centennial High School, Vice President of Health Occupations Students of America (HOSA) specializing in sports medicine and a member of the volleyball team. **Matti** plans to attend Utah State University majoring in Human Body Movement and Development. **Chairman McKenzie** and the members of the committee welcomed **Matti**.

PRESENTATION: **Chairman McKenzie** introduced **Brent D. Reinke**, Chairman of the Idaho Criminal Justice Commission, to present the 2013 Legislative Update.

Mr. Reinke explained that the Commission is made up of 25 members from all three branches of government plus county, city and citizen representatives who meet ten to eleven times a year. They deal with all issues facing Idaho's criminal justice system. He introduced several members of the Commission who were present.

Mr. Reinke stated that the focus of the update will be on public defense, human trafficking and sex offender management. **Sara Thomas**, State Appellate Public Defender, who has been intimately involved with the Public Defender Project will begin the discussion. She will also cover the human trafficking issues.

Ms. Thomas opened her remarks with recommendations for the public defense situation in Idaho and how it can be improved. She then spoke about human trafficking in Idaho, the Criminal Justice Commission (CJC) involvement and the appointment of a subcommittee that would work on human trafficking this year. Recommendations for legislation have been developed to address those issues.

The CJC has recommended the following legislation that could go forward this year: 1) Statutes on the uniform appointment of counsel; 2) Juvenile's right to counsel; and 3) Appointment of counsel-Guardian ad litem. CJC has also recommended that an interim committee look at the Idaho system.

Ms. Thomas stated that anyone charged with a serious crime and facing jail time is entitled to representation by a public defender if they meet the statutory guidelines on indigency. Currently Idaho allows each judge in each case to decide whether or not someone is indigent. There is no standard of uniformity and each instance can be addressed differently county by county and even judge by judge. One of the recommendations is to install a presumption of indigency if a person is 250 percent of the federal poverty guideline, or receiving public assistance, or currently incarcerated.

Senator Davis asked for an explanation of the 250 percent of federal guidelines and how it translates into gross income. **Ms. Thomas** responded that a one person family income would be \$27,925 and a family of four would be \$57,625. That is 250 percent of the guidelines. **Senator Davis** asked that the actual numbers for the guidelines and the computations be provided. **Ms. Thomas** agreed to do so.

Chairman McKenzie inquired if there would be a standard form and uniformity in the process in which income was reported. **Ms. Thomas** stated that such a form is not in the legislation. However, the Idaho Supreme Court is looking at that issue. The new legislation also provides some protections that when those forms are filled out, they can only be used for certain purposes to avoid other problems.

Senator Hill asked if there is currently a presumption of indigency and the answer was that there is not.

Ms. Thomas moved on to juvenile representation. Currently 11 percent of juveniles who are actually incarcerated in Idaho never had an attorney when they were going through the court system. In fact, Idaho's *Juvenile Rule 6 (i)* allows prosecutors to negotiate plea agreements with unrepresented children. CJC has recommended legislation that would ensure that there are specific standards for juvenile representation.

CJC also addresses a current problem with Idaho law which allows an attorney to act both as guardian ad litem as well as the child's attorney. There is an inherent conflict because of the responsibilities of each assignment.

Ms. Thomas addressed the recommendation that an interim legislative committee be formed to review how public defense services are provided in Idaho. It would determine the best system, cost of changes and identify appropriate funding mechanisms.

Ms. Thomas explained that the CJC created a subcommittee to look at human trafficking in Idaho. Two questions were addressed: 1) Did Idaho have a human trafficking problem? and 2) Does Idaho need legislation to address these problems? The results of the study showed that Idaho has a growing human trafficking problem and that gangs are involved. Human trafficking is not a crime but is a sentencing enhancement only if done in connection with another substantive crime. Idaho needs additional statutory authority. There are gaps in current Idaho law regarding human trafficking. CJC would like to change Idaho human trafficking law to address three specific issues:

- 1) Make it a felony to use an underage person for prostitution.
- 2) Broaden the definition of sexual prostitution for a minor so it isn't just for a fee but for anything of value, i.e., food, shelter or medical care in exchange for sexual behavior.
- 3) Take away the profits (money or property) of the perpetrators facilitating the crime.

Mr. Reinke referred to an Executive Summary (included as part of these minutes) from the standpoint of a public defender. There is also a package being developed for legislation for 2014 and that will be presented to the committee next year.

Sharon Harrigfeld, Juvenile Corrections, commented on the Results First Initiative. They are using a model produced by the Washington State Institute for Public Policy and customized it for Idaho's laws and data. Results First is a collaborative effort involving state agencies, the judiciary and counties. It is a result of a three step research project to locate real world evaluations, estimate the taxpayer and crime victim benefits and costs of the programs, and determine how alternative programs would affect prison demand, public spending and crime. The intent of this effort is to provide the legislature with a list of well researched policies that can lead to better statewide results and efficient use of taxpayer dollars.

Chairman McKenzie asked for questions.

Senator Siddoway referred to trafficking young people; were those sales short or long term? **Ms. Thomas** said the cases they referred to were short term.

Senator Winder ask if the issues that needed legislative help would come after the interim committee is established or will they come forward in this session. **Ms. Thomas** responded that there are two different areas. The interim committee will focus on the system itself. All other pieces of legislation will come forward this session.

Senator Fulcher expressed thanks to the CJC for this effort. They are very much appreciated.

Chairman McKenzie stated his thanks for the presentation and announced the beginning of the Pending Rules Review. **Teresa Luna**, Director, Department of Administration, will present their rules. **Chairman McKenzie** explained that when the Rules are brought before the committee, public testimony is not taken. There are those who had signed up to testify and they are listed on the sign up sheet. Questions from committee members will be heard.

PENDING RULES REVIEW

Department of Administration Rules **Ms. Luna** stated that the rules promulgated by the Department of Administration as a requirement of H693 passed during the 2012 Session. These rules address the care, management and maintenance of Capitol Mall properties. There are three new chapters of rules before the committee governing the usage of the interior and exterior of Capitol Mall properties and for the exterior of the Capitol building itself including the Jefferson steps. **Ms. Luna** explained the criteria for developing the new rules which reflect the same policies, procedures and guidelines that the Department of Administration has used to manage the Capitol Mall properties. Each rule defines the properties in question, the hours of usage, any limits or restrictions, and administrative activities. The first draft of the rules was posted for public comment for 30 days in May and June of 2012 and was posted for public comment again in September after revisions were made.

Chairman McKenzie requested that the rules be reviewed in more detail since this is a new Chapter.

38.04.06-Rules governing the exterior of State property, the Capitol Mall and other State facilities excluding the Capitol.

Ms. Luna described what kinds of buildings this rule covered. **Chairman McKenzie** asked if there was any reference to specific buildings. **Ms. Luna** deferred to **Julie Weaver**, Deputy Attorney General, who explained that Section 67-5709(2)(a)(b), Idaho Code describes each of the properties.

Senator Davis referred to page 10 under "Written Interpretations" and asked **Ms. Luna** if, as of today's date, any written interpretations have been issued for the old Ada County Courthouse. **Ms. Luna** responded "no."

Senator Werk asked if the constitutionality of the provisions within these rules had been reviewed. **Ms. Weaver** responded that they had worked with the Civil Litigation Division as a team to draft this Chapter. There is currently litigation around the constitutionality of this Chapter. Any questions remaining will be resolved in that litigation. **Chairman McKenzie** asked if the litigation is over the statute that gave authority to write the rules or is it over the rules themselves or both. **Ms. Weaver** responded that it has been amended and broadened to include these rules. **Senator Davis** asked if there is a status report on the litigation. **Ms. Weaver** stated they were currently filing the briefs for summary judgement. She was not aware of a trial date.

Ms. Luna continued to page 12, "Other State Properties." *H693* extended the opportunity for other agencies that managed properties, such as Parks and Recreation and the Historical Society, to opt into these rules if they chose with the permission of the legislature. The Idaho State Historical Society has asked to have all of their properties included and subject to these rules.

Senator Werk stated that it appears that one rule was developed and that theme was carried forward into the other two rules. Is that correct? **Ms. Luna** said yes, in general themes. **Senator Werk** went back to page 11, Subsection 07, defining event as a meeting of two or more people. What could that mean? If two people met on the Capitol steps to discuss a topic, is that considered an event? **Ms. Luna** said the short answer is no. page 14 addresses public use and the traditional trends of use by the public.

Ms. Luna said that use of state facilities begins on page 14 describing what events and exhibits can be held, prohibited uses, commercial activity, private events, event and exhibit duration, what equipment and supplies will or will not be provided by the state, area closures ... **Senator Davis** referred to Section 200 and asked for further explanation on authorized and prohibited uses. **Ms. Luna** responded that these rules are based on policies and procedures that the Department has used for years. The area concerns the walkways and the grassy areas around the Capitol Mall, not the Capitol building itself. Traditionally those uses have been pedestrian and events are not typically held in those areas. However, they would be allowed during business hours or hours set forth in the rules. Prohibited usage would include commercial activity with a few exceptions: no camping, no private events and events where public access is restricted. State events and exhibits may occur anywhere within the State facilities. State maintenance and usage has priority over any usage. **Senator Werk** asked about the hot dog stand at the courthouse. Would that be a prohibited use? **Ms. Luna** said that concessions authorized by law are allowed.

Chairman McKenzie commented that private events are prohibited and those are defined on page 11. For clarification, if private citizens were protesting or supporting some public policy, does the purpose of protesting make it a public event? **Ms. Weaver** went back to the definition; it focuses on excluding the public from the event, not on the organization sponsoring it. Any organization can sponsor an event, it just has to allow anyone access who wants to attend.

Ms. Luna (back to page 14 - duration) Any individual or group is allowed to use the properties during the hours allowed not to exceed seven days in a row. They can leave for 24 hours and then return.

Section 202 deals with equipment and supplies. The Department would not provide a podium or public address system. Section 203-Establishment of Perimeters and Section 204-Area Closures allows the Department to close areas if deemed necessary for maintenance, etc.

Section 300 discusses Restrictions and Limitations on Use. An event should not interfere with the primary use of the facility and shouldn't block exits and entrances.

Section 302 outlines Hours and Locations of Use. Subsection 01: The hours of the Capitol Mall Office Properties are 7:00 a.m. to 9:00 p.m. during the months of March through October and 7:00 a.m. to 6:00 p.m. during the months of November through February. These properties have limited lighting and security between sundown and sunup. Subsection 02: The same rules cover the Capitol Annex which is part of the Capitol Mall Property definition. Sections 303 and 304 cover motorized and non motorized means of transportation or entertainment.

Senator Davis inquired about how the hours of use of the mall properties, which are time certain, relate to Section 201 that talks about seven consecutive days which he assumed to be a 24 hour period? Are those seven days not a 24 hour time period? **Ms. Luna** stated that it was not a 24 hour time period. They may use the property for seven days in a row during the hours of usage set forth in 302.01.

Senator Davis questioned: What if the legislature is doing something that is perceived by some to be controversial, are you limiting their speech rights within the hours that are being subscribed under 302.01? **Ms. Luna** responded no. That will be made more clear in the Capitol exterior rules which allow, regardless of sunup or sundown, usage of the grounds surrounding the Capitol building to 30 minutes before and 30 minutes after the legislature adjourns. **Senator Davis** responded that the legislature does not normally go that late but there may be committees that run into the nighttime hours. Are you talking about the adjournment of the body or does it also speak in terms of committees? **Ms. Luna** said that the rule for the Capitol exterior says that when "either one or both of the houses of the legislature or any of the Legislative Committees are in session" – so it is either.

Senator Davis asked why a speech right would be limited to 30 minutes from adjournment. What is the public policy reason? **Ms. Luna** explained that the hours for the exterior of the Capitol building (reminder that those rules are in another section) are until midnight on the Capitol steps. **Ms. Luna** pursued 305-Animals, wild and domestic, and 306-Landscaping.

Senator Siddoway asked for a definition of the irrigation equipment in Section 306.03. **Ms. Luna** stated that this could mean removing equipment because of watering times when the irrigation heads need to pop up to allow the system to work properly. Staking is not allowed because it could damage the pipe system underground. **Senator Siddoway** referred to "interfere with equipment" and gave an example of what he thought that meant. **Ms. Luna** agreed and continued on with her explanation of Sections 307-312. Section 313-Sound Level and Amplification was explained in more detail.

Senator Werk asked if 313 would prohibit use of sound amplification. **Ms. Luna** stated that they do not want sound to be disruptive. **Senator Werk** inquired if this same rule was included in the Capitol building rules or is it modified. **Ms. Luna** answered that those rules are modified for the Capitol exterior. Ms. Luna went on with her explanation to the end of this docket.

DOCKET NO.
38-0407-1202

38.04.07 - Rules Governing Use of the Interior of State Property in the Capitol Mall and Other State Facilities

Ms. Luna stated that these are the same properties that were discussed in the previous section for the exterior. The properties in question are housed by state agencies. The usage is the common areas of the Capitol Mall properties. **Senator Siddoway** noted that normally, in the negotiated rulemaking process, the agencies tried to bring together the opposing sides of an issue and would try to reach some kind of consensus. However, according to the language on pages 22-23, "further consensus between interested parties on the content of the rules is improbable" seems to indicate that negotiated rule making was not attempted. That seems like an abdication of the responsibility of the agency. **Ms. Luna** believed the language on page 22-23 was a true statement. They worked with Occupy Boise through mediation as well as the court case and law sessions to come up with acceptable guidelines since, at the time, there were no rules. They asked that the guidelines, very similar to these rules, be recognized and be followed. That was met with much disdain. They did not feel there was any hope of coming up with negotiated rules. **Senator Siddoway** asked if that was legal for an agency to not take on that responsibility. **Ms. Luna** answered "yes it is."

Ms. Luna proceeded to explain the definitions and rules. **Senator Winder** asked about the process that is followed when an additional property is added to one of the other state facilities. **Ms. Luna** responded that the facility would have to come before the Body for permission to add another property.

Senator Fulcher referenced 200.02.a—Prohibited Uses which states that the Interior State Facilities shall not be used by the public for press conferences, conferences, receptions or gatherings. Within the Capitol building, these kind of meetings occur and this rule does not have a provision for that. **Ms. Luna** stated that these rules are only inclusive of the Capitol Mall properties and excludes the Capitol building itself.

Ms. Luna continued with her explanation beginning with page 28 and ends on page 30 of the rule book.

DOCKET NO.
38-0408-1202

Rules governing use of the Idaho State Capitol exterior.

Ms. Luna said that these rules apply to the grounds directly adjacent to the Capitol building and in particular, the Jefferson steps and the East and West steps of the Capitol. **Ms. Luna** read through the items that are required for all rules on pages 33-36.

Senator Davis asked for confirmation of Section 002 that there are no written statements by the Department pertaining to the interpretations of this Chapter. **Ms. Luna** concurred.

Ms. Luna stated that the rules are similar until Rule 200-Use of State Capital Exterior which is very similar to the use of the Capitol Mall exteriors. They talk about state events, exhibits, priority uses, duration, equipment and supplies which, in this case, can be reserved if the steps are reserved. Establishment of perimeters, area closures, and the restrictions and uses in Section 300.

Section 302-Hours and Locations of use. The same hours apply as previously explained with the exception of the legislative session where the 30 minute rule applies. There is further discussion about the Jefferson street steps which are available for public use 6:00 a.m. to 11:59 p.m. seven days a week. However, they can only be reserved during business hours.

Senator Davis recalled an incident two years ago where opponents to some legislation circled the entire Capitol building. In the event the legislature had adjourned and it was past the time period in the hour section, would that type of conduct be precluded by Section 302. **Ms. Luna** thought that instance would fall under the 30 minute rule. They would be allowed to be on the property 30 minutes before and after any committee meeting or floor activity. **Senator Davis** remembered that the march went on for an extended period of time. Are you saying that other than the use of the Jefferson Street steps, upon adjournment plus the 30 minutes, that type of speech would be restricted to the hours that are allowed. **Ms. Luna** said yes, it would be restricted to Capitol steps themselves.

Senator Winder referred to page 30, Section 302.01.d and noted it would prohibit events lasting 24 hours or any overnight use of the steps. **Ms. Luna** said that without a waiver from the Director, yes it would prohibit those types of activities. Once business hours at the Capitol are over, the security staff drops substantially and that was considered when developing the hours of usage. **Senator Winder** asked if a permit could be obtained to have a 24 hour event and if so, explain the process. **Ms. Luna** answered that they could not, not without a waiver from the Department. They would have to ask for a special exemption. There have been several instances in the past where there have been 24 hour events and those were not reserved or permitted, they just happened. Those would not occur under this rule.

Senator Davis pursued the "human chain" example which was intended to be symbolic and call attention to the traffic on State Street and Jefferson. It was an effective exercise of speech rights and it is hard to understand why it is appropriate to exercise rights up to midnight on the front of the Capitol but it is inappropriate to exercise those same speech rights within that time period on the East, West, and North side of the Capitol even though there may be security issues. Is that it? **Ms. Luna** agreed that security has a lot to do with it and in addition, the rules were based on the policies and procedures that were in place and on experience. As far as the circle goes, that type of event doesn't traditionally occur but the steps are used several times a day, every day. That event ended around dusk, which are essentially the hours that have been set. The lighting just doesn't allow for that type of activity after dark. It is asked that if an event goes past dark, it would be limited to the Capitol steps which is well lit and it is easier for security to maintain.

Senator Davis asked the intent of the Chairman regarding the closing of the discussion on the rules. **Chairman McKenzie** said he would close if all questions were answered and if they were not, voting would be held over until next meeting. **Senator Davis** stated that there is a lot to like about the proposed rules but there are areas of concern. He wanted to vote but had to leave early today.

Senator Werk assumed that the sidewalk around this building is considered a part of the Capitol Mall and is not included. **Ms. Luna** said the State property only goes up to the sidewalk. The sidewalk and mow strip are the property Ada County Highway District (ACHD) or the city. **Senator Werk** stated that any restrictions pertaining to the exterior of the Capitol would not apply to the sidewalk and mow strip. **Ms. Luna** concurred.

Ms. Luna began at page 39 talking about Sections 303 through 312. Section 313—Sound Amplification for the Capitol exterior which is only allowed by an authorized permit. **Ms. Luna** completed Sections 314 - 317.

Sections in the 400's pertained to Permits. This piece for the Capitol exterior is different from the other Mall and State facility sections. For many years the public has been allowed to reserve the Jefferson steps for up to four hours. Anyone is welcome to use the steps. However, if you want your place guaranteed or want equipment provided, a permit is required. **Ms. Luna** concluded her remarks after reviewing the remaining rules and stood for questions.

Senator Werk asked about the process. When these rules were put out for public comment, what were the deadlines and were those deadlines met before presenting the rules. **Ms. Luna** explained that *H693* was the bill that required the Department to promulgate rules within 30 days of signing. That bill was signed on March 30th. These three chapters of rules were developed and posted by April 17th and enforcement began on April 30th which was 30 days after the signing of the bill. The rules were up for public comment in May and June and 26 comments were received most of which dealt with the hours of the Capitol steps. After receiving the comments, hours were extended. The revised rules were posted on December 10th and then there was another 30 days for public comment. No comments were received on the revised rules. The rules were then published in the bulletin in October.

Chairman McKenzie stated that, based upon the request from Senator Davis to hold the vote on these rules until he could be here to vote and the absence of other committee members, the vote will be held until next meeting on Wednesday, January 16th.

The Department was asked to prepare these very quickly and they did an excellent job but they were not able to go through the negotiated rulemaking process.

Chairman McKenzie requested that the committee hear from **Monica Hopkins** from the American Civil Liberties Union of Idaho and who is co-counsel for the lawsuit which is not necessarily related to the policies behind the statute or the rules. They can state whether or not they believe this goes beyond the scope of what is in statute or constitutional authority. The Department of Administration will then address any further questions from the committee and then a vote will be taken.

ADJOURNED: There being no more business before the committee, **Chairman McKenzie** adjourned the meeting at 9:34 a.m. until Wednesday, January 16th.

Senator McKenzie
Chairman

Twyla Melton
Secretary