

MINUTES
SENATE HEALTH & WELFARE COMMITTEE

DATE: Wednesday, January 27, 2016

TIME: 3:00 P.M.

PLACE: Room WW54

MEMBERS PRESENT: Chairman Heider, Vice Chairman Nuxoll, Senators Lodge, Hagedorn, Martin, Lee, Harris, Schmidt and Jordan

ABSENT/ EXCUSED: None

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 Heider** called the meeting of the Senate Health and Welfare Committee (Committee) to order at 3:03 p.m.

PASSED THE GAVEL: Chairman Heider passed the gavel to Vice Chairman Nuxoll to conduct the rules review.

DOCKET NO. 16-0219-1501 **Rules of the Department of Health and Welfare Related to Food Safety and Sanitation Standards for Food Establishments (The Idaho Food Code).** **Patrick Guzzle**, Food Protection Program Manager, Division of Public Health in the Department of Health and Welfare (Department), presented this docket.

Mr. Guzzle stated that the pending rules update the current Idaho Food Code and adopt, by reference, the 2013 Food and Drug Administration (FDA) Model Food Code, with specific changes for Idaho. The Department negotiated these pending rules with representatives from the retail food industry, lodging and restaurant industry and small food-producing businesses. He reported that the proposed rules reflect current best practices and provide consistency for food businesses. **Mr. Guzzle** reviewed three major changes within the pending rules related to (i) cottage foods, (ii) certified food protection managers and (iii) acidified foods.

First, regarding the cottage foods updates, **Mr. Guzzle** reported that the Department held 18 public meetings around the State to speak with producers of cottage foods. He stated that the negotiated pending rules clearly define examples of "cottage food products" and noted that cottage food products have properties that do not allow for the growth of harmful bacteria nor do these foods have a history of causing outbreaks of foodborne illness. **Mr. Guzzle** indicated that, although cottage food producers are exempt from the general food establishment rules, these pending rules clearly specify where and how cottage food products may be distributed. **Mr. Guzzle** commented that the Department has established an informational website for cottage food producers, which can be found at www.foodsafety.idaho.gov.

Second, **Mr. Guzzle** reported that the pending rules require each applicable food establishment to have a "certified food protection manager" available. This update will not become effective until July 1, 2018, in order to allow businesses adequate time to complete the necessary courses and exams. He clarified that a certified manager need not be present during all hours of service of preparation.

Third, **Mr. Guzzle** stated that an "acidified food" is a food to which an acid ingredient, such as vinegar, has been added in order to make the product shelf-stable. He stated that the pending rules clarify the standards for producers of these types of foods and the regulatory community.

Vice Chairman Nuxoll asked the Committee members if they had any questions.

Noting that the pending rule delegated certain regulatory authorities to two entities (the public health districts and the Division of Licensing and Certification), **Senator Schmidt** asked Mr. Guzzle to clarify the regulatory responsibilities of the entities, such as who sets and collects the fees authorized in these rules. **Mr. Guzzle** explained that the seven public health districts are separate agencies from the Department, and the Division of Licensing and Certification (DLC) is a part of the Department. The DLC is responsible for inspecting hospitals, nursing homes and assisted living centers. The public health districts are responsible for inspecting grocery stores, restaurants and other retail food operations. **Mr. Guzzle** stated that the fees collected go directly to the public health district. **Senator Schmidt** asked Mr. Guzzle to clarify the DLC's regulatory role. **Mr. Guzzle** replied that, as part of the DLC's certification of hospitals and other health care facilities, the DLC conducts a kitchen inspection. The public health districts do not inspect these kitchens because the efforts would be duplicative. **Senator Schmidt** reiterated his question regarding who sets the fees. **Mr. Guzzle** replied that the fees are set in statute.

Senator Lee asked Mr. Guzzle the approximate cost of certification as a food protection manager. **Mr. Guzzle** answered that the test can cost between \$25 for the exam alone to \$125 for a review course and the exam. He clarified that the rule only requires that a person pass the certifying exam. A passed exam is valid for five years.

Senator Hagedorn asked as of what date must acidified food products meet the requirements of Code of Federal Regulations (CFR) 114. **Mr. Guzzle** replied that the rules are written to be effective as of July 1, 2016. **Senator Hagedorn** commented that CFRs are subject to change; he requested that, going forward, the Department include the date of the CFRs being approved in the rules.

Vice Chairman Nuxoll asked for clarification regarding the definition of "intermittent food establishment" and the exclusion of "vendors of farm-fresh ungraded eggs at a recurring event." **Mr. Guzzle** responded that the language in the pending rules aligns with specific statutory language. He clarified that a person selling farm-fresh, ungraded eggs at a farmer's market would not be considered an intermittent food establishment. **Vice Chairman Nuxoll** asked for an example of a recurring event. **Mr. Guzzle** said one example would be a farmer's market or holiday fair that is held consistently and approximately at the same time, not exceeding ten consecutive days.

TESTIMONY:

Vice Chairman Nuxoll invited testimony regarding this docket.

Elizabeth Criner testified on behalf of the Northwest Food Processors Association (NWFPFA) (see attachment 1). **Ms. Criner** stated that the NWFPFA has been engaged in the rulemaking process and supports the bulk of pending rule. However, the NWFPFA does not support the exemption of cottage foods from food safety regulation. She recommended that the provisions allowing exemption for cottage foods from regulation be stricken. **Senator Martin** asked Ms. Criner to provide the page on which the referenced cottage foods exemption is located. **Ms. Criner** replied that she did not have the rule before her. However, she directed the Committee members to an NWFPFA letter, which includes citations. She noted that regulations can be seen as negative, but she believes the regulations can be helpful and educate cottage food producers.

Julia Page testified as a member of the Idaho Organization of Resource Councils (IORC). **Ms. Page** stated that the IORC supports the pending rules. **Senator Jordan** asked which safety rules are in place to mitigate the concerns of the NWFPA. **Ms. Page** replied that (i) cottage foods are not time and temperature controlled for safety and have historically been safe and (ii) it is in the business interest of these producers to sell safe products. Inquiring about the liability of cottage food producers, **Senator Lodge** asked how both the producers and the public would be protected. Second, **Senator Lodge** asked whether cottage foods would be allowed in public schools. **Ms. Page** answered that she was unsure how these rules would affect donations to public schools. Regarding liability, the public would be protected by labeling requirements and the producers could purchase liability insurance.

Troy Darmody, Senior Manager of Food Safety and Quality Assurance for Albertsons/Safeway, testified that Albertsons/Safeway supports the pending rules because the language aligns with the most current version of the FDA Model Food Code. This alignment makes centralized training programs more efficient.

MOTION: There being no further questions, **Senator Hagedorn** moved to approve **Docket No. 16-0219-1501**. **Senator Harris** seconded the motion.

Vice Chairman Nuxoll requested that the Department specify the date of the CFRs incorporated by reference in future rules. **Senator Schmidt** observed that there needs to be flexibility in the oversight these rules. **Senator Lee** indicated that she was in support of the motion, but stated the Committee would be looking for the updates next year. **Vice Chairman Nuxoll** commented that she was impressed with the negotiated rule making.

The motion carried by **voice vote**.

**DOCKET NO.
16-0701-1501**

Rules of the Department of Health and Welfare Related to Behavioral Health Sliding Fee Schedules. **Jamie Teeter**, Bureau Chief, Division of Behavioral Health in the Department of Health and Welfare (Department), presented this docket.

Ms. Teeter said that the pending rules combine the fee schedules for mental health and substance use disorder services into one fee schedule instead of two fee schedules; the fee schedule percentages were not changed. **Ms. Teeter** also stated that certain provisions referencing obsolete Medicaid rates have been deleted from the rule. **Ms. Teeter** noted that negotiated rulemaking was not conducted for these pending rules because the changes were not substantial; no negative comments were received. Further, **Ms. Teeter** indicated that there is no anticipated fiscal impact on the State General Fund or any other fund.

MOTION: There being no questions, **Senator Schmidt** moved to approve **Docket No. 16-0701-1501**. **Senator Martin** seconded the motion. The motion carried by **voice vote**.

**DOCKET NO.
16-0710-1501**

Rules of the Department of Health and Welfare Related to Behavioral Health Sliding Fee Schedules. **Ms. Teeter** presented this docket.

Ms. Teeter stated that the Department would like to repeal this chapter of rule because all appropriated grant funds have been disbursed. The Regional Behavioral Health Services Act allows community providers to seek funding through the regional behavioral health boards. **Ms. Teeter** stated that negotiated rulemaking was not conducted for these pending rules because the lack of appropriations made this chapter obsolete. Further, **Ms. Teeter** indicated there is no anticipated fiscal impact on the State General Fund or any other funds.

Vice Chairman Nuxoll asked the Committee members if they had any questions.

Senator Hagedorn asked if the Department's intent was to completely repeal the rule. **Ms. Teeter** answered yes.

Senator Schmidt asked how the regional behavioral health boards would receive funding if this rule is repealed. **Ms. Teeter** replied that the Regional Behavioral Health Services Act allows for the funding to come from the Department or other sources. **Senator Schmidt** asked Ms. Teeter to confirm that statute or rule allows for the flow of funding from the Department to the regional behavioral health boards. **Ms. Teeter** deferred to Ross Edmunds. **Ross Edmunds**, Administrator of the Division of Behavioral Health in the Department, indicated that the mechanism for funding is contractual and not grants. The path for funding is established by statute. **Senator Schmidt** asked if regional boards could form contracts with Department, but not receive funding from them. **Mr. Edmunds** replied that the contracts involve the exchange of funds. He clarified that the regional behavioral health boards partner with health districts to contract with the Department.

MOTION:

There being no further questions, **Senator Hagedorn** moved to approve **Docket No. 16-0710-1501**. **Senator Lodge** seconded the motion. The motion carried by **voice vote**.

**DOCKET NO.
16-0715-1501**

Rules of the Department of Health and Welfare Related to Behavioral Health Programs. **Ms. Teeter** presented this docket.

Ms. Teeter stated that the purpose of the pending rules is to move towards an integrated behavioral health system that includes both mental health and substance use disorder providers. The pending rules establish one behavioral health certification process for both mental health and substance use disorder providers. Historically, the Division of Medicaid certified mental health providers and the Division of Behavioral Health certified substance use disorder providers; the new single certification process will be administered by the Division of Behavioral Health.

Ms. Teeter stated that the Idaho Alcohol and Intoxication Treatment Act directs the Department to (i) establish a comprehensive substance use disorder program and (ii) set standards for provider certification. Historically, the Department met this directive under IDAPA 16.07.20; the Department proposes to replace IDAPA 16.07.20 with these pending rules.

Ms. Teeter stated that when managed care was implemented in Idaho, oversight of the certification process for mental health providers was moved to Idaho's managed care contractor, Optum Idaho. During negotiated rulemaking, mental health providers advocated for the return of state certification. Specifically, mental health providers commented that (i) State certification is required by certain private payers, like Blue Cross, in order for providers to receive payments and (ii) State certification is often required in order to obtain federal grant funding.

However, during negotiated rulemaking, behavioral health providers also commented that mandatory audits are becoming administratively burdensome to their business. As a result of these comments, the Department will complete the certification process by requiring attestations from the providers, conducting selected site audits and reviewing other certification audits – a process called "deeming." **Ms. Teeter** stated that "deeming" means that the Division of Behavioral Health reviews audit findings from other groups, including national certification bodies, in lieu of a certification audit by the State. **Ms. Teeter** noted that this practice is common in other states.

Ms. Teeter pointed out that there were two provisions in the pending rules for which a consensus among stakeholders was not reached. First, if a behavioral health provider fails a criminal history background check, the pending rules allow the provider to request a waiver of this requirement. **Ms. Teeter** explained that this waiver program only applies to behavioral health providers and does not apply to the Department's whole criminal history process. Second, the pending rules allow the Department to grant variances from compliance. The Department wanted to maintain flexibility of the certification rules in order to align with future best practices set at the national level.

Ms. Teeter indicated that there is no anticipated fiscal impact for this rule. The Department currently collects a fee of \$100 for treatment program facilities and \$50 for recovery support providers, such as taxi companies and child care providers. The proposed rule will create a flat \$100 fee for each behavioral health program.

Vice Chairman Nuxoll asked the Committee members if they had any questions.

Regarding background check waivers for behavioral health providers, **Senator Jordan** asked if successful graduates from drug court, who later became behavioral health counselors, could provide services in the same facility in which they received treatment. **Ms. Teeter** answered that this example was exactly the intention of these waivers.

Vice Chairman Nuxoll asked if the entire rule was rewritten. **Ms. Teeter** replied that it was rewritten.

Senator Martin asked if there was a backlog in the current inspection process and, if so, how long is the backlog. **Ms. Teeter** answered that there is no current backlog for inspections. She noted that the substance use disorder network is approximately 150 sites or 120 to 130 providers. The Department performs approximately ten inspections a month.

Senator Harris asked for clarification about the number of times audits take place for a provider. **Ms. Teeter** replied that the proposed rule is for one State certification, which involves the review of minimum standards for behavioral health providers. However, each payer or entity that reimburses providers has its own auditing schedule and requirements for providers. Therefore, it depends on who the provider is billing and the exact requirements for that entity.

To clarify the modification of the current fees to a flat fee, **Senator Hagedorn** asked what the current fee is for a recovery support provider – for example a taxi company – and what its fee will be after the rule is implemented. **Ms. Teeter** answered that the current fee for a taxi company is \$50. After the rule is implemented, a taxi company would pay \$0. Second, if a payer to a behavioral health provider requires certain certification standards for that provider and there is a national certification a provider can obtain, **Senator Hagedorn** asked why the Department offering another certification. **Ms. Teeter** answered that the Department wants to make sure that providers understand the particular State statutes and rules that impact them, and to provide an optional path for State certification for providers who are required by their payers to be State certified. **Senator Hagedorn** asked why the Department was implementing a State certification process based on the opportunity to inform all providers of State policy, if Optum Idaho is already informing providers of State policy. **Ms. Teeter** noted that Optum only informs Medicaid providers. However, there are other providers in Idaho, who are not part of Optum Idaho's network, who may need State certification to obtain payments from certain payers. **Senator Hagedorn** asked if a national certification would satisfy those other payers such

as Blue Cross. **Ms. Teeter** answered that it is her understanding that a national certification would not satisfy Blue Cross requirements.

Senator Schmidt asked if a behavioral health provider is the same as a behavioral health program, as mentioned in the rules. **Ms. Teeter** replied that these are the same. **Senator Schmidt** inquired if a recovery center or recovery support service be considered a behavioral health program. **Ms. Teeter** answered that it depended on the direction the recovery center took. For example, those that want to become billable service providers will fall into this rule. **Senator Schmidt** asked why the definition of a behavioral health program does not include billable services as a requirement, if that is part of the intent. **Ms. Teeter** replied that the rule is aimed at providers who provide out-patient services that would be billable such as individual, group and family therapy.

TESTIMONY:

Vice Chairman Nuxoll invited testimony.

Greg Dickerson, Mental Health Provider, Director and Treasurer of the Idaho Association of Community Providers (IACP), testified that IACP opposes the pending rules (see attachment 2). Referencing the costs of accreditation (see attachment 2 - handout 4b), **Senator Hagedorn** asked why the handout estimated cost of accreditation at \$3,000 and Mr. Dickerson stated the IACP's cost of accreditation was approximately \$9,000. **Mr. Dickerson** replied that the \$3,000 was the approximate cost of accreditation by the Joint Commission. IACP was certified by the Commission on Accreditation of Rehabilitation Facilities (CARF). **Senator Hagedorn** asked if the Joint Commission and CARF are both national accrediting bodies. **Mr. Dickerson** replied that both are national accrediting bodies, but noted that the Joint Commission accredits mostly hospitals and rehabilitation services. Noting that State certification is optional, **Senator Jordan** asked why the Committee should reject the pending rules. **Mr. Dickerson** answered this rule is the lead-in for proposed rules related mental health providers and that the goal for this rule is to align substance abuse providers under the same credentialing system for mental health providers. **Vice Chairman Nuxoll** asked why a provider would want to pay for national accreditation. **Mr. Dickerson** replied that IACP has maintained its CARF accreditation because the CARF standards manual provides a lot of technical data that helps the association's business. **Senator Schmidt** asked if Mr. Dickerson was a representative for the Mental Health Providers Association of Idaho (MHPAI). **Mr. Dickerson** answered that he is a representative for IACP, which was formerly known as several other organizations including the MHPAI. **Senator Schmidt** asked about the scope and membership size of the IACP. **Mr. Dickerson** replied that the IACP consists of mental health, substance abuse, residential habilitation, case management and developmental disability providers. The IACP includes 60 mental health service providers and an unknown number of substance use disorder service providers. He commented that only 60 percent of its members support current legislation, while 30 percent of its members oppose current legislation and 10 percent of members were undecided. **Senator Schmidt** asked for clarification regarding the disposition of IACP members towards the pending rules. **Mr. Dickerson** answered that 60 percent of IACP members represent a good majority for the IACP for recommendations.

Senator Hagedorn asked Ms. Teeter why the Department is proposing State certification to conform with a private insurance company instead of having the insurance company change their rules. **Ms. Teeter** stated that the Department's goal is to streamline the credentialing process for behavioral health providers. She stated that State statute requires mandatory State certification for substance abuse providers, while State certification for mental health providers is optional; the Department is working to integrate the certification process for both types of behavioral health providers. Questioning the statutory authority for these rules, **Senator Hagedorn** asked if creating a State statute rather than making a rule would better accomplish the task of bringing in mental health providers under the mandatory standards that substance abuse providers have to abide by. **Ms. Teeter** responded that the Department worked with the Deputy Attorney General and concluded that the Regional Behavioral Health Services statute provides the statutory authority necessary to promulgate rules such as this one. **Mr. Edmunds** summarized that the purpose of this rule is to streamline the process that is already in place via rules and State statutes for substance use disorder providers. On the mental health side, the rule creates a voluntary State approval process to allow mental health providers to obtain State certification if such certification is required by their respective funding bodies. He suggested that if the proposed rule required national accreditation for all mental health providers in the State, there would be a line out the door in opposition.

Kelly Keele, Executive director of Children's Supportive Service, Inc., testified that the pending rules should be rejected (see attachment 3).

Sara Bartles, Contract Manager, BPA Health (BPA), testified in favor of State accreditation. **Ms. Bartles** noted BPA's acceptance of national accreditation, but stated that BPA understands that State accreditation is a more feasible option for some providers. **Senator Schmidt** asked if BPA was a member of IACP. **Ms. Bartles** stated that BPA is not a member of IACP because they are not a direct service provider. **Senator Schmidt** asked if members of BPA are part of IACP. **Ms. Bartles** answered some BPA network members are members of IACP, but not all. **Senator Hagedorn** asked if approval of this rule docket would allow BPA providers to bill Blue Cross. **Ms. Bartles** replied that some BPA members are contracted with Blue Cross. She commented that if providers interested in delivering services in the BPA network, they would have to seek facility approval from the Department. **Senator Hagedorn** asked if BPA members are providers to Optum and whether they met Optum's credentialing. **Ms. Bartles** responded that there are providers in the BPA network that are providers in Optum's network, but it is not a complete overlap.

Senator Martin asked Mr. Dickerson to clarify his position after the Committee had heard other testimony. **Mr. Dickerson** indicated that mental health providers are concerned about being included in the State's certification process when they are already audited by their respective funding sources. **Senator Jordan** asked whether there are people in the community who need mental health services but are unable to access those services because of the inability of the provider to bill the insurance company due to the absence of the opportunity to have a State certification. **Mr. Dickerson** answered that he did not understand the concern about Blue Cross, since the IACP is part of Blue Cross' network and has never been required to produce a State certification. IACP reached out to a provider that was required to provide a State certification to Blue Cross, but that provider was trying to be credentialed as a substance provider. IACP has applied for federal contracts and responds to the State requirement questions by stating that there is no certification available. The IACP has been successful in obtaining federal contracts. **Senator Jordan** asked if there are other grants

or resources that may require State certification. **Mr. Dickerson** stated that he was not aware of any such examples.

MOTION:

Chairman Heider moved to hold **Docket 16-0715-1501** in Committee and that the providers and networks come back before the Committee after they are able to come to an agreement. **Senator Martin** seconded the motion.

Senator Lee supported the motion, but commented that not all rulemaking results in agreement by all parties. **Senator Hagedorn** stated that there are unanswered questions and enough concern from both sides that the Committee might not ever be able to come to a conclusion. He commented that if the rule is held until the end of the Legislative session, the rule goes into effect whether the Committee votes on it or not. He stated his opposition to accepting this rule. He stated his support for the current motion. **Senator Lodge** requested that the Department answer some of the questions posed by Mr. Dickerson. She asked how many organizations were involved in the rule making process.

The motion carried by **voice vote**.

Vice Chairman Nuxoll stated that in lieu of time the Committee would wait with the other dockets. **Ms. Teeter** stated that the next two dockets would not need to be discussed if the previous docket does not pass.

**PASSED THE
GAVEL:**

Vice Chairman Nuxoll passed the gavel back to Chairman Heider.

Chairman Heider explained that **Docket 16-0715-1501**, **Docket 16-0717-1501** and **Docket 16-0720-1501** will be held indefinitely until the Department would like to present them.

ADJOURNED:

There being no further business, **Chairman Heider** adjourned the meeting at 4:56 p.m.

Senator Heider
Chair

Karen R. Westbrook
Secretary

Michael Jeppson
Assistant