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AGENDA

Committee on Legal Services

Friday, March 27, 2015

Upon Adjournment of House and Senate

SCR 354

(Lunch will be provided for the Committee members)

1. Review of New Rules (rules adopted or amended on or after November 1, 2014, and before November 1, 2015, and scheduled to expire May 15, 2016):
 - a. Rule 7.000.3 of the State Board of Human Services, Department of Human Services, concerning exceptions to rules in rules relating to the overview of child welfare services, 12 CCR 2509-1 (LLS Docket No. 150022; SOS Tracking No. 2014-00905).
Staff: Jane Ritter
(Status: Unknown)
2. Approval of SB 15-100 by Senator Steadman; also Representatives Foote and McCann – Rule Review Bill.
3. Other.

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MEMORANDUM

TO: Committee on Legal Services

FROM: Jane Ritter, Office of Legislative Legal Services

DATE: March 19, 2015

SUBJECT: Rule 7.000.3 of the State Board of Human Services, Department of Human Services, concerning exceptions to rules in rules relating to the overview of child welfare services, 12 CCR 2509-1 (LLS Docket No. 150022; SOS Tracking No. 2014-00905).¹

Summary of Problem Identified and Recommendation

Section 26-1-107, C.R.S., provides broad statutory authority to the State Board of Human Services ("Board") to promulgate rules concerning programmatic aspects of child welfare programs and services. An express prohibition does not exist for the Board to promulgate a rule granting county departments of human or social services ("County Departments") the power to create an exception to a Board rule in certain instances. However, because the exception process created by Rule 7.000.3 has the effect of allowing County Departments to, in effect, establish rules, this grant of authority by the Board presents several problems:

1. Broad statutory authority to waive Board rules does not exist. When the General Assembly concludes that an exception is warranted, it provides express authority for such exceptions in statute;

¹ Under section 24-4-103, C.R.S., the Office of Legislative Legal Services reviews rules to determine whether they are within the promulgating agency's rule-making authority. Under section 24-4-103 (8) (c) (I), C.R.S., this rule is not scheduled to expire until May 15, 2016, but the Committee on Legal Services requested that the Office of Legislative Legal Services review the rule during the current regular session of the General Assembly.

2. An exception created by a County Department pursuant to Rule 7.000.3 can alter programmatic operations related to child welfare and, therefore, could essentially function as a binding "legislative rule", which County Departments do not have statutory authority to adopt. Thus, Rule 7.000.3 is an unlawful delegation by the Board;
3. The exception process created by Rule 7.000.3 allows County Departments to bypass the overarching purpose of the "State Administrative Procedure Act", which is the provision of legal "guardrails" in the creation of state policies; and
4. The criteria included in the rule establishing authority for County Departments to create exceptions to Board rules concerning child welfare are vague and overly broad.

Although Rule 7.000.3 is not scheduled to expire until May 15, 2016, the Committee on Legal Services asked that the Office of Legislative Legal Services ("the Office") review this rule during the current regular session of the General Assembly.

The Office has reviewed Rule 7.000.3 and has concluded that the rule is not within the Board's rule-making authority. **We therefore recommend that Rule 7.000.3 of the rules of the Board concerning exceptions to rules in rules relating to the overview of child welfare services be repealed.**

Analysis

1. **Rule 7.000.3 of the State Board of Human Services grants County Departments the authority to create exceptions to existing Board rules.**

(12 CCR 2509-1)

7.000.3 EXCEPTIONS [Eff. 1/1/15]

Exceptions to rule are allowed when justification for the exception and the alternative provision meet the following requirement(s):

- A. Do not impact the safety and/or risk of a child(ren); and,
- B. Are in the best interest of the child(ren).

The exception shall be documented in the statewide automated case management system and approved by a county department supervisor. Exceptions cannot be granted for requirements of federal law, state statutes, or those rules

directly related to the safety and/or risk of a child(ren). Exceptions cannot be granted for financial limitations established in rule.

2. Statutory authority for adopting, repealing, or amending programmatic rules, including rules that govern the actions of County Departments related to the child welfare system, lies solely with the Board.

The General Assembly has delegated rule-making authority for specific functional areas to the Board. Section 26-1-107 (5) (a), C.R.S., clearly outlines the areas over which the Board may promulgate rules:

26-1-107. State board of human services - rules. (5) (a) "Board rules" are rules promulgated by the state board governing:

- (I) Program scope and content;
- (II) Requirements, obligations, and rights of clients and recipients;
- (III) Non-executive director rules concerning vendors, providers, and other persons affected by acts of the state department.

3. Broad statutory authority to waive Board rules does not exist. When the General Assembly concludes that an exception is warranted, it provides express authority in statute.

Broad statutory authority related to rule-making beyond that granted to the State Department of Human Services for internal administrative functions in section 26-1-108, C.R.S., does not exist, nor does broad statutory authority exist to waive Board-promulgated rules.

However, in certain instances, the General Assembly has determined that it is in the public's best interests if partial authority exists to waive one or more parts of a Board-promulgated rule of programmatic nature, as well as the ability to bypass the normal rule-making procedure set forth in section 24-4-103, C.R.S. In these cases, the General Assembly clearly establishes the exact nature of the exception, the process for obtaining a waiver, and the parameters surrounding such an action.²

For example, section 26-5-105.4 (2) (a), C.R.S., provides the following exemption for county departments:

26-5-105.4. Title IV-E waiver demonstration project - county performance agreements - Title IV-E waiver demonstration project cash fund created - rules - repeal. (2) (a) Pursuant to the terms and conditions of the project

² Examples include sections 26-2-712 (9), 26-2-803 (1) through (6), 26-1-111 (4) (c), 26-5-102 (1) (a), 26-5-105.4 (2) (a), and 26-5-105.5 (2) C.R.S.

established to integrate systemic child welfare reforms and innovative practices and any subsequent written documentation that modifies the federal requirements governing the implementation of the project, the state department is hereby authorized to enter into performance agreements with individual counties or groups of counties. **An individual county or group of counties that enters into a performance agreement with the state department is exempt from the rules of the state department and state board governing the delivery of child welfare services, as such exemptions to rules are identified in the performance agreement. An exemption in a performance agreement must not negatively impact child safety, permanency, well-being, or compliance with federal requirements (emphasis added).**

Another clear example is found in section 26-2-712 (9), C.R.S.:

26-2-712. State department duties - authority. (9) Waiver process.
(a) Except as provided in paragraph (c) of this subsection (9), the governor and the state department, acting jointly, may grant a county's application for a waiver of any requirement of this part 7 or the rules promulgated pursuant to this part 7. **Any waiver granted pursuant to this subsection (9) shall be designed to improve methods of achieving participants' self-sufficiency, meeting work participation rates and performance goals, or reducing dependency.**

(b) Any application for a waiver shall include a statement of the purpose of the waiver... **(emphasis added).**

Without similar statutory authority, the Board may not allow County Departments to make exceptions to Board rules.

4. An exception created by a County Department pursuant to Rule 7.000.3 can alter programmatic operations related to child welfare and, therefore, could essentially function as a binding "legislative rule", which County Departments do not have the statutory authority to adopt. Thus, Rule 7.000.3 is an unlawful delegation.

A "rule" is defined in the "State Administrative Procedure Act" as "...the whole or any part of every agency statement of general applicability and future effect implementing, interpreting, or declaring law or policy or setting forth the procedure or practice requirements of any agency".³

Colorado courts have distinguished between "legislative rules", rules that fall under this definition and therefore subject to the requirements of the "State Administrative

³ Section 24-4-102 (15), C.R.S.

Procedure Act", and "interpretative rules". In *Hammond v. Public Employees' Ret. Ass'n*, the court noted that:

Whether a rule is legislative or interpretive depends on its effect: it is legislative if it establishes a norm that commands a particular result in applicable proceedings; it is interpretive if it establishes guidelines that do not bind the agency to a particular result.⁴

In *Home Builders Ass'n v. Public Utilities Com'n*, the Colorado Supreme Court weighed three factors before concluding that a decision by the Public Utilities Commission (Commission) was "nothing less than an 'agency statement of general applicability and future effect implementing [and] declaring policy'".⁵ First, it noted that the Commission "clearly intended its decision to be of general applicability to all future permanent service customers".⁶ Second, the policy was cast in terms of a "permanent service policy".⁷ Finally, it noted that the Commission itself recognized the rule-making character of its action.⁸

An exception to a previously promulgated Board rule could create a new policy or procedure that is clearly intended as a new statement of general applicability on the issue or issues in question. Such an exception created pursuant to Rule 7.000.3 would reverse an established policy and would not, therefore, merely establish "guidelines that do not bind the agency".

Therefore, a new policy or procedure established through the exception in Rule 7.000.3 could function as a binding "legislative rule", which the County Departments lack any authority to adopt. By delegating such authority to County Departments through Rule 7.000.3, the Board, in effect, granted County Departments rule-making authority through an unlawful delegation.

5. The exception process created by Rule 7.000.3 allows County Departments to bypass the overarching purpose of the "State Administrative Procedure Act", which is the provision of legal "guardrails" in the creation of state policies.

Section 24-4-103, C.R.S., establishes the statutory framework for agency rule-making. The essence of this framework is to establish a series of legal "guardrails" to ensure

⁴ *Hammond v. Public Employees' Ret. Ass'n*, 219 P.3d 426 (Colo. App. 2009).

⁵ *Home Builders Ass'n v. Public Utilities Com'n*, 720 P.2d 552 (Colo. 1986).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

that any rule promulgated by an agency is not done in a vacuum but rather with the active input of interested parties. The first of these crucial "guardrails" are the notice provisions of section 24-4-103, C.R.S.:

24-4-103. Rule-making - procedure - definitions - repeal. (2) When rule-making is contemplated, public announcement thereof may be made at such time and in such manner as the agency determines. **The agency shall establish a representative group of participants with an interest in the subject of the rule-making to submit views or otherwise participate informally in conferences on the proposals under consideration or to participate in the public rule-making proceedings on the proposed rules. In establishing the representative group, the agency shall make diligent attempts to solicit input from representatives of each of the various stakeholder interests that may be affected positively or negatively by the proposed rules.** If the agency convenes a representative group prior to issuing a notice of proposed rule-making as provided in paragraph (a) of subsection (3) of this section, the agency shall add those persons who participated in the representative group to the list of persons who receive notification of proposed rule-making as provided in paragraph (b) of subsection (3) of this section (**emphasis added**).

(3) (a) Notice of proposed rule-making shall be published as provided in subsection (11) of this section and shall state the time, place, and nature of public rule-making proceedings that shall not be held less than twenty days after such publication, the authority under which the rule is proposed, and either the terms or the substance of the proposed rule or a description of the subjects and issues involved.

Equally crucial is the requirement for a public hearing on the rule:

(4) (a) **At the place and time stated in the notice, the agency shall hold a public hearing at which it shall afford interested persons an opportunity to submit written data, views, or arguments and to present the same orally unless the agency deems it unnecessary. The agency shall consider all such submissions.** Any proposed rule or revised proposed rule by an agency which is to be considered at the public hearing, together with a proposed statement of basis, specific statutory authority, purpose, and the regulatory analysis required in subsection (4.5) of this section, shall be made available to any person at least five days prior to said hearing. The rules promulgated by the agency shall be based on the record, which shall consist of proposed rules, evidence, exhibits, and other matters presented or considered, matters officially noticed, rulings on exceptions, any findings of fact and conclusions of law proposed by any party, and any written comments or briefs filed (**emphasis added**).

Other important requirements and "guardrails" include a requirement for a regulatory analysis,⁹ the right for any interested person to petition for the issuance, amendment, or repeal of a rule,¹⁰ a requirement that the rule be submitted for review to the Office of Legislative Legal Services and, if necessary, the Committee on Legal Services,¹¹ and publication.¹²

The lack of the requirements and "guardrails" of the "State Administrative Procedure Act" could result in a lack of accountability for a County Department that creates an exception to an established Board rule. Additionally, because an end result of the rule-making procedure contemplated by the Administrative Procedure Act is the uniform application of state policy, a county by county interpretation of established Board rules could result in a fractured and unequal program of child welfare services delivery across the various counties of Colorado.

6. The criteria included in the rule establishing authority for County Departments to create exceptions to Board rules concerning child welfare are vague and overly broad.

Rule 7.000.3 allows County Departments to create exceptions to Board rules concerning child welfare if the alternative provision (1) does not impact the safety of the child(ren); and (2) is in the best interest of the child(ren). Additionally, exceptions cannot be granted for financial limitations established in rule.

Whether a policy "impacts the safety of the child(ren)" or is "in the best interest of the child(ren)" are highly subjective questions. Input of the type contemplated by public hearings in rule-making proceedings from interested parties might be highly necessary to even determine if a proposed exception met the criteria set forth by Rule 7.000.3. Determining if a proposed exception will affect a financial limitation might also require additional testimony. Rule 7.000.3 leaves all of these questions open-ended and subject to the opinion of a few people in a County Department.

⁹ Section 24-4-103 (4.5), C.R.S.

¹⁰ Section 24-4-103 (7), C.R.S.

¹¹ Section 24-4-103 (8) (d), C.R.S.

¹² Section 24-4-103 (11), C.R.S.

Conclusion

We therefore recommend that Rule 7.000.3 of the rules of the State Board of Human Services concerning exceptions to rules in rules relating to the overview of child welfare services be repealed.