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SUMMARY OF MEETING

COMMITTEE ON LEGAL SERVICES

March 27, 2015

The Committee on Legal Services met on Friday, March 27, 2015, at 10:48 a.m. in SCR 354. The following members were present:

Senator Scheffel, Chair
Senator Johnston
Senator Roberts
Senator Steadman
Representative Dore
Representative Foote (present at 10:59 a.m.)
Representative Kagan
Representative McCann, Vice-chair
Representative Willett

Senator Scheffel called the meeting to order.

10:49 a.m. – Debbie Haskins, Assistant Director, Office of Legislative Legal Services, addressed the Committee. She said I just want to explain procedurally where we are with the rule review bill and this rule issue. The bill was adopted on second reading in the Senate and then it was re-referred back to the Committee so that you could hear this rule issue that we'll take up in a moment. When you're hearing the rule issue, the Committee is sitting as the Committee on Legal Services to determine what to do about this rule and whether it's authorized or not. Because it is an out-of-cycle rule, your motion regarding the rule, if you decide that it should not be continued, is to move to repeal. After

you've heard the presentation, taken public testimony, and decided what you want to do on that rule issue, then you will be sitting as the Senate committee of reference to hear the bill. At that point, you can act on the bill and there will be an amendment to add the rule to the bill depending upon your earlier action. I just wanted to explain that. This is how we've handled it in the past with the oil and gas rules and education rules.

10:51 a.m. – Jane Ritter, Senior Attorney, Office of Legislative Legal Services, addressed agenda item 1a – 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).

Ms. Ritter said Rule 7.000.3 grants county departments of human or social services the ability to create an exception to a state board rule when the justification for the exception and the alternative provision do not affect the safety of a child or are in the best interests of a child. The rule also states that it cannot be granted for requirements of federal law, state law, or rules directly related to the safety of a child or for financial limitations established in state rules. It's a short rule but it covers a lot of ground. The broad statutory authority for promulgating rules lies with the state board. They have the authority to promulgate rules about program scope and content, about the requirements and obligations and rights of clients and recipients, and any nonexecutive director rules. There is no broad statutory authority to waive a board-promulgated rule. There are places in statute where the General Assembly has determined that it is a good idea to allow such waivers of board rules but when that happens it is very expressly stated in statute that it can occur. In the Office's memo are several examples of that. Without that statutory authority, the board cannot allow county departments to make exceptions to board rules.

Ms. Ritter said another issue comes up that an exception created by a county department pursuant to this rule could have a blanket effect of altering programmatic operations related to child welfare. Therefore, the rule could essentially function as a legislative rule but county departments don't have authority to adopt such rules. The problem there is the exception would create a new policy. It would be a new statement of general applicability and that's for the state board to do. One of the reasons that we have it set up that way in the "State Administrative Procedure Act" (APA) is because the APA sets up legal guardrails through the rule-making process to make sure that the policies work for everybody, that they're a good idea, and that the people's voice has been heard. Some of those guardrails are the notice provision, the requirement for a

public hearing, review by our Office, and the opportunity to have a judicial review if necessary. The lack of those guardrails has the potential to create a lack of accountability for any county department that creates an exception to established board rule and it also has the potential to create an un-uniform application of state policy because each county could potentially apply different child welfare statutory provisions differently because of these exceptions. I think the people from the department will discuss that the intent was to have this more on a case-by-case basis, but I think it's important to note that the way the rule was written has the potential to have this blanket change of policy.

Ms. Ritter said finally, we feel that the criteria established in the rule for an exception are very vague. It has to be in the best interest of the child and not affect the safety of the child, and those are the sorts of things that during a public hearing people will offer testimony on whether it does in fact deal with the safety of a child or is in the best interests of a child. Again, that's vague and subject to interpretation and we found that problematic.

Representative McCann said can you give an example of one of these exceptions that a county department has adopted, if you know of any where they've used this provision about the exceptions? Ms. Ritter said I do not have specific examples and I think Mr. Bicha would be much better qualified to answer that question.

10:57 a.m. – Reggie Bicha, Executive Director, Department of Human Services, testified before the Committee. He said thank you for the opportunity to testify on this matter. While the department is not officially contesting the repeal action before you today, I did think it was important to personally show up to clarify because there may have been some perceptions of ill intent about how this rule was promulgated and when it was promulgated. I wish to clarify that with all of you and, lastly, to leave you with a question that I will be walking out with today which is if not this process then what process? Rule 7.000.3 on exceptions was properly promulgated by the state board. The state board is a type 1 board. The rule was developed in large part in response to concerns that were identified in the child welfare audit that was released in November. The timing of the rule package was largely coincidental. We had set out to rewrite the volume 7 rules, which are the entire rules for all child welfare practice, but looking at the front end, which is the practice from when the phone call comes in through the investigation process until you transfer a case to an ongoing worker or close the case. We were rewriting that entire rule package as a part of the hotline requirements that were passed by the General Assembly the year before. The rule package had gone through six to eight months of rewrites with the contract with the Rocky Mountain Children's Law Center. It was up for

second reading the week before the audit was released in November, but we knew internally what the audit findings were. We were making revisions to the rule package, all of which were made public as a part of that process, all of which were cleared through the Attorney General's office, and all of which were shared with the state board for their consideration. We were trying to be responsive to the Audit Committee's concerns in prior audits that we weren't moving fast enough to make audit changes. In this situation, we were trying to get ahead of the ball game to be responsive to an audit and some, I believe, had perceived that that was a way of trying to get around the auditor, which couldn't have been further from the truth. The draft rule was reviewed and signed off on by our deputy attorney general before it was considered before the state board. We appreciate that the Office has a different legal opinion and I want to be clear that we understand and respect that two attorneys have different opinions, but there was no way that we were trying to waive a rule or get around a rule. We were trying to make corrections to respond to the concerns of the auditor.

Mr. Bicha said the rule established a process to comply with administrative rules in volume 7 while balancing the best interest needs of children and families served in the child welfare system. To Representative McCann's question about examples – and this is an example that came up in the child welfare audit – a child had been reported to child protective services. That child was in the hospital. It was screened in by the county to do an investigation with an immediate response determined, meaning that the caseworker needs to go out immediately or within 24 hours. The caseworker in that case went to the hospital and interviewed health care providers and family members and gathered information. It was determined that the child was to remain in the hospital. What the caseworker did not do in that case was to go into the hospital room where the child was and interview the child. We said that made a lot of sense given the facts of the case and if the doctor says it's not good for the child to be interviewed, but our rule says immediately and the first thing you have to do is see the child. There's a disconnect. We were trying to create a provision in rule that would allow a caseworker, with review from the supervisor, to acknowledge that sometimes setting aside a criteria in rule might actually be the very best thing for the child. Do we require a caseworker to go into a room when a child is in ICU and can't be interviewed if we have medical records and a physician's opinion saying it's not good for the caseworker to do that? If we have a case that's in for investigation but the child is visiting grandma in Florida, do we send a caseworker to Florida to see that child because that's what the rule says or do we create some sort of provision that takes into consideration the realities of doing this work with human beings, with kids, with families? The administrative rules allow for professional judgment throughout. Our administrative rules require screening decisions and they give criteria about

information that should be gathered and assessed to screen in or screen out a referral, but it's a caseworker and a supervisor who make that decision. With placement decisions and whether or not a child stays in the home or goes to foster care or some other setting, there's criteria in the administrative rule, but caseworkers are applying that criteria all the time in making those decisions. I could go on and on about the amount of discretion that caseworkers and their supervisors are given by state law and rule each and every day and we need them to apply that discretion to keep kids safe and to achieve permanency. Professional judgment is necessary in the child protection system and so we didn't see that this rule was creating some broad judgment that would be unusual for the child welfare system. A criteria of best interest of the child is one that's explicitly stated throughout Title 19, C.R.S., which is the child welfare statutes. To ask a caseworker and a supervisor to consider something that is in the best interests of a child, does not harm the safety of the child, and does not violate federal law, state law, or financial rules, we thought was providing the right parameters to make certain we are following the rules as the auditor interprets rules, allowing enough flexibility and professional judgment to meet the needs of kids and families, and could give clear direction to caseworkers and supervisors around the state about how to meet the needs of children and comply with state law and state rule at the same time. I will leave you with this: If it is the decision of this Committee to repeal this rule, I am left to go back to caseworkers across Colorado and say do everything in this rule or you will be noncompliant with statutory requirements and with rule, which sometimes will be contrary to what we want for kids. If we don't have this policy, I need direction from the legislature, or consensus between the Attorney General's office and Office of Legislative Legal Services, about what we can do to reach a better balance than what this rule provided.

Representative McCann said thank you for the clarification. I'm trying to think of a solution here because I understand your dilemma. From my perspective we would want to be able to have exceptions for those kinds of cases when it really is either inappropriate or impossible to talk to the child within 24 hours. One of the things I think Ms. Ritter brings up that I think has some bearing is this idea of the public hearing and comment. Couldn't the state board create an exception by going through the APA and following that process so there is notice and public hearing and so forth? It seems like that would satisfy a lot of the problems. Mr. Bicha said what we were trying to create was a provision that recognized the unique needs of an individual case. The rules should apply 99% of the time but there's that 1% of the time where it doesn't make sense to follow the rules the way the rules are written. We were trying to recognize that and create a provision that allowed for that but that also had the right sign off with

the supervisor and documentation so that we could track it both at my level and the state level.

Representative McCann said it seems like there ought to be a way to do this that would satisfy the requirements of our statute.

Senator Steadman said as I understand it, Rule 7.000.3 was adopted pursuant to the APA. Is that correct? Mr. Bicha said yes.

Senator Steadman said my concern with this rule is its breadth. It's striking in its breadth. I understand its placement in your volume of rules is intended to apply to the entire volume. You've told us of one example about timing where the amount of time a caseworker has to see a child is something that creates impracticalities or impossibilities if the child is out of state. Would it have been possible to write an exception to that one requirement that was narrowly tailored? Mr. Bicha said we could ask the state board to draft something that is specific to the two examples that I gave, but, as you can imagine, there would be many, many other situations in other parts of the rule where the same logic and challenges would apply and I fear it would be nearly impossible to try to predict all of those different variations, which is why we came up with the rule.

Senator Steadman said I appreciate that. My reason for asking the question is to get us to realize what you're trying to do through administrative rule-making is to grant broad waiver power that is quite sweeping and isn't necessarily tailored at all to the examples that you've cited, compelling though they are. For me, I'm worried that, particularly in this subject area of child welfare where we've seen too many fatalities and too many children failed to death by our system, we're creating broad, sweeping waiver authority for county-by-county determinations of what rules they do and don't want to follow when they think it's best. That concerns me a great deal. Regarding other examples of exceptions that have been granted explicitly in statute, where the legislature has decided that there are instances in which a particular rule or statutory requirement may not apply, I agree with staff that that would be a far preferable way to approach this problem then just trusting the system.

Representative Dore said when I was reading over everything I felt the rule was a catch-all and it's the rule you use when you can't figure out how to do what you need to do. In the one situation you gave, I could see where you could create some kind of rule that would get them from under that, like "reasonable means" or such like that to meet with the child, but this seems overly broad. Do the attorneys general provide you with a statement or opinion saying that this rule fits in here and here's why? Mr. Bicha said I have my assistant attorney

general here with me and perhaps she could answer the question about the attorney general review.

11:11 a.m. – Alicia Calderon, First Assistant Attorney General, Attorney General's Office, testified before the Committee. She said we play multiple roles in the rule-making process. We always have an assistant attorney general at the state board meetings advising the board as the rule-making process is occurring. In this case I was actually present for that board hearing. If the board has legal questions they can ask them on the record. Once the rule has been promulgated by the board, it goes to the Attorney General's office and the solicitor general reviews all the rules and they pass the rule.

Representative Dore asked when they pass rules is there a written explanation of why they are passing it? Are questions presented to it or is it more of a summary of a bunch of rules that have gone through the process and they sort of check it off? Ms. Calderon said the process as Mr. Bicha described is actually quite a lengthy process. As rules are being drafted, there's an assistant attorney general who is reviewing the rules and writing a written opinion. This particular rule is one of many that were in that rule package and the opinion memo would have simply said that the rule package is approved. It would not have given detailed analysis.

Senator Johnston asked how did you all deal with these exigent circumstances before this rule was promulgated? Two or three years ago if you had the hospital situation, how would you have dealt with that? What latitude did you have to deal with that before this rule? Mr. Bicha said there was no provision, so caseworkers simply would have made their best decision and may or may not have documented it or may or may not have received approval from a supervisor. There was no provision and we'd see great variation.

Senator Johnston said I imagine it was that part of the audit observation to which you were responding by creating this rule. You talked about how you were trying to get ahead of the audit recommendations. What were the things the audit was pushing you on that particularly motivated you to adopt this rule? Mr. Bicha said there are a number of cases that the audit took exception to where we looked at it from a clinical point of view and said this made good, clinical sense given the factors the caseworker had to work with at the time. There were discrepancies because the auditor looked at it and said here's what statute says, here's what rule says, and the caseworker deviated from those and the auditors did not consider whether or not it was a good, clinical decision to make. They only looked at their interpretation of the rule or statute. There were a number of cases like that, one of which was the example I gave of the child in

the hospital. There was another case of a family member in a county who had moved here recently and the county screened it in for differential response instead of a traditional assessment and the auditor took great exception to that because the family, they believed, had come to Colorado from another state in order to avoid child protection. Well, when you went through and read the entire case, that wasn't the case at all. The family came here because they were trying to get a different life and a new start like so many Coloradans have throughout the generations. Having read the entire case, the casework was fantastic in that situation with that community and with that family and resolved many issues with that family, but because the auditor interpreted the rule a certain way, we said we have to come up with some way that we can recognize the variations that go on but document and keep track of it and then I can manage to it as the executive director of the department by having a track record of these and seeing if we shouldn't be adjusting rules or statutes down the road.

Representative McCann asked is there a procedure whereby you can get a variance from the rules on a case-by-case basis? Ms. Calderon said currently in the child welfare rules there isn't any procedure like that. This rule, perhaps, is the attempt to create that.

Senator Steadman asked is there any provision in Colorado statutes that contemplates variances? Ms. Calderon said there is no language that I'm aware of either in the children's code or in Title 26, C.R.S., that would suggest a variance. However, all of the statutes that are written create a great deal of discretion with the caseworkers in making their case decisions. Especially when looking at Title 19, C.R.S., the children's code, there is simply a lot that isn't in there. Title 19 is not your most delineated of statutes.

Senator Johnston said it seems there are essentially two options. You can have very loose statutes and very loose regulations with broad authority for caseworkers on the ground who make decisions, or you can have tight legislative language and tight regulations with some waiver process for exigent circumstances on the ground for caseworkers. You can't have both. You can either have very tight proscriptions with no waivers or very loose language and expect not to have great variance in decision-making. Do you see in other parts of the Attorney General review of other departments how they deal with these analog versions of exigent circumstances? When you have a different department and they have a rule that calls for one thing and in exigent circumstances it calls for another, how do other departments deal with that possibility? Ms. Calderon said as Ms. Ritter identified there are some statutes that create the ability to grant waivers. Some of those create the process and

some just say you may do that and then the department has to create the process. There are specific statutes but they vary as well. In terms of other provisions and other waiver processes that I'm aware of, where it's more proscriptive - for example in the business and licensing arena - that's where I've heard the word "variance" used and that's where I've seen that process used. I think in the child welfare world in the department of human services nowhere have I seen the word "variance" used. There are the few statutes that talk about waiver but that is a different concept that isn't generally used in human services.

Representative Willett said with the experts involved in your department, I assume they are licensed and have ethical standards and they work with medical professionals who have legal and ethical regulatory standards. Is it too simplistic to say that we don't need an exception so much as we just need them to follow their ethics and in those rare instances file a report and get approval after the fact for what was done, trusting them to follow their ethical, legal, and regulatory constraints? Mr. Bicha said in Colorado we have a state-supervised county-administered human services system. Sixty-four counties have the day-to-day administrative responsibilities of implementing child welfare. As a result, Colorado has, in my view, very proscriptive administrative rules about how to do the work because we need clear directions to the counties to ensure consistency of practice. In addition we require fairly extensive training for caseworkers and supervisors doing the work to try to enhance practice. There are no licensing requirements for caseworkers or supervisors in Colorado, thus no professional ethics per say that caseworkers would have to respond to like a physician or attorney might. That said, I'm not sure what the provision would be. Further, as we've been discussing today, I don't know that there is a legal mechanism for a caseworker or supervisor to document after the fact to get permission about something that did or did not occur that was in contrast to rule. That's exactly what we were trying to do with this rule, which is subject to repeal.

Representative McCann asked Ms. Calderon what do you suggest? We're trying to figure out a way to allow for some variance when there's an emergency or some critical reason that they can't actually comply precisely with a rule. Is there a way that we can do this? Ms. Calderon said that is one of the conversations I've had about would it be effective to go through other rules and in each rule where a caseworker could use their discretion put it in there. But there are hundreds of rules and I don't see that being practical or effective. That would be one option. Another option is to rewrite the rule to make it tighter, more clear, and more specific. I do understand the concern with the language being a bit broad and perhaps it can be improved upon.

Senator Johnston said if you had some language in which you said where exigent circumstances were present, subject to documentation, and those exigent circumstances make it impracticable or contrary to the best interests of the child, and that general language goes to what the director is after in terms of some variance but addresses some of the Committee's concerns about not being overly broad, it seems to me there would be a way. I think Mr. Bicha has a fair request which was if not this then what. There has to be some guidance on how these caseworkers should take action. It seems to me that if we have some language on exigent circumstances and tighten the definition for what that looks like, and acknowledge there's going to be a thousand different scenarios, is that the kind of compromise that you think makes sense or what would you suggest? Mr. Bicha said in terms of the policy issue I'm looking for some direction. There's no margin in doing something that we as a state don't feel comfortable is the right way to do it. I'm open to figuring out a way that we can come up with language that allows for good case practice but does so in a way that members of the General Assembly, the Governor, and the public feel comfortable is being done consistently.

Senator Steadman asked to what extent is the matter we're now delving into under the continuing jurisdiction of the Audit Committee? You just had this child welfare audit in November and I know there was quite a bit of back and forth about this issue with the auditor and the Audit Committee. Have you had your follow-up with them? Are they going to be proposing any legislation as a result of your audit? Is that perhaps where the solution lies because the issue before this Committee is whether the rule has statutory authority or whether it should be repealed. The solution to your problems I'm thinking may be found in the audit findings and the ongoing review of department corrective actions by the Audit Committee. Mr. Bicha said the issue before us today is different than the waiver issues that were identified in the audit. They found issues about timeliness and the audit did not come up with any recommendations that recognized this best interest or clinical judgment. They just said you failed and wrote it up as an audit finding and said how we should be working harder to get out and see kids, as an example. The issue of waivers that came up with the audit and caused some turbulence around the executive and legislative branches and determining who can waive or can't waive rules had to do with two issues, both of which were broad policy. One was a financial issue and we agreed that the auditor was right and we should not have waived it. The second one was about the use of a specific tool. We were in the middle of rewriting the rules and we said to the counties that they still have to do assessments but you don't have to use this particular tool. That's another situation where we consulted with the attorney general and that's where there was some discrepancy. This solution was trying to solve a different problem. We don't have any follow-up

meetings that I'm aware of with the Audit Committee on the child welfare audit.

Senator Johnston said this may be a question for Ms. Haskins. Procedurally, if the Committee's belief is that this rule is over broad but some authority is needed for the director to be able to deal with exigent circumstances, can the Committee repeal this rule and then suggest amendments to the rule bill to insert new language that would provide guidance to the director? Or does that have to go back through the board to promulgate rules that replace the one that we repeal? If we pull this out and we can't put anything in its place have we failed to answer the problem, and if not this then what?

11:28 a.m. – Debbie Haskins addressed the Committee again. She said our position has always been that it's not appropriate for the Committee to write rules. That's crossing the separation of powers line. We generally recommend strongly against amending the rule review bill to rewrite a rule or to change a statute. Traditionally, this process we're going through right now, where the Committee members are giving comments to the department, is a way to communicate to the department what this Committee thinks are the issues and the things that ought to be addressed. It's really then up to the agency if a statute needs to be changed to find a sponsor to change the statute. We try to keep the process separate from changing the statute or writing the rule.

Senator Johnston said so then procedurally what would happen is if we repeal the rule, we would verbally give guidance on what we think needs to happen to give the department that variance. Their next steps would be to either promulgate a new rule through the board that met our guidance or to come to the legislature and seek a new bill to provide legislative language that clarified that. Is that correct? Ms. Haskins said yes.

11:31 a.m.

Hearing no further discussion or testimony, Senator Steadman moved to repeal Rule 7.000.3 of the State Board of Human Services, effective May 15, 2015. Senator Steadman said I make the motion based on our staff's recommendation and their conclusion that the rule does exceed the authority of the state board. I also do so out of concern with the scope of the waivers that the rule authorizes. I am not unsympathetic to the department's recitation of examples where the rules are perhaps too rigid, where caseworkers are asked to respond to a multitude of varying situations. We cannot anticipate all of the things that they see in the field and that they're required to do, but there has been a great deal of scrutiny on how well our child protection services and that safety net works

today and whether or not there are too many kids slipping through cracks and whether the system is failing children and families. When we see the creation of broad waiver authority like this, it does give me a great deal of concern that we're inviting more inconsistency and more cracks and gaps to open up for more kids to fall in. I would hope that the department would be able to go back to the drawing board with what they are trying to accomplish and find more narrowly tailored ways specific to examples and real world problems or anticipated problems where their rules perhaps are too rigid for caseworkers to adhere to in all instances and all cases. That may be appropriate and there may exist authority in the statutes for that to happen or perhaps the department should work with the legislature to be granted that authority so that they're able to avoid the rigidity of some of these rules. For today, I think this rule goes too far and raises a number of concerns and I urge that we repeal it this May.

Representative Kagan said I would like to also urge the repeal of this rule. It allows the county departments to decide which rules they follow and to decide which rules really impact the safety and risk of children and are in the best interests of the children, and, simply on that basis, to decide which parts of the rules are going to be waived and which aren't. As Senator Steadman said, that's a terribly sweeping authority to the county departments to decide which parts of the rules are going to be followed. That's a very worrying thought to me and I understand Senator Johnston's concern and the concern expressed by Mr. Bicha, which is what are we going to do about those circumstances where the rules really aren't sensible. The answer is not to allow a broad waiver of all the rules and I think we should decide today that that is not the answer and it's a dangerous response to that problem. It's not within our power to solve the problem today but it is in our power to make sure that the current, broad, optional nature of all the rules should not be allowed to continue. I feel strongly we should repeal this and I urge members to do so.

Representative Dore said I agree with my colleagues on the Committee and their statements so far. My question is procedural since I'm still new to the Committee. Why would the effective date be May 15? Can we do that immediately? Ms. Haskins said the May 15 date is the same date that is used for the expiration of all the rules that are subject to this year's rule review bill. Usually when the Committee is repealing a rule they select that same date as the expiration for the rule to be repealed. Under the APA the rule review bill needs to become law and be signed by the governor before midnight on May 15. That's why we choose that date.

Senator Scheffel said if there is a desire to make it effective sooner would we have to do a date that would be consistent for the whole rule review bill or could

we pick this one out as being effective sooner? Ms. Haskins said it depends on when the General Assembly passes the bill and when it would become effective. The bill has a safety clause on it. I wouldn't recommend saying this rule expires on April 1 because I'm guessing you won't have the bill passed by then. You could make it effective upon passage, but the statute for the extension of the expiration of all the rest of the rules is tied to having the Governor sign the bill before midnight of May 15.

Senator Scheffel asked would it be advisable to include a provision that says upon the earlier of upon passage or May 15, whichever occurs first? Ms. Haskins said I'm sure we could come up with some language if that's the desire of the Committee.

Senator Steadman withdrew his motion.

11:38 a.m.

Senator Steadman moved to repeal Rule 7.000.3 of the State Board of Human Services, effective on passage of Senate Bill 15-100, and that that be a separate section of the bill with its own effective date provision. Senator Johnston said now that I'm learning about how these processes work, and that the formal guidance requested by Mr. Bicha is really the feedback from this Committee verbally, I just want to go on the record and echo the comments from earlier, which is I do think there is a need. At the same time we want to provide more and more regulation for the department of human services to ensure better outcomes, we can't do that at the same time in a business that requires intense and high-stakes human decision-making without having some flexibility. I think we should offer guidance for how to solve that dilemma. My feedback today is that there ought to be some focus on language that there will be circumstances that require a different set of analysis and that there ought to be documentation for those moments of exigent circumstances to show why the decision was made in the best interests of a child, and that there ought to be language that shows those exigent circumstances make following the rule either practically impossible or contrary to the health or wellness of the child. That would be my feedback. I thought it was a very fair request of the director that if we're going to keep a tight set of rules with the variety of decisions that have to be made, they have to have some flexibility.

Representative Willett said I am concerned about approving the current motion and effectively repealing this rule, given that there are 64 counties out there and I assume that some of them are operating under this rule. Is there anything that can be done to notify those counties if the Committee does repeal this rule?

Wouldn't they be violating the rule or the spirit of the rule if they continue to operate on it until the passage of the bill?

Senator Steadman said I have every confidence that the department will be communicating to the counties that the rule is subject to repeal when the Governor signs the bill. They have bulletins that go out regularly to advise them of new rule-making and the counties are the state's partners in administering the child welfare system and I'm sure those notices will take place. I imagine the counties will have a lot of input for the department about how they might approach this issue differently to be more narrowly tailored for waivers or exceptions that are granted.

Senator Johnston said I think Representative Willett raises an important point. This Committee is going to create a gap in which all 64 counties are going to operate with no allowance for variation for whatever time it takes from when this rule is repealed until a new rule is adopted.

Senator Steadman said this rule has only been in effect for a couple months. Prior to November 7 when this rule was passed last fall, they were in the same gap you're worried about.

Senator Johnston said my understanding is that gap is what created the audit reviews that said people were dissatisfied with the decisions caseworkers were making without variance allowed to them and we are disgruntled that they are passing rules out of cycle to do that. One of the things we're asking them to do is to pass another rule out of cycle to make sure they adopt something in the next three to six months that would be a temporary replacement to this process, so you don't have folks making decisions at variance with the rules or the process. The next rule cycle will be nine months out. When does the rule process begin again?

Ms. Haskins said every time an agency adopts rules it's in a particular cycle. It wouldn't be out of cycle. Whenever they adopt the rules it's in the cycle for that one-year period. The agency has the authority to adopt rules at any time under their statutory authority.

Senator Johnston said then I would add that the department should feel that they have direction and encouragement from us to adopt a new rule that is more narrowly tailored with all deliberate speed because I don't think we want a scenario where you have a newspaper article two weeks from now saying a caseworker forced themselves to take a deposition from an unconscious child who the doctor was recommending they not depose because the rule does not

allow variance. I would say we've appropriately said this is too broad of an overreach and we should also say it's appropriate for them to give new direction that provides a more tailored response and to do it quickly.

Senator Steadman said I'd just remind the Committee that the APA does have provisions for emergency rule-making. I rather doubt that that's what's going to happen in this case because I think the rules that need to be crafted to accomplish the flexibility that the department seeks are not going to be easy to write and I think it's going to take some time and thoughtfulness to question where are the places in the rules where there is too much rigidity and inflexibility and that waivers or exceptions may be warranted. I hope that what they will do is go back and look at the particular rules that raise those problems and not come back with a blanket exception or waiver. If they wanted to, they could have something in place before this bill gets to the Governor's desk for signature under the emergency rule-making procedures of the APA. That's unlikely given the complexity and sensitivity of what they're trying to do.

Senator Johnston said this is strange since the only way for feedback is debate and there's no settled question on this, so there may be conflicting records from this conversation. I think the other option seems to be writing specific carve outs to all 220 rules based on exigent circumstances. That also to me seems excessive. I would say that the carve outs should be of general application but it should be more narrowly tailored language. I would not want to set them up to say that our expectation is that you're going to take every rule in your rule book and write out an explicit exception to each one of them.

Representative Kagan said if we're urging the board to make new rules to fill the gap, I would like to put on record that the rule must be more than narrowly tailored; it must not be a substantially similar rule to this one. I'm worried that it could be taken as a green light to slightly tweak this rule and pass a new rule with all deliberate speed that basically provides unchanneled waiver authority, just slightly more narrowly tailored than this. I think it needs to be more than narrowly tailored and I think that counsels against all deliberate speed being used because I don't think a rule that is not just a broad rule can be devised.

Senator Johnston said my sense is that there's not going to be meaningful and coherent feedback out of this Committee. My feeling is I don't know if there is a list of specific enumerated exceptions that are going to practical either. If the difference between broad and detailed is an enumerated item of exceptions for each sub-rule of the 200, that doesn't seem practical. If for you a broad application to all the rules is too similar to this rule, then I think we're stuck. Where I thought we were in agreement was something of broad application to

all the rules but with much more specific language about what one would have to do to meet the exigent circumstances required to opt out of that. That's where I thought we were heading. If that seems still too broad for you, then I think maybe you really are asking them to enumerate under every sub-rule what the exceptions are.

Senator Steadman said I've not read the whole volume of rules, but it may be possible to say that when rules require something to happen within a certain timeframe – 24 hours, 72 hours – in exigent circumstances, do a waiver for rules that impose timing deadlines. It may be possible that there are rules that say there must be a physical observation of a child or a visit or interview with the child and if the child is in intensive care, there can be exceptions to those. If we're going to sit here and start to parse through a volume of rules that we're not familiar with, I would prefer that, rather than a blanket waiver, they come back saying deadlines and timeframes in rules may not always have to be adhered to in certain circumstances, but that they are more narrowly tailored to the problem they're trying to solve and not just this broad grant that statute doesn't authorize. I'm very concerned about the inconsistency this invites into our system, a system that is already somewhat plagued by inconsistency and periodic failures. I don't think we've been inconsistent in how we've all debated this and I think there is a path forward for the department and I think they have a number of options. I'm not certain they have statutory authority for any of the things I just described and some of what they may need to do to move forward is to come to the legislature and work with the General Assembly on the ability to craft rules that provide this sort of flexibility. I've not studied Title 26 or Title 19, C.R.S., enough to know whether that authority exists there or not. I'm relying today on our staff recommendation and my concern about the breadth of the rule that's before us.

Senator Scheffel said when this issue hit my radar screen there was a feeling that it was important that we bring this back here to committee and we act upon it. We have a recommendation from staff and for my own part I believe the rule is too broad and needs to be acted upon by the Committee. I think we all recognize that the department needs to function and it needs to do its job and be effective in doing so and I assume they will, and if a rule needs to come from that they'll do it and it will be available for continued review and observation.

The motion passed on a vote of 9-0, with Representative Dore, Representative Foote, Senator Johnston, Representative Kagan, Senator Roberts, Senator Steadman, Representative Willett, Representative McCann, and Senator Scheffel voting yes.

Senator Scheffel said now we're sitting again as the committee of reference for Senate Bill 15-100.

11:53 a.m. – Debbie Haskins addressed agenda item 2 – Approval of SB 15-100 by Senator Steadman; also Representatives Foote and McCann – Rule Review Bill.

Ms. Haskins said nothing has really changed dramatically since the last time we heard the bill, and we went through all of the items last time so I think the members are familiar with the bill and what its purpose is and what the contents are. The amendment that I had drafted for you is not completely lined up with what you just voted on. I think what I need is a motion for the bill to be amended to reflect the prior vote to repeal the rule and add the effective date upon passage, and then you need to repass the bill as amended.

Representative Kagan asked is that amendment L.005? Ms. Haskins said it is but it doesn't have the effective date language. That's what isn't lined up.

Representative Kagan said so I'm just thinking procedurally, doesn't somebody have to move to amend L.005?

11:55 a.m.

Hearing no further discussion or testimony, Senator Steadman moved Senate Bill 15-100 to the Senate Committee of the Whole in the Senate and moved a conceptual amendment to add two new sections to the bill, one of which would specify that Rule 7.000.3 of the State Board of Human Services is repealed and the other section would give that prior new section an effective date of upon passage. Ms. Haskins said I think Senator Steadman's conceptual amendment makes sense and that's how we can draft the amendment, because you wanted to vary the date of the repeal to make that upon passage. The amendment I had prepared had the date of May 15, so that's where the amendment doesn't line up with what you had previously done. Senator Scheffel said let's vote on the conceptual amendment first, which is to align Senate Bill 15-100 with the motion that we've already passed and making the bill consistent with that. Ms. Haskins said with the prior motion to repeal the rule, yes. Senator Scheffel said which takes into account the language making it effective upon passage of Senate Bill 15-100. There were no objections to that motion and it passed unanimously.

11:58 a.m.

Hearing no further discussion or testimony, Senator Steadman renewed his motion to refer Senate Bill 15-100 to the Committee of the Whole in the Senate with a favorable recommendation. The motion passed on a vote of 9-0, with Representative Dore, Representative Foote, Senator Johnston, Representative Kagan, Senator Roberts, Senator Steadman, Representative Willett, Representative McCann, and Senator Scheffel voting yes.

Representative Willett said it went smoothly today because there wasn't any objection to our decision against the rule, but I could see a situation where the agency disagrees with our position and we repeal a rule but then we're in limbo land. What, if anything, can we do to give us the power, if it doesn't violate separation of the branches, to be able to repeal a bad rule immediately? Do we need legislative authority for that?

Ms. Haskins said the way our rule review process works in Colorado is that the Committee is taking action through a legislative bill that has to go through both the House and Senate and be adopted. When the Committee votes not to extend a rule or when the Committee votes to repeal a rule, that rule is still in effect until the May 15 date or a different date if that's specified by the Committee. The agency can still enforce the rule until that May 15 date. Generally, it's not really limbo land but the rule is still in effect until that particular date or the bill has become law.

Representative Willett said I think that states the issue and I understand that, but doesn't it strike anyone else as odd that you can have an abuse by the executive branch. They could stick to their guns on a rule when this Committee has decided that it's not in the best interest of the public welfare and there's no way for us, such as with an emergency unrule-making provision.

Representative Kagan said I think under those circumstances it would be open to us to run a bill and get it through the legislature.

Senator Steadman said in both of those instances, whether we're putting something in the rule review bill or legislating a solution, we still need the signature of the Governor. We don't do these things acting all by ourselves.

Senator Scheffel said it's incumbent upon us if we're worried enough about this to get a bill through that will get through the system quickly and get signed by the Governor.

Senator Roberts said or we could sue the executive branch.

Representative Willett said raising questions of TROs and criminal injunctions against the rule. Maybe that's the best answer, bringing in yet another branch of government.

12:02 p.m.

The Committee adjourned.