

OFFICE OF LEGISLATIVE LEGAL SERVICES

COLORADO GENERAL ASSEMBLY



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Kathy Zambrano

AGENDA

Committee on Legal Services

December 18, 2013

10:00 a.m.

House Committee Room 0111

1. Review of New Rules (rules adopted or amended on or after November 1, 2012, and before November 1, 2013, and scheduled to expire May 15, 2014):
 - a. Rules of the Executive Director, Department of Public Safety, Colorado Bureau of Investigation, concerning evidence collection in connection with sexual assaults, 8 CCR 1507-29 (LLS Docket No. 130489; SOS Tracking No. 2013-00927).
Staff: Jeremiah Barry
(Status Unknown)
 - b. Rules of the Medical Services Board, Department of Health Care Policy and Financing, concerning medical assistance - hospice services benefit coverage standard and speech-language and hearing services benefit coverage standard, 10 CCR 2505-10 (LLS Docket No. 130445; SOS Tracking No. 2013-00804) and medical assistance benefit coverage standards, 10 CCR 2505-10 (LLS Docket No. 120246; SOS Tracking No. 2012-00204).
Staff: Brita Darling
(Status Unknown)
 - c. Rules of the Colorado Racing Commission, Department of Revenue, concerning racing - chapter 5, veterinary practices, animal health and

medication, 1 CCR 208-1 (LLS Docket No. 130211; SOS Tracking No. 2013-00151).

*Staff: Duane Gall
(Uncontested)*

2. Approval of the Rule Review Bill and Sponsorship of the Rule Review Bill.
Staff: Debbie Haskins
3. Sponsorship of Other Committee on Legal Services Bills:
Bill to Enact the C.R.S.
Revisor's Bill
Staff: Jennifer Gilroy, Revisor of Statutes
4. Litigation Update.
Staff: Bob Lackner
5. Scheduled Meetings During the Session:
January 10, 8:30 a.m. - Organizational Meeting to Elect a Chair and Vice-Chair
First Fridays of the Month from Noon to 2:00 p.m.:
February 7, March 7, April 4, and May 2
6. Other.

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MEMORANDUM

TO: Committee on Legal Services

FROM: Jeremiah B. Barry, Office of Legislative Legal Services

DATE: December 10, 2013

SUBJECT: Rules of the Executive Director of the Department of Public Safety, Colorado Bureau of Investigation, concerning evidence collection in connection with sexual assaults, 8 CCR 1507-29 (LLS Docket No. 130489; SOS Tracking No. 2013-00927).¹

Summary of Problem Identified and Recommendation

Section 24-33.5-112 (1) (b), C.R.S., requires the Executive Director of the Department of Public Safety (“Executive Director”) to adopt rules, including consent forms, related to a person’s consent for the collection, testing, and release of test results of forensic evidence of a sexual assault. Although the rules reference a form by name, the form itself is not included in the rules. **We therefore recommend that the nine paragraphs after the heading “Consent” of the rules of the Executive Director concerning evidence collection in connection with sexual assaults not be extended.**

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., the rules discussed in this memo will expire on May 15, 2014, unless the General Assembly acts by bill to postpone such expiration.

Analysis

Section 24-33.5-113, C.R.S., enacted in H.B. 13-1020, requires the Executive Director to promulgate rules concerning the collection and testing of forensic medical evidence collected in connection with an alleged sexual assault (forensic medical evidence). Section 24-33.5-113 (1) (b) (IV), C.R.S., specifically provides:

24-33.5-113. Forensic medical evidence in sexual assault cases - rules - testing - confidentiality - repeal. (1) (b) On or before six months after June 5, 2013, the executive director shall promulgate the rules. **The rules must include:**

(IV) Standards for consent for the collection, testing, and release of test results of the forensic medical evidence, including but not limited to:

(A) **Consent forms** that notify persons of the potential effects of each step of the process, including collection, testing, and release of test results and require acknowledgment of consent for each step of the process;

(B) Who may give consent and when is it required;

(C) Who may withdraw consent and when it may be withdrawn;

and

(D) When and how results of tests may be released and for what purposes; (emphasis added)

In response to this directive, the Executive Director adopted rules concerning evidence collection in connection with sexual assaults found in 8 CCR 1507-29, a copy of which is attached as **Addendum A**. Although the rules reference the “Colorado Sexual Assault Consent and Information Form”, the form itself was not made part of the rules. A copy of the form is attached as **Addendum B**.

Section 24-33.5-113 (1) (b) (IV), C.R.S., requires the rules to include more than just a reference to a form developed by the Department of Public Safety. Since the form is not in the rules, the public is unable to determine whether in fact it adequately notifies persons of the effects of each step of the process.

We therefore recommend that the nine paragraphs under the heading “Consent” of the rules of the Executive Director concerning evidence collection in connection with sexual assaults not be extended.

ADDENDUM A



**DEPARTMENT OF PUBLIC SAFETY
COLORADO BUREAU OF INVESTIGATION**

**RULES AND REGULATIONS
CONCERNING
EVIDENCE COLLECTION IN CONNECTION
WITH SEXUAL ASSAULTS**

STATEMENT OF BASIS, STATUTORY AUTHORITY, AND PURPOSE

Pursuant to Section § 24-33.5-113 C.R.S., the Executive Director of the Colorado Department of Public Safety shall promulgate rules and regulations concerning evidence collection in connection with sexual assaults.

It was declared by the General Assembly that this act is necessary for the immediate preservation of the public peace, health and safety of Colorado citizens. The absence of implementing rules to carry out the purpose of the statute would be contrary to this declaration. For these reasons, it is imperatively necessary that the proposed rules be adopted.

**DEPARTMENT OF PUBLIC SAFETY
COLORADO BUREAU OF INVESTIGATION**

**RULES AND REGULATIONS
CONCERNING FORENSIC MEDICAL
EVIDENCE COLLECTION IN CONNECTION
WITH SEXUAL ASSAULTS
IN THE STATE OF COLORADO**

(A) AUTHORITY

The Colorado Department of Public Safety Executive Director is mandated to promulgate rules and regulations concerning forensic medical evidence collection in connection with sexual assaults pursuant to CRS § 24-33.5-113.

(B) DEFINITIONS

The following definitions apply to these rules and regulations:

“Accredited Crime Laboratory” means a law enforcement crime laboratory which has received forensic accreditation through ASCLD/LAB (American Society of Crime Laboratory/Laboratory Accreditation Board) Legacy or ISO/IEC (International Organization of

Standardization/International Electrotechnical Commission) 17025:2005 by a recognized accrediting body.

“Backlog” as referenced in C.R.S § 24-33.5-113 means all unanalyzed collected forensic medical evidence stored in any law enforcement facility in the State of Colorado. All forensic medical evidence received by law enforcement entities as part of an active investigation shall be considered “backlog” until the date these rules become effective.

“CODIS” (COmbined DNA Index System) means a database system controlled by the Federal Bureau of Investigation (FBI) authorizing individuals within an accredited crime laboratory to utilize the system upon successful completion of a FBI QAS (Quality Assurance Standards) audit.

“Forensic Evidence” as referenced in section 113 (b) (I) of CRS § 24-33.5-113 means forensic medical evidence.

“Forensic Medical Evidence” means evidence collected by medical or law enforcement personnel using a sexual assault evidence collection kit (or components thereof) consistent with state/national collection standards. This excludes any toxicological evidence.

“Forensic evidence analysis/release of results” for the purposes of this law means that any results from the forensic analysis conducted will be released to the submitting agency.

APPLICABILITY

These rules and regulations apply to all personnel who participate in any or all parts of the collection, transportation, storage, forensic analysis, investigation, and the judicial process of forensic medical evidence in

connection to alleged sexual assaults occurring in the State of Colorado. These rules must be complied with by March 1, 2014.

(C)

CONSENT

Forensic medical evidence must be collected if a victim of an alleged sexual assault requests the collection. Law enforcement and medical personnel shall not, for any reason, discourage a victim of an alleged sexual assault from receiving a forensic medical examination.

Any person who receives forensic medical evidence or the results of those tests conducted on the forensic medical evidence shall not disclose that information except for the authorized purpose for which that forensic medical evidence was obtained.

The **COLORADO SEXUAL ASSAULT CONSENT AND INFORMATION FORM** must be utilized to obtain consent from and provide information to sexual assault victims regarding:

- 1) Evidence collection through a medical forensic exam;
- 2) Forensic evidence analysis/release of results;
- 3) Reporting options; and
- 4) Victims' ability to withdraw consent.

This form must be used beginning March 1, 2014. This form should be utilized prior to the collection of forensic medical evidence whether collected by medical or law enforcement personnel.

Consent or non-consent must be confirmed through the victim's initials and signature on the form.

Sexual assault victims may withdraw their consent for evidence collection and forensic evidence analysis/release of results. However, consent for analysis/release of results cannot be withdrawn once forensic analysis has been initiated by a qualified employee of an accredited crime laboratory.

Withdrawal of consent becomes effective when the investigating law enforcement agency verifies that the person seeking to withdraw consent is the victim who is acting of her/his own free will. If possible, law enforcement should obtain written confirmation of the withdrawal from the victim.

If the evidence collection kit is in the custody of the accredited crime lab when the withdrawal of consent becomes effective, law enforcement must notify the accredited crime lab about the withdrawal as soon as possible, but no later than the second business day after consent has been withdrawn and victim identification has been verified.

Law enforcement must make a reasonable attempt to verify the identity of the person seeking to withdraw consent. If law enforcement cannot verify the identity of the person seeking to withdraw consent, or does not believe the victim is acting of her/his own free will, consent cannot be withdrawn.

FORENSIC ANALYSIS

Beginning on March 1, 2014, all forensic medical evidence received by a law enforcement entity must be submitted to the Colorado Bureau of Investigation or an accredited crime laboratory for analysis within 21 days of receipt of such evidence except under the following circumstances:

- 1) The victim has not consented or has withdrawn consent to have the forensic analysis conducted;

- 2) A law enforcement investigation has corroborating evidence that the alleged sexual assault never occurred; or
- 3) The law enforcement entity is not the investigating agency and must forward the forensic medical evidence to the appropriate agency of jurisdiction for submission as soon as possible.

Upon submission to an accredited crime laboratory, that laboratory must strive to analyze and, when appropriate, upload the information into CODIS within six (6) months of receipt of the forensic medical evidence being submitted, assuming the laboratory has sufficient resources.

The appropriate accredited crime laboratory must report the results of the forensic analysis upon completion of the analysis to the submitting agency.

LAW ENFORCEMENT

Law enforcement agencies must submit their backlog of untested forensic medical evidence for analysis to the Colorado Bureau of Investigation or another accredited crime laboratory no later than March 1, 2014.

These rules apply whether the forensic medical evidence is submitted to the Colorado Bureau of Investigation or to another accredited crime laboratory.

ADDENDUM B

COLORADO SEXUAL ASSAULT CONSENT and INFORMATION FORM

Collection, Analysis/Release, and Consent Withdrawal of Sexual Assault Evidence/Information



- **You have the right to have this form explained and all of your questions answered. Please initial and sign where appropriate. You will receive a copy of this form after it is completed.**

Law Enforcement Agency:	Case No:
Officer Name:	Phone No:

Medical Forensic Exam

- _____ **I consent to a medical forensic exam.** I understand I can stop the exam at any time and can decline any portion of the exam or collection of any sample.

Reporting Decision (initial only one)

- _____ **I am choosing to make a report to law enforcement.** I give permission for evidence collected and information gathered during my sexual assault exam to be released to law enforcement for use in investigation(s) and potential prosecution(s). I understand the investigating law enforcement agency will be given my name and contact information.
- _____ At this time, **I am choosing NOT TO REPORT TO LAW ENFORCEMENT OR PARTICIPATE** in any investigation. I understand I can change my mind and later report to law enforcement. I understand law enforcement may be given my name. I understand law enforcement may choose to investigate but I do not have to participate.

Evidence Analysis/Release of Results (initial only one)

- _____ **I consent for law enforcement to release the collected evidence to a forensic lab for analysis.** I understand law enforcement **may** submit the evidence to a lab no later than 21 days after receiving it. I understand if the evidence is analyzed, law enforcement **will** receive the results for the purposes of investigation(s) and potential prosecution(s).
- _____ **I consent only to the collection and storage of evidence** at a law enforcement agency. I understand this means the evidence will **NOT** be submitted to a forensic lab for analysis. I understand I can change my mind, make a report to law enforcement and possibly have the evidence analyzed at a forensic lab. I understand law enforcement is only required to hold the evidence for a minimum of 2 years.

Withdrawal of Consent for Evidence Analysis/Release of Results

- _____ **I understand I may withdraw my consent for evidence analysis/release of results** by contacting the law enforcement agency listed on this form. I understand the withdrawal of consent becomes effective when law enforcement verifies my identity, but will not apply to any actions already taken. I understand that once analysis has begun, consent cannot be withdrawn.

Printed Patient Name	Patient Signature	Date
Printed Witness Name/Title	Witness Signature	Date

White Copy - Enclose with Kit Yellow Copy - Law Enforcement Pink Copy - Medical Records Green Copy - Patient

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MEMORANDUM

TO: Committee on Legal Services

FROM: Brita Darling, Office of Legislative Legal Services

DATE: December 9, 2013

SUBJECT: Rules of the Medical Services Board, Department of Health Care Policy and Financing, concerning medical assistance hospice services benefit coverage standard and speech-language and hearing services benefit coverage standard, 10 CCR 2505-10 (LLS Docket No. 130445; SOS Tracking No. 2013-00804),¹ and medical assistance benefit coverage standards, 10 CCR 2505-10 (LLS Docket No. 120246; SOS Tracking No. 2012-00204).²

Summary of Problems Identified and Recommendations

Pursuant to the State Administrative Procedure Act (“APA”), contained in article 4 of title 24, C.R.S., and section 25.5-1-303, C.R.S.,

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., the rules discussed in this memo concerning hospice services and speech-language and hearing services benefit coverage standard incorporation by reference will expire on May 15, 2014, unless the General Assembly acts by bill to postpone such expiration.

² The rule concerning medical assistance benefit coverage standards was adopted in a prior rule-making cycle and has already been extended.

rules relating to eligibility and amount, scope, and duration of covered services pursuant to the “Colorado Medical Assistance Act” (“medicaid”) must be promulgated as rules subject to the APA. But Rules 8.550.4.C (hospice services benefit coverage standard) and 8.200.3.D 2. (speech-language and hearing services benefit coverage standard) of the Medical Services Board (“Board”) in the Department of Health Care Policy and Financing (“Department”) lack statutory authority because they do not adopt the benefit coverage standards as rules pursuant to the APA. Instead, the Board has attempted to incorporate the standards by reference in a method inconsistent with the incorporation by reference requirements of the APA. **We therefore recommend that Rule 8.550.4.C and Rule 8.200.3.D 2. of the rules of the Medical Services Board in the Department of Health Care Policy and Financing concerning the benefit coverage standards not be extended.**

The Board adopted Rule 8.010 (medical assistance benefit coverage standards) on April 13, 2012, and relies on this rule, in part, as authority to adopt Rule 8.550.4.C and Rule 8.200.3.D 2., referenced above, through an incorporation by reference process. Although this Office reviewed Rule 8.010 and had no objection to the rule at that time, the Office now concludes that the rule lacks statutory authority because it purports to allow benefit coverage standards to be adopted that relate to eligibility and amount, scope, and duration of covered services in the medicaid program without complying with the APA. **We therefore recommend that Rule 8.010 of the rules of the Medical Services Board in the Department of Health Care Policy and Financing concerning medical assistance benefit coverage standards be repealed, effective May 15, 2014.**

Analysis

- I. **Rule 8.550.4.C and Rule 8.200.3.D. 2. lack statutory authority pursuant to the section 25.5-1-303, C.R.S., and the APA.**
 - A. **The Board’s hospice and speech-language and hearing benefit coverage standards must be rules that are promulgated pursuant to the APA.**

In 2008, the Department established the Benefits Collaborative in an effort to define its covered services within the medicaid program. The Benefits Collaborative includes a stakeholder process that results in the creation of benefit coverage standards relating to program eligibility and amount, scope, and duration of covered medicaid services. All providers of medicaid services are required to comply with the benefit coverage standards. However, under this process, the substantive content of the

benefit coverage standards is *not* promulgated pursuant to the APA notice and review process and does not appear in the Colorado Code of Regulations (“CCR”). However, the Board purports to give the standards the full force of law through the incorporation of the standards by reference into a single, brief “incorporation rule” that is adopted pursuant to the APA and contained in the CCR. (See **Addendum A** for Rules 8.550.4.C and 8.200.3.D 2.) The Board outlines this incorporation process in Rule 8.010, which rule is discussed in section II of this memorandum. For the reasons set forth in this memorandum, the Board’s benefit coverage standards must be promulgated as *rules* pursuant to the APA, and therefore the Board’s rules incorporating by reference standards on hospice services and speech-language and hearing services should not be extended. Further, the Board’s medical assistance benefits coverage rule concerning incorporation of the benefit coverage standards does not comply with the medicaid statutes or the APA and should be repealed.

Pursuant to section 25.5-1-303 (3) and (7), C.R.S. (attached as **Addendum B**), the Board has the duty to *adopt rules* concerning the implementation of Colorado’s medicaid program. These rules are to govern the establishment of, among other things, “eligibility requirements for persons receiving services from the state department” and the “types of benefits” that a recipient of services may obtain if eligible. *The statute specifically requires that the Board comply with the APA in carrying out its duty.*

The hospice services and speech-language and hearing services benefit coverage standards at issue here include provisions relating to, among other things, who qualifies for services and who may provide services, the scope and duration of the benefit, and specific limitations on services. The Board, itself, defines a “benefit coverage standard” as “a document that defines and limits the appropriate amount, duration and scope of a covered service.” (See Rule 8.010 in **Addendum C**) Therefore, notwithstanding the Board’s terminology, the subject matter contained in the Board’s “benefit coverage standards” includes the specific subject matter that the Board has a duty to *adopt by rule* pursuant to the requirements of the APA including notice, hearing, and review, and ultimately, publication in the CCR.

In addition, the APA that governs an agency’s exercise of rule-making authority, defines the term “rule” as follows:

24-4-102. Definitions. As used in this article, unless the context otherwise requires:

(15) "Rule" means 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. "Rule" includes "regulation".
(**emphasis added**)

The Board's statements establishing program eligibility and the amount, scope, and duration of covered services contained in its benefit coverage standards are clearly "statements of general applicability and future effect . . . declaring law or policy" under the APA definition. Further, the Board requires regulated parties to comply with the benefit coverage standards. Thus, the benefit coverage standards are "agency statements" that are governed by the requirements of the APA concerning the promulgation of rules.

Because the Board's benefit coverage standards contain agency statements of law or policy relating to eligibility and amount, scope, and duration of covered services in the medicaid program, the Board, *by law*, must adopt these agency statements as rules that are promulgated pursuant to the APA and published in the CCR. Therefore, the Board's hospice services and speech-language and hearing services benefit coverage standards do not comply with the APA and must not be extended.

B. The Board's rules do not comply with the incorporation by reference provisions of the APA.

The Board did not follow the correct process for promulgating the hospice services and speech-language and hearing services benefit coverage standards as rules pursuant to the APA. In adopting the hospice services and speech-language and hearing services benefit coverage standard incorporation by reference rules, as well as the medical assistance benefit coverage standards rule discussed in section II of the memorandum, the Board relies on a faulty interpretation of the incorporation by reference provision of the APA.

The introductory portion of section 24-4-103 (12.5) (a), C.R.S., states:

24-4-103. Rule-making - procedure - definitions - repeal. (12.5) (a) A rule may incorporate by reference all or any part of a code, standard, guideline, or rule that has been **adopted** by an agency **of** the United States, **this state**, or another state, or adopted or published by a nationally recognized organization or association, if: (**emphasis added**)

The statute permits a rule to incorporate by reference all or any part of a standard or rule that has been adopted by an agency of this state, thereby eliminating the need for an agency to essentially "republish" the text of the

adopted standard or rule in the agency's rule. For example, an agency might incorporate by reference federal regulations printed in the Code of Federal Regulations. Or, an agency might incorporate by reference adopted rules of another state agency, for example, if the Department of Human Services was requiring a child care center to comply with the rules of the Department of Public Health and Environment regarding the safe handling of food. However, pursuant to the specific language of subsection (12.5) (a), the standard or rule incorporated by reference *must have been adopted* by the state agency *first* before it can be incorporated by reference into another rule. In the context of rule-making, an agency "adopts" a standard or rule by promulgating the standard or rule pursuant to the APA's notice, hearing, and review procedures.

Although the Board purports to adopt its hospice services and speech-language and hearing services benefit coverage standards through incorporation by reference pursuant to subsection (12.5) (a), subsection (12.5) (a) does *not* permit an agency to create the substantive content of agency rules *outside* of the APA and then attempt to satisfy the APA requirements through incorporation by reference into its *own* rules. This interpretation of the statute would be absurd. Because the underlying "standards" are not adopted rules, only the "shell" *incorporation* rule would be subject to the APA's notice, hearing, and review provisions and be published in the CCR. If taken to the extreme, this process could result in the CCR consisting of page after page of two-paragraph incorporation rules that refer regulated parties to the agency's website. Moreover, there would be no legal requirement for the underlying substantive content included with the incorporation rule to be created with public input and transparency. The APA's purpose is to subject all agency-made law to the same process. In construing statutes, there is a presumption that "a just and reasonable result is intended". See section 2-4-201, C.R.S., regarding intentions in enacting statutes. Further, a statute should not be construed in a manner that would result in absurd consequences. See *People v. Pipkin*, 762 P.2d 736 (Col. App. 1998). Interpreting the language of the APA as authorizing the Board's incorporation rules is an absurd result that undermines the intent of the APA.

Additionally, the Board's improper use of the APA's incorporation by reference provisions creates unnecessary confusion and ambiguity with respect to the law applicable to regulated parties in the medicaid program. For example, the CCR contains additional rules relating to eligibility and amount, scope, and duration of hospice services. See Rules 8.550.1 – 8.550.9, 10 CCR 2505-10. These rules remain in effect alongside the Board's hospice services benefit coverage standards. However, because the hospice rules published in the CCR and the hospice benefit coverage

standards have overlapping content that is not precisely aligned, it may be unclear to regulated parties which rules or policies apply. Section 24-4-103 (4) (b) (III), C.R.S., requires a regulation to be “clearly and simply stated so that its meaning will be understood by any party required to comply with the regulation.” Further, subsection (4) (b) (IV) states that no rule shall be adopted unless the regulation “does not conflict with other provisions of law...”. Therefore, the Board’s improper use of the APA’s incorporation by reference procedure violates the APA.

Because the Board’s statements declaring law or policy relating to eligibility for, and the amount, scope, and duration of hospice services and speech-language and hearing services have not been adopted as rules in compliance with the APA as required by section 25.5-1-303, C.R.S., we recommend that Rules 8.550.4.C and 8.200.3.D 2. of the Medical Services Board in the Department of Health Care Policy and Financing concerning the hospice services benefit coverage standard and the speech-language and hearing services benefit coverage standards not be extended.

II. Rule 8.010 lacks statutory authority by failing to comply with the APA. (Note: This rule is out of cycle)

In reviewing the Board’s rules discussed in section I of the memorandum, this Office discovered that the Board relies, in part, on Rule 8.010, concerning medical assistance benefit coverage standards, adopted April 13, 2012, to support the content benefit standards incorporation by reference process for promulgating its rules relating to eligibility and amount, scope, and duration of services in the medicaid program. (See **Addendum C**). Although this Office reviewed Rule 8.010 in 2012 and had no objection at that time, upon further review, this Office now concludes that Rule 8.010 violates section 25.5-1-303, C.R.S., and the APA and therefore recommends that the rule be repealed.

As already stated, pursuant to section 25.5-1-303, C.R.S., the Board must adopt *rules* in compliance with the APA relating to program eligibility and the amount, scope, and duration of medicaid services. Therefore, notwithstanding the Board’s terminology, the Board’s hospice services and speech-language and hearing services benefit coverage standards that relate to program eligibility and the amount, scope, and duration of services must be adopted as rules following the APA’s notice, hearing, and review procedures and be published in the CCR. Further, because these benefit coverage standards have not previously been adopted pursuant to the APA’s procedures, the Board cannot *convert them into rules* through the APA’s incorporation by reference provision.

Because Rule 8.010 purports to authorize a process that violates not only section 25.5-1-303, C.R.S., but also the APA, we therefore recommend that Rule 8.010 of the Medical Services Board in the Department of Health Care Policy and Financing concerning medical assistance benefit policy statements, adopted April 13, 2012, be repealed, effective May 15, 2014.

ADDENDUM A

8.550.4.C Hospice Services Benefit Coverage Standard

All eligible providers of hospice services enrolled in the Colorado Medicaid program shall be in compliance with the Colorado Medicaid Hospice Services Benefit Coverage Standard (approved May 30, 2012), **which is hereby incorporated by reference.** The incorporation of the Hospice Services Benefit Coverage Standard excludes later amendments to, or editions of, the referenced material. (**emphasis added**)

The Benefit Coverage Standard is available from Colorado Medicaid's Benefits Collaborative Web site at Colorado.gov/hcpf. Click "Boards & Committees," and click "Benefits Collaborative," and click "Approved Benefit Coverage Standards." Pursuant to § 24-4-103 (12.5), C.R.S., the Department maintains copies of this incorporated text in its entirety, available for public inspection during regular business hours at: Colorado Department of Health Care Policy and Financing, 1570 Grant Street, Denver, CO 80203. Certified copies of incorporated materials are provided at cost upon request.

8.200.3.D Physician Services Benefit Coverage Standards

2. Speech – Language and Hearing Services Benefit Coverage Standard

All eligible providers of speech language and hearing services enrolled in the Colorado Medicaid program shall be in compliance with the Colorado Medicaid Speech – Language and Hearing Services Benefit Coverage Standard (approved June 17, 2012), **which is hereby incorporated by reference.** The incorporation of the Speech – Language and Hearing Services Benefit Coverage Standard excludes later amendments to, or editions of, the referenced material. (**emphasis added**)

The Benefit Coverage Standard is available from Colorado Medicaid's Benefits Collaborative Web site at Colorado.gov/hcpf. Click "Boards & Committees," and click "Benefits Collaborative," and click "Approved Benefit Coverage Standards." Pursuant to § 24-4-103 (12.5), C.R.S., the Department maintains copies of this incorporated text in its entirety, available for public inspection during regular business hours at: Colorado Department of Health Care Policy and Financing, 1570 Grant Street, Denver, CO 80203. Certified copies of incorporated materials are provided at cost upon request.

ADDENDUM B

25.5-1-303. Powers and duties of the board - scope of authority - rules.

(1) The board shall have the authority set forth in subsection (3) of this section over the following programs administered by the state department:

(a) The "Colorado Medical Assistance Act", as specified in articles 4, 5, and 6 of this title;

(2) Nothing in this section shall be construed to affect any specific statutory provision granting rule-making authority to the board in relation to a specific program.

(3) **The board shall adopt rules** in connection with the programs set forth in subsection (1) of this section governing the following:

(a) The implementation of legislative and departmental policies and procedures for such programs; except that no rules shall be promulgated for any policy or procedure which governs the administration of the state department as specified in section 25.5-1-108 (1);

(b) **The establishment of eligibility requirements for persons receiving services** from the state department;

(c) **The establishment of the type of benefits that a recipient of services may obtain if eligibility requirements are met**, subject to the authorization, requirements, and availability of such benefits;

(d) **The requirements, obligations, and rights of clients and recipients;**

(e) The establishment of a procedure to resolve disputes that may arise between clients and the state department or clients and providers;

(f) The requirements, obligations, and rights of providers, including policies and procedures related to provider payments that may affect client benefits;

(g) The establishment of a procedure to resolve disputes that may arise between providers and between the state department and providers.

(7) The rules issued by the state board shall be binding upon the county departments. At any public hearing relating to a proposed rule-making, interested persons shall have the right to present their data, views, or arguments orally. **Proposed rules of the state board shall be subject to the provisions of section 24-4-103, C.R.S.**

ADDENDUM C

8.010 MEDICAL ASSISTANCE BENEFIT COVERAGE STANDARDS

8.010.1 Basis and Purpose

Authority for this rule is section 1902(a)(5) of the Social Security Act, 25.5-4-104 C.R.S., 24-4-103 C.R.S., 25.5-1-303 C.R.S, and 25.5-5-102(2) C.R.S. **These laws: (1) require the Department of Health Care Policy and Financing to administer the Medical Assistance Program using state rules to define and limit covered services, (2) require the Department to keep expenditures within approved appropriations, by establishing limits on services provided so long as the services provided are still sufficient in the amount, duration, and scope to reasonably achieve the purpose of the services, as required by federal law or regulation and (3) allow the Department to incorporate by reference its Benefit Coverage Standards into state rules.**

8.010.2 Definitions

Benefit Coverage Standard means a document that defines and limits the appropriate amount, duration and scope of a covered service.

Benefits Collaborative means the Department's formal benefit coverage standard development process. The Benefits Collaborative is a stakeholder driven process that ensures Benefit Coverage Standards are based on the best available clinical evidence, outline the appropriate amount, duration, and scope of Medicaid services, ensures that any limitations on the amount, duration, and scope of Medicaid services are reasonably tailored to achieve the purpose of the services, as required by federal law or regulation, and the policies and practices of the Benefit Coverage Standards promote the health and functioning of Medicaid clients.

8.010.3 Benefit Coverage Standard Incorporation by Reference

8.010.3.A The Department may incorporate by reference a Benefit Coverage Standard into a state rule that regulates medical assistance services.

8.010.3.B The Department may incorporate by reference the benefit coverage standard development manual, Benefits Collaborative Process Guidelines and Coverage Standards, which outlines the Benefits Collaborative process for determining appropriate amount, duration, and scope for a covered service, and contains a Benefit Coverage Standard review schedule and all incorporated Benefit Coverage Standards.

8.010.3.C All Benefit Coverage Standards that are developed through the Benefits Collaborative will go before the Medical Services Board, individually, for incorporation by reference adhering to the formal rule-making process.

8.010.3.D All Benefit Coverage Standards that are approved as incorporated by reference shall state that they have been approved as such, identify the date upon which the Benefit Coverage Standard was approved as incorporated by reference, and identify the next review date of the Benefit Coverage Standard.

8.010.3.E Should a Benefit Coverage Standard need to be updated prior to the next review date as indicated within the Benefit Coverage Standard and when the rule was incorporated by reference, the Benefit Coverage Standard update will be subject to the formal rule-making process.

8.010.3.F Copies of these incorporated texts may be obtained through the Benefits Collaborative Web site. Please go to: Colorado.gov/hcpf, click “Boards & Committees,” click “Benefits Collaborative,” and click “Approved Policies.”

8.010.3.G The incorporation of the Benefits Collaborative Process Guidelines and Coverage Standards and the Benefit Coverage Standards may not reference prospective amendments or modifications. Later amendments or editions of the referenced material must meet the requirement of the Benefits Collaborative process in order to be incorporated by reference, and will be subject to the formal rule-making process.

8.010.3.H Pursuant to 24-4-103 (12.5), C.R.S., the Department maintains copies of the incorporated texts in their entirety which shall be available for public inspection during regular business hours at: Colorado Department of Health Care Policy and Financing, 1570 Grant Street, Denver, CO 80203.

8.010.3.I Certified copies of incorporated materials shall be provided upon request. Additionally, any material that has been incorporated by reference after June 1, 2012 may be examined in any state publications depository library. Copies of the incorporated materials have been sent to the state publications depository and distribution center, and are available for interlibrary loan. (**emphasis added**)

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MEMORANDUM

TO: Committee on Legal Services

FROM: Duane Gall, Office of Legislative Legal Services

DATE: December 11, 2013

SUBJECT: Rules of the Colorado Racing Commission, Department of Revenue, concerning racing – chapter 5, veterinary practices, animal health and medication, 1 CCR 208-1 (LLS Docket No. 130211; SOS Tracking No. 2013-00151).¹

Summary of Problem Identified and Recommendation

Section 24-4-103 (12.5) (a), C.R.S., authorizes a state agency to incorporate by reference into its rules certain types of codes, standards, guidelines, or rules adopted or published by a nationally recognized organization or association, and imposes requirements for how the incorporation is to be done that help ensure that the public has ready access to the incorporated material. But a portion of Rule 5.441 of the Racing Commission ("Commission"), concerning penalties for medication and drug violations, references certain classification guidelines published by the Association of Racing Commissioners International even though the incorporation by reference provision of the rule does not satisfy the statutory requirements. **We therefore recommend that Rule 5.441 of the rules of Colorado Racing Commission, concerning penalties for**

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., the rules discussed in this memo will expire on May 15, 2014, unless the General Assembly acts by bill to postpone such expiration.

individuals found guilty of medication and drug violations, not be extended.

Analysis

- I. **Rule 5.441 of the rules of the Colorado Racing Commission, concerning penalties for medication and drug violations, conflicts with section 24-4-103 (12.5) (a), C.R.S., because it references guidelines of a professional association without complying with the statutory requirements for incorporating material by reference.**

Section 24-4-103 (12.5) (a), C.R.S., authorizes a state agency to incorporate by reference into its rules, certain types of codes, standards, guidelines, or rules and specifies requirements for incorporating such materials. Several of these requirements are located in section 24-4-103 (12.5) (a), which states:

24-4-103. Rule-making - procedure - definitions - repeal.
(12.5) (a) **A rule may incorporate by reference all or any part of a code, standard, guideline, or rule that has been adopted by an agency of the United States, this state, or another state, or adopted or published by a nationally recognized organization or association, if:**

(II) The reference fully identifies the incorporated code, standard, guideline, or rule by citation **and date, identifies the address of the agency where the code, standard, guideline, or rule is available for public inspection, and states that the rule does not include any later amendments or editions of the code, standard, guideline, or rule; ... (emphasis added)**

See **Addendum A** for the text of Rule 5.441. The last, un-numbered paragraph of Rule 5.441 states:

The Commission adopts as part of Rule 5.441 of the Colorado Racing Commission rules certain Association of Racing Commissioners International Uniform Classification Guidelines for Foreign Substances referred to in this Rule 5.441. Such guidelines are published by the Association of Racing Commissioners International. These guidelines were promulgated by the Association of Racing Commissioners model rules committee.

Notably, the rule contained incorporation-by-reference language which apparently complied with the requirements of section 24-4-103 (12.5) (a) prior to its most recent revision, in which the statutorily required disclaimers of later amendments or editions and other information were

deleted. In its current form, Rule 5.441 fails to meet the other specific requirements of section 24-4-103 (12.5) (a) (II), C.R.S., because it does not identify the referenced guidelines by date, specify the agency address where the regulations are available for public inspection, or state that the rules do not include any later amendments to the regulations.

We therefore recommend that Rule 5.441 of the Colorado Racing Commission, concerning penalties for individuals found guilty of medication and drug violations, not be extended.

ADDENDUM A

Rule 5.441: -- (Modified Effective date May 15, 2013)

- (1) In issuing penalties against individuals found guilty of medication and drug violations, a regulatory distinction shall be made between the detection of therapeutic medications used routinely to treat racehorses and those drugs that have no reason to be found at any concentration in the test sample on race day.
- (2) The stewards or the commission will use the Racing Medication and Testing Consortium's penalty category and schedule as a starting place in the penalty stage of the deliberations for a rule violation for any drug listed in the *Association of Racing Commissioners International Uniform Classification Guidelines for Foreign Substances*.
- (3) If a licensed veterinarian is administering or prescribing a drug not listed in the *RCI Uniform Classification Guide lines for Foreign Substances* or shown in the *RMTC Penalty Guideline Listing*, the identity of the drug shall be forwarded to the official veterinarian to be forwarded to the Racing Medication and Testing Consortium for classification.
- (4) Any drug or metabolite thereof found to be presenting a pre- or post-race sample which is not classified in the most current *RCI Uniform Classification Guidelines for Foreign Substances* shall be assumed to be a RCI Class 1 Drug and the trainer and owner shall be subject to those penalties as set forth in schedule "A" unless satisfactorily demonstrated otherwise by the Racing Medication and Testing Consortium, with a penalty category assigned.
- (5) The penalty categories and their related schedules, if applicable, shall be on the following criteria:
 - (a) Whether the drug is approved by the U.S. Food and Drug Administration for use in the horse;
 - (b) Whether the drug is approved by the U.S. Food and Drug Administration for use in any species;
 - (c) Whether the drug has any legitimate therapeutic application in the equine athlete;
 - (d) Whether the drug was identified as "necessary" by the RMTC Veterinary Advisory Committee;
 - (e) Whether legitimate, recognized therapeutic alternatives exist, and;
 - (f) The current RCI Classification of the drug.

The penalty categories “A”, “B” and “C” and their related schedules for Trainers and Owners are shown in the following tables.

The following are recommended penalties for violations due to the presence of a drug carrying a Category “A” penalty and for violations of ARCI-011-015: Prohibited Practices:

LICENSED TRAINER:		
1st offense	2nd LIFETIME offense in any jurisdiction	3rd LIFETIME offense in any jurisdiction
<ul style="list-style-type: none"> ◦ Minimum one-year suspension absent mitigating circumstances. The presence of aggravating factors could be used to impose a maximum of a three-year suspension. <p style="text-align: center;">AND</p> <ul style="list-style-type: none"> ◦ Minimum fine of \$10,000 or 10% of total purse (greater of the two) absent mitigating circumstances. The presence of aggravating factors could be used to impose a maximum of \$25,000 or 25% of purse (greater of the two). <p style="text-align: center;">AND</p> <ul style="list-style-type: none"> ◦ May be referred to the Commission for any further action deemed necessary by the Commission. 	<ul style="list-style-type: none"> ◦ Minimum three-year suspension absent mitigating circumstances. The presence of aggravating factors could be used to impose a maximum of license revocation with no reapplication for a three-year period. <p style="text-align: center;">AND</p> <ul style="list-style-type: none"> ◦ Minimum fine of \$25,000 or 25% of total purse (greater of the two) absent mitigating circumstances. The presence of aggravating factors could be used to impose a maximum of \$50,000 or 50% of purse (greater of the two). <p style="text-align: center;">AND</p> <ul style="list-style-type: none"> ◦ May be referred to the Commission for any further action deemed necessary by the Commission. 	<ul style="list-style-type: none"> ◦ Minimum five-year suspension absent mitigating circumstances. The presence of aggravating factors could be used to impose a maximum of license revocation with no reapplication for a five-year period. <p style="text-align: center;">AND</p> <ul style="list-style-type: none"> ◦ Minimum fine of \$50,000 or 50% of total purse (greater of the two) absent mitigating circumstances. The presence of aggravating factors could be used to impose a maximum of \$100,000 or 100% of purse (greater of the two). <p style="text-align: center;">AND</p> <ul style="list-style-type: none"> ◦ May be referred to the Commission for any further action deemed necessary by the Commission.
LICENSED OWNER:		
1st offense	2nd LIFETIME offense in owner’s stable in any jurisdiction	3rd LIFETIME offense in owner’s stable in any jurisdiction
<ul style="list-style-type: none"> ◦ Disqualification and loss of purse. <p style="text-align: center;">AND</p> <ul style="list-style-type: none"> ◦ Horse shall be placed on the veterinarian’s list for 90 days and must pass a commission-approved examination before becoming eligible to be entered. 	<ul style="list-style-type: none"> ◦ Disqualification and loss of purse. <p style="text-align: center;">AND</p> <ul style="list-style-type: none"> ◦ Horse shall be placed on the veterinarian’s list for 120 days and must pass a commission-approved examination before becoming eligible to be entered. 	<ul style="list-style-type: none"> ◦ Disqualification, loss of purse and \$50,000 fine. <p style="text-align: center;">AND</p> <ul style="list-style-type: none"> ◦ Horse shall be placed on the veterinarian’s list for 180 days and must pass a commission-approved examination before becoming eligible to be entered. <p style="text-align: center;">AND</p> <ul style="list-style-type: none"> ◦ Referral to the Commission with a recommendation of a suspension for a minimum of 90 days.

The following are recommended penalties for violations due to the presence of a drug carrying Category “B” penalty, for the presence of more than one NSAID in a plasma/serum sample, subject to the provisions set forth in ARCI-011-020 E.(1)(c) and for violations of the established levels for total carbon dioxide:

LICENSED TRAINER:		
1st offense	2nd offense (365-day period) in any jurisdiction	3rd offense (365-day period) in any jurisdiction
<ul style="list-style-type: none"> ◦ Minimum 15-day suspension absent mitigating circumstances. The presence of aggravating factors could be used to impose a maximum of a 60-day suspension. <p style="text-align: center;">AND</p> <ul style="list-style-type: none"> ◦ Minimum fine of \$500 absent mitigating circumstances. The presence of aggravating factors could be used to impose a maximum of \$1,000. 	<ul style="list-style-type: none"> ◦ Minimum 30-day suspension absent mitigating circumstances. The presence of aggravating factors could be used to impose a maximum of a 180-day suspension. <p style="text-align: center;">AND</p> <ul style="list-style-type: none"> ◦ Minimum fine of \$1,000 absent mitigating circumstances. The presence of aggravating factors could be used to impose a maximum of \$2,500. 	<ul style="list-style-type: none"> ◦ Minimum 60-day suspension absent mitigating circumstances. The presence of aggravating factors could be used to impose a maximum of a one-year suspension. <p style="text-align: center;">AND</p> <ul style="list-style-type: none"> ◦ Minimum fine of \$2,500 absent mitigating circumstances. The presence of aggravating factors could be used to impose a maximum of \$5,000 or 5% of purse (greater of the two). <p style="text-align: center;">AND</p> <ul style="list-style-type: none"> ◦ May be referred to the Commission for any further action deemed necessary by the Commission.
LICENSED OWNER:		
1st offense	2nd offense in stable (365-day period) in any jurisdiction	3rd offense in stable (365-day period) in any jurisdiction
<ul style="list-style-type: none"> ◦ Disqualification and loss of purse [in the absence of mitigating circumstances]. <p style="text-align: center;">AND</p> <ul style="list-style-type: none"> ◦ Horse must pass a commission-approved examination before becoming eligible to be entered. 	<ul style="list-style-type: none"> ◦ Disqualification and loss of purse [in the absence of mitigating circumstances]. <p style="text-align: center;">AND</p> <ul style="list-style-type: none"> ◦ Horse must pass a commission-approved examination before becoming eligible to be entered. 	<ul style="list-style-type: none"> ◦ Disqualification and loss of purse, and in the absence of mitigating circumstances a \$5,000 fine. <p style="text-align: center;">AND</p> <ul style="list-style-type: none"> ◦ Horse shall be placed on the veterinarian’s list for 45 days and must pass a commission-approved examination before becoming eligible to be entered.

The following are recommended penalties for violations due to the presence of a drug carrying a Category “C” penalty and overages for permitted NSAIDs and furosemide: (All concentrations are for measurements in serum or plasma.)

LICENSED TRAINER	Phenylbutazone (5.1-9.9 mcg/ml)	Phenylbutazone (≥10.0 mcg/ml)
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	Flunixin (21-99 ng/ml) Ketoprofen (11-49 ng/ml) Furosemide (>100 ng/ml) and no furosemide when identified as administered**	Flunixin (≥100 ng/ml) Ketoprofen (≥50 ng/ml) and CLASS C Violations
1 st Offense (365-day period) in any jurisdiction	Minimum fine of \$250 absent mitigating circumstances	Minimum fine of \$1,000 absent mitigating circumstances
2 nd Offense (365-day period) in any jurisdiction	Minimum fine of \$500 absent mitigating circumstances	Minimum fine of \$1,500 and 15-day suspension absent mitigating circumstances
3 rd Offense (365-day period) in any jurisdiction	Minimum fine of \$1,000 and 15-day suspension absent mitigating circumstances	Minimum fine of \$2,500 and 30-day suspension absent mitigating circumstances
LICENSED OWNER	Phenylbutazone (5.1-9.9 mcg/ml) Flunixin (21-99 ng/ml) Ketoprofen (11-49 ng/ml) Furosemide (>100 ng/ml) and no furosemide when identified as administered**	Phenylbutazone (≥10.0 mcg/ml) Flunixin (≥100 ng/ml) Ketoprofen (≥50 ng/ml) AND CLASS C VIOLATIONS
1 st Offense (365-day period) in any jurisdiction		Loss of purse. Horse must pass commission-approved examination before being eligible to run
2 nd Offense (365-day period) in any jurisdiction		Loss of purse. If same horse, placed on veterinarian's list for 45 days, must pass commission-approved examination before being eligible to run
3 rd Offense (365-day period) in any jurisdiction		Loss of purse. Minimum \$5,000 fine. If same horse, placed on veterinarian's list for 60 days, must pass commission-approved examination before being eligible to run

- (6) The recommended penalty for a violation involving a drug that carries a Category “D” penalty is a written warning to the trainer and owner. Multiple violations may result in fines and/or suspensions.
- (7) Any licensee of the commission, including veterinarians, found to be responsible for the improper or intentional administration of any drug resulting in a positive test may, after proper notice and hearing, be subject to the same penalties set forth for the licensed trainer.
- (8) The licensed owner, veterinarian or any other licensed party involved in a positive laboratory finding shall be notified in writing of the hearing and any resulting action. In addition their presence may be required at any and all hearings relative to the case.
- (9) Any veterinarian found to be involved in the administration of any drug carrying the penalty category of “A” shall be referred to the State Licensing Board of Veterinary Medicine for consideration of further disciplinary action and/or license revocation. This is in addition to any penalties issued by the stewards or the commission.
- (10) Any person who the stewards or the commission believe may have committed acts in violation of criminal statutes may be referred to the appropriate law enforcement agency. Administrative action taken by the stewards or the commission in no way prohibits a prosecution for criminal acts committed, nor does a potential criminal prosecution stall administrative action by the stewards or the commission.

Procedures shall be established to ensure that a licensed trainer is not able to benefit financially during the period for which the individual has been suspended. This includes, but is not limited to, ensuring that horses are not transferred to licensed family members.

The Commission adopts as part of Rule 5.441 of the Colorado Racing Commission rules certain Association of Racing Commissioners International Uniform Classification Guidelines for Foreign Substances referred to in this Rule 5.441. Such guidelines are published by the Association of Racing Commissioners International. These guidelines were promulgated by the Association of Racing Commissioners model rules committee.