

**COLORADO BOARD OF HEALTH
MEETING MINUTES
June 15, 2011**

NOTE: These minutes are a summary of the proceedings and motions of the June 15, 2011 meeting of the Colorado Board of Health. The complete and accurate record is the audio recording of the meeting. Documents referenced in the minutes are available for public inspection at the Board of Health Office, Colorado Department of Public Health and Environment, Bldg. A, 5th Floor, 4300 Cherry Creek Drive South, Denver, CO., or call 303-692-3464 to request copies.

Call to Order/Roll Call

The June 15, 2011 Colorado Board of Health meeting was called to order at approximately 9:05 a.m. at the Colorado Department of Public Health and Environment, Sabin Conference Room, 4300 Cherry Creek Drive South, Denver, Colorado, by Laura Davis, president.

Members Present

Laura Davis, District 2; Kindra Mulch, District 4; Glenn Schlabs, District 5; Joan Sowinski, District 6; Christine Nevin-Woods, D.O., At-Large; Christopher Stanley, M.D., District 7; Sue Warren, At-Large, Christopher Urbina, M.D., M.P.H., Executive Director and Chief Medical Officer, (ex-officio).

Members Absent:

Philip Mehler, M.D., District 1, and Crestina Martinez, District 3, County Commissioner.

Staff Present:

Karen Osthus, Board Administrator; Jamie L. Thornton, Program Assistant, Jennifer L. Weaver, First Assistant Attorney General, legal counsel and, Bernie Buescher, Deputy Attorney General, legal counsel.

Approval of Minutes

BY UNANIMOUS CONSENT, the May 18, 2011 minutes were approved as written.

Public comments regarding matters not on the agenda

Laura Kriho, Director, Cannabis Therapy Institute (CTI) remarked that she is concerned about the confidentiality of the Medical Marijuana Registry due to information sharing between the department and the Department of Revenue (DOR). She encouraged the Board to conduct a formal rulemaking procedure or reconvene the Medical Marijuana Advisory Committee to address the issue of patient privacy.

David Sarello remarked that the Board's focus should be on the health and safety of patients rather than on restricting patient's access to their medication.

Timothy Tipton, Rocky Mountain Caregivers Cooperative, encouraged the department to address the problems of indigency as it pertains to the Medical Marijuana Registry and patient access to medicine. He added that the department should not be providing any information to the federal government and encouraged the Board to bring some constitutional compassion back into the rulemaking process.

Robert Chase, Colorado Coalition for Patients and Caregivers, stated that there is an ongoing revolt against the constitution and that items addressed by the Board three years ago are being addressed again. He encouraged the Board to take steps to reform the department.

Board comments regarding matters not on the agenda

Ms. Sowinski requested that the department present a briefing on the syringe exchange program.

Request for Appointment to: Tobacco Education, Prevention and Cessation Grant Program Review Committee – filling vacancy for representative of a statewide nonprofit organization with a demonstrated expertise in and commitment to tobacco control

Staff Comments: Jennifer Ludwig, Vice Chair, Tobacco Education, Prevention and Cessation Grant Program Review Committee presented a recommendation for the appointment of Ms. Laura Mortimer. She remarked that Ms. Mortimer is the Health and Life Skills Program Coordinator of the Boys and Girls Clubs of Metro Denver and that she will represent the Colorado Alliance of Boys and Girls Clubs. Jason Vahling, Director, Healthy Living Branch, Center for Healthy Living and Chronic Disease Prevention, Prevention Services Division, responded to questions from the Board pertaining to the rationale used when making the recommendation. Mr. Vahling reiterated the Review Committee's dedication to obtain participation from all regions of Colorado.

MOVED by Ms. Mulch, seconded by Ms. Sowinski, to approve the appointment of Ms. Mortimer to the Tobacco Education, Prevention and Cessation Grant Program Review Committee as the representative of a statewide nonprofit organization with a demonstrated expertise in and commitment to tobacco control.

MOTION CARRIED UNANIMOUSLY

Discussion/Request for a Rulemaking Hearing: Proposed amendments to 6 CCR 1011-1, Chapter VII, Assisted Living Residences, pertaining to reduction of renewal license fee

Staff Comments: Howard Roitman, Director, Health Facilities and Emergency Medical Services Division, provided a brief background regarding the proposed regulations.

Mr. Roitman commented that in previous years the department raised licensure fees for assisted living residences (ALR) in order to meet the direct and indirect cost of administering and enforcing the ALR licensing statute. He pointed out that the General Assembly determines the dollar amount and the number of staff associated with administering the program. He added that the department is not permitted to raise more money or hire more staff than what is outlined in the Long Bill. He remarked that due to an increase in ALR fees in 2008, based on standard projection methods, the department currently exceeds its spending authority and is statutorily required to reduce fees.

Laurie Schoder, Policy Analyst, Health Facilities and Emergency Medical Services Division, commented that the effective date of the proposed rules would coincide with ALR licenses renewed on or after January 1, 2012. She added that the stakeholders provided positive feedback and support the proposed rules.

The Board asked questions pertaining to the ability of the department to establish a reserve and the consideration of including a time limitation for the reduction in fees.

BY UNANIMOUS CONSENT, the Board scheduled a public rulemaking hearing on August 17, 2011 to consider proposed amendments to 6 CCR 1011-1, Chapter VII, Assisted Living Residences, pertaining to reduction of renewal license fee.

Discussion/Request for a Rulemaking Hearing: Proposed amendments to 6 CCR 1011-1, Chapters II General Licensure, VII Assisted Living Residences and XXVI Home Care Agencies- pertaining to health facility naming and change fee reduction

Staff Comments: Laurie Schoder, Policy Analyst, Health Facilities and Emergency Medical Services Division presented the proposed amendments to Chapters II, VII, and XXVI. She discussed the current and proposed criteria for naming health facilities and home care agencies. She summarized why the proposed language includes a request to reduce the fees associated with facilities changing their name and/or address. Ms. Schoder asked the Board to schedule a public rulemaking hearing in August to consider the proposed changes.

BY UNANIMOUS CONSENT, the Board scheduled a public rulemaking hearing on August 17, 2011 to consider proposed amendments to 6 CCR 1011-1, Chapter II, General Licensure, and Chapter VII Assisted Living Residences and Chapter XXVI, Home Care Agencies.

PUBLIC RULEMAKING HEARING: Proposed amendments to 5 CCR 1006-2 Medical Use of Marijuana, pertaining to primary care-giver rules

Staff Comments: Ann Hause, Director, Office of Legal and Regulatory Affairs, presented the proposed amendments to Regulation 2 and new proposed rules pertaining to Regulations 9, 10 and 11 concerning: a) the primary care-giver and patient relationship; and b) waivers for the primary care-giver to serve more than five patients or transport medical marijuana for homebound or minor patients.

Ms. Hause provided a historical review of the Medical Marijuana Program and discussed the stakeholder process. She summarized previous and recent bills enacted by the Colorado General Assembly and reviewed results of litigation pertaining to rules associated with medical marijuana.

She stated that when the department reviewed the proposed rules with the Medical Marijuana Advisory Committee (MMAC), significant discussion ensued regarding: a) the definition of *significant responsibility for managing the well-being of a patient*; b) the limits applied to primary care-giver designations and c) the timeline for waiver approvals.

Ms. Hause pointed out that the legislation clearly states that provision of medical marijuana does not satisfy the definition of significant responsibility of managing the well-being of a patient. She stated that comments received during the stakeholder process opposed requiring a primary care-giver be involved in any aspects of care beyond those related to supplying medical marijuana. She added that the MMAC approved language that allowed *education and consultation on medical marijuana use* in relation to the patient's condition to satisfy the significant responsibility clause.

She reminded the Board that the Attorney General's Office (AGO) issued an opinion stating that the definition approved by MMAC was not consistent or compliant with the current statutory language. She reminded the Board that the department sought additional feedback after the AGO issued an opinion on the MMAC language. She stated that most of the comments received by the division encouraged the department to adopt the rules as originally passed by the MMAC, and rewrite the definition requiring primary care-givers to do something other than provide medical marijuana when patients request additional services.

Ms. Hause stated that based on the opinion received from the AGO, the department does not believe that the language approved by the MMAC or the alternate language received during the stakeholder process is legally sufficient. She added that the department's proposed revision of the current definition would require primary care-givers to provide regular assistance in

combination with activities of daily living and rejects any reference to education or consultation on the use of medical marijuana.

Ms. Hause remarked that current rules regarding primary care-giver designation do not limit the frequency an individual may change his/her primary care-giver. She pointed out that the turnover in primary care-giver designations results in the following negative side effects: a) potential loss of investment for primary care-givers who cultivate medical marijuana; b) increased difficulty for law enforcement to implement rules; and c) an increased workload for the program.

Ms. Hause mentioned that some MMAC members were concerned with the length of time it may take the department to act on a waiver request for a primary care-giver to serve more than five patients. She added that MMAC voted 5-2 to deem the waiver request approved if the department does not act on the request within 35 days of receiving the waiver.

Ms. Hause responded to various questions regarding the proposed amendments. Ms. Hause also provided and explained proposed amendments to the proposed rules.

Public Comments

Support Department's Proposal:

The following persons testified in support of the department's proposal: Neal Richardson, Chief Deputy D.A., Denver District Attorney; Ernie Martinez, Colorado Association of Chiefs of Police; Jerry Peters, North Metro Drug Task Force; William F. Nagle, Denver Police Department. Below is a summary of comments supporting the proposal.

- Judicial and legislative mandates require that the blending of commercial operations with primary caregivers be managed;
- Concerned with the ability for law enforcement to distinguish a legitimate primary care-giver versus someone trying to scam the system;
- Comports with the legal guidance from the AGO;
- Remain concerned with the lack of licensure requirements for primary care-giver;
- Emphasized that the definition of *significant responsibility* is the lynchpin pertaining to enforcement efforts regarding people who are dealing drugs.

Oppose Department Proposal:

The following persons testified in opposition to the department's proposal: Laura Kriho, Cannabis Therapy Institute; Josh Kappel, Sensible Colorado; Kathleen Chippi, Patient and Caregiver Rights Litigation Project; Corey Donahue, patient; Shannon Gass, Director, Cannabis Consumer Health and Patient Advocacy Association; Robert Chase, Colorado Coalition for Patients and Caregivers; Timothy Tipton, Rocky Mountain Caregivers Cooperative; Jason Lauve, patient; Truett Soefield, self; Janet Perry, Colorado News Journalist; Robert Nolan, self; Alan Trenany, Higher Ground of Denver; Betty Aldworth, representing Jill Lamoureaux; James McVaney, independent disability rights advocate; William Chengelis, United States Marijuana Party of Colorado; Michael Marcella, care-giver; Scooby, care-giver. Below is a summary of the comments opposing the proposal.

- Department does not have the authority to implement primary care-giver rules;
- Department's only responsibility is to provide a medical marijuana registry;
- Lack confidence in department concerning protecting patient privacy;
- Opposed to limiting the number of patients a primary care-giver can have;
- Patients are not required to list a primary care-giver;

- Medical marijuana centers are not held to the same standards as primary care-givers;
- Proposed rules criminalize patients and medical marijuana;
- Proposed rules only benefit attorneys and the DOR;
- AGO opinion is faulty;
- Proposal lacks compassion for patients;
- Segments of the proposed rules are vague and unenforceable;
- Proposal is designed to harm patients and dismantle the program;
- Board should include language that allows primary care-givers to reach out to other businesses to assist with fulfilling the *significant responsibility* requirement;
- Patients are being chased out of the system and into the black market;
- Many individuals will not use centers because they are concerned with privacy and law enforcement; and
- Proposed rules usurp constitutional rights.

Board Comments:

There were various questions and comments regarding the proposed amendments. Board members discussed: a) the definition of significant responsibility and various avenues primary care-givers have to meet the requirement; b) the intent of the Constitution and statutes; c) the process for approving waivers; and d) the need for clarity in the regulations.

The Board engaged in further discussion about the proposed rules and concerns raised during the public comment period. Ms. Mulch remarked that she had several legal questions and requested guidance on how to proceed with asking those questions.

Call for Motion to Convene in Executive Session

MOVED by Mr. Schlabs, seconded by Ms. Mulch, to convene in executive session to receive legal advice on specific legal questions pursuant to C.R.S. §24-6-402(3)(a)(II), specifically to receive advice from counsel with regard to legal issues pertinent to this rulemaking.

MOTION CARRIED UNANIMOUSLY

(at least 2/3 vote required to go into executive session)

The Board convened in executive session in Conference Room A2B at approximately 12:30 p.m. with legal counsel, the Executive Director, Board Administrator, and Board's program assistant.

Following the executive session, the Board reconvened in the Sabin-Cleere Conference Room in regular session at approximately 1:15 p.m.

Ms. Davis stated, "The Board convened in executive session at approximately 12:30 p.m. – 1:15p.m. during that, time counsel to the Board and Board members engaged in communication seeking legal advice on specific legal questions pertaining to the rulemaking hearing on 5 CCR 1006-2 Medical Use of Marijuana – pertaining to primary care-giver rules under consideration by the Board. The communications consisted of discussions that are protected by the attorney –client privilege under C.R.S. §13-90-107(1)(b) and 24-6-402(3)(a)(II) and are therefore exempt from the Open Meetings Act pursuant to §24-6-402(3)(a)(II). During the executive session the Board did NOT adopt any proposed policy, position, resolution, rule, regulation or formal action in accordance with C.R.S. §24-6-402(3)(a)(II)."

Ms. Weaver stated, "During the executive session an electronic recording was kept of the discussion; however, based on my opinion, the discussion constituted a privileged attorney-client communication and that the recording will not be released to the public."

Deliberations

The rulemaking record was closed. Ms. Davis asked for comments and discussion from the Board.

MOVED by Mr. Schlabs, seconded by Dr. Stanley, to adopt the proposed amendments to 5 CCR 1006-2 Medical Use of Marijuana, pertaining to primary care-giver rules, along with the statement of basis and purpose, specific statutory authority and regulatory analysis, along with the thirteen amendments presented at the hearing.¹

MOTION CARRIED UNANIMOUSLY

PUBLIC RULEMAKING HEARING: Proposed amendments to 5 CCR 1006-2 Medical Use of Marijuana, pertaining to patient rules

Staff Comments: Ann Hause, Director, Office of Legal and Regulatory Affairs, requested the Board adopt proposed amendments to Regulations 1, and 2, as well as, the new proposed rules pertaining to Regulations 12 and 13.

Ms. Hause remarked that the department has undertaken a series of rulemakings to implement the requirements of HB 10-1284 and SB 10-109 regarding the Medical Marijuana Registry. She provided a brief history of previous rules adopted by the Board of Health. She added that the patient rules are meant to fill in the gaps of the other rules pertaining to the medical use of marijuana.

Ms. Hause stated that the proposed language for Regulations 1 and 2 consists of: a) allowing the department to confirm registry information with law enforcement; b) clarifying that patients may identify a primary care-giver or a medical marijuana center on his/her application; and c) limiting the number of times a patient can change his/her primary care-giver.

She remarked that the proposed language pertaining to Regulations 12 and 13 include: a) allowing patients to remove their mailing address and social security number when providing a primary care-giver a copy of their application; b) informing patients when they must provide the department with certain information; and c) addressing fees related to when department staff are subpoenaed to provide information pertaining to the registry. Ms. Hause emphasized that the Medical Marijuana Advisory Committee (MMAC) reviewed and unanimously approved the proposed rules.

Public Comments:

The following persons testified in opposition to the department's proposal: Josh Kappel, Sensible Colorado; Kathleen Chippi, Patient and Caregiver Rights Litigation Project; Corey Donahue, patient; Robert J. Corry Jr., lawyer-representing patients; Jason Lauve, patient; Scooby, caregiver. Below is a summary of the comments opposing the proposal.

- Opposed to the department sharing protected information with law enforcement;
- Opposed to limiting the number of times a patient can change their primary

¹ A copy of the amendments may be obtained by contacting Jamie Thornton, program assistant, at Jamie.thornton@state.co.us

- care-providers;
- Concerned that the proposed rules add undue burdens to individuals experiencing compromised health issues;
- Indigent patients should not have to pay fees when staff are subpoenaed;
- Proposed language is unconstitutional;
- Proposed rules create barriers for individuals to have access to medicine;
- Concerned that the rulemaking notice was not provided properly;
- Concerned with the merits of the rules; and
- Concerned with the Board's inability to appreciate individual patient needs.

Board Discussion

The Board members asked various questions of department staff, including: a) the process for managing applications; b) the rationale and obstacles for limiting primary care-giver designations; c) the department's increased workload related to patient's change requests; d) the criteria for rejecting applications; and e) technical assistance provided for filling out applications.

MOVED by Mr. Schlabs, seconded by Dr. Nevin-woods, to adopt the proposed amendments to 5 CCR 1006-2, Medical Use of Marijuana - pertaining to patients, with the proposed amendments presented ¹, along with the statement of basis and purpose, specific statutory authority and regulatory analysis.

MOTION CARRIED UNANIMOUSLY

Reports of the Executive Director and Chief Medical Officer, Chris Urbina, Executive Director/Chief Medical

Dr. Urbina updated the Board on the reorganization efforts of the department and he stated that all senior executive management positions have been filled. He remarked that the Process and Operating Systems Improvement Team (POSITeam) recently adopted the "LEAN principles" which will be used as the department's programs are reviewed. He added that the focus of LEAN is to create efficiencies and help programs focus on customer service. Dr. Urbina emphasized his commitment to taking a bottom up approach concerning the department's reorganization and he stated that he views the project as a team effort.

Public Health Act Update Kathleen Matthews, Director, Office of Planning and Partnerships

Ms. Matthews updated the Board on the timeline associated with the implementation of the Public Health Act. She discussed communication plans, funding formulas, and future requests for rulemaking. She introduced Shannon Rossiter, JD, MPH, Public Health Planner, and she stated that Ms. Rossiter is responsible for writing the Core Public Health Services rules.

Ms. Matthews responded to several questions from the Board pertaining to funding streams for specific counties.

Attorney General's Report-Updates on litigation involving the State Board of Health

Jennifer Weaver, First Assistant Attorney General, updated the Board on the status of the following cases:

- LaGoy v. CDPHE - fully briefed before the Colorado Court of Appeals. Oral argument scheduled for mid-August
- CCHI v. BOH - being briefed before Denver District Court

Administrative Business Karen Osthus, Board Administrator

Ms. Osthus thanked everyone for their hard work and she advised Board members that the July meeting would include a two-hour work session.

The meeting was adjourned at approximately 3:15p.m