

JOINT COMMITTEE ON ADMINISTRATIVE RULES

ILLINOIS GENERAL ASSEMBLY

CO-CHAIR:
SEN. BILL CUNNINGHAM

CO-CHAIR:
REP. KEITH R. WHEELER



700 STRATTON BUILDING
SPRINGFIELD, ILLINOIS 62706
(217) 785-2254

SEN. JOHN F. CURRAN
SEN. DONALD P. DeWITTE
SEN. KIMBERLY A. LIGHTFORD
SEN. ANTONIO MUÑOZ
SEN. SUE REZIN
REP. TOM DEMMER
REP. MICHAEL HALPIN
REP. FRANCES ANN HURLEY
REP. STEVEN REICK
REP. CURTIS J. TARVER, II

MINUTES

November 16, 2021

MEETING CALLED TO ORDER

The Joint Committee on Administrative Rules met on Tuesday, November 16, 2021, at 11:30 a.m. in Room C-1 of the Stratton Building, Springfield. Co-Chair Cunningham called the meeting to order and announced that the policy of the Committee is to allow only representatives of State agencies to testify orally on any rule under consideration at Committee meetings. Other persons are encouraged to submit their comments to the JCAR office in writing.

ATTENDANCE ROLL CALL

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|-------------------------------|---------------------------------------|
| X Senator Bill Cunningham | X Representative Tom Demmer |
| X Senator John F. Curran | Representative Michael Halpin |
| X Senator Donald DeWitte | X Representative Frances Ann Hurley |
| Senator Kimberly A. Lightford | X Representative Steven Reick |
| X Senator Antonio Muñoz | X Representative Curtis J. Tarver, II |
| Senator Sue Rezin | X Representative Keith Wheeler |

APPROVAL OF THE MINUTES OF THE OCTOBER 19, 2021 MEETING

Co-Chair Wheeler moved, seconded by Rep. Hurley, that the minutes of the October 19, 2021 meeting be approved. The motion passed unanimously (9-0-0).

REVIEW OF AGENCY RULEMAKING

Department of Human Services – WIC Vendor Management Code (77 Ill. Adm. Code 672; 45 Ill. Reg. 9702)

Sen. Muñoz moved, seconded by Rep. Reick, that JCAR, with the concurrence of the Department of Human Services, extend this rulemaking for an additional 45 days. The motion passed unanimously (9-0-0).

Department of Human Services – Supplemental Nutrition Assistance Program (SNAP) (Peremptory) (89 Ill. Adm. Code 121; 45 Ill. Reg. 13125)

Rep. Demmer moved, seconded by Rep. Hurley, that JCAR recommend that DHS take more care to follow the procedure for preemptory rulemaking outlined in Sec. 5-50 of the Illinois Administrative Procedure Act. The IAPA requires preemptory rules to be filed with the Secretary of State within 30 days after the rule change is required. DHS filed this preemptory rule implementing Federal Fiscal Year 2022 SNAP income thresholds and allowances on September 30, 2021, one day before the October 1 effective date established in federal SNAP rules. The motion passed unanimously (9-0-0).

AGENCY RESPONSES

Illinois State Board of Education – Voluntary Registration and Recognition of Nonpublic Schools (23 Ill. Adm. Code 425)

Due to the appropriateness of the agency's response, no further action was taken.

CONSIDERATION OF OTHER RULEMAKINGS AND ISSUES

Department of Human Services – Supplemental Nutrition Assistance Program (SNAP) (89 Ill. Adm. Code 121; 45 Ill. Reg. 6881)

Sen. Curran moved, seconded by Rep. Tarver, that JCAR recommend that DHS be more timely in implementing statute in rule. Public Act 101-110, which this rulemaking implements, was effective on July 19, 2019, required the program to be operational by January 1, 2020 and directed the Department to adopt any rules necessary to implement the program. The motion passed unanimously (9-0-0).

Illinois Housing Development Authority – Homeowner Assistance Fund Programs (Emergency) (47 Ill. Adm. Code 302; 45 Ill. Reg. 13447)

Kathryn Finn, Deputy General Counsel, and Peter Sellke, Assistant Director for Strategic Response, represented IHDA.

Co-Chair Wheeler: In Section 302.105(a), "[t]he Authority may prepare, use, prescribe, supplement and amend forms, including application forms, agreements" and our primary concern is "other documents and procedures as may be necessary to implement any Homeowner Assistance Fund program." Why would those documents and procedures not be delineated inside the rule?

Ms. Finn: We are preparing forms now. The program hasn't launched yet. The U.S. Treasury has not approved our plan, nor any other state's HAF plan, and we wanted to get rules started while we were implementing those forms. Those are now coming along, and we can have them in here. We can specify them, attach them, whatever the best approach is deemed appropriate. As I've explained, and I apologize to Jonathan Eastvold, I've never drafted rules. So he's been very helpful and I appreciate everyone's patience. The purpose of "as may be necessary to implement any HAF program"—the way it's set up in our guidance from Treasury is that we can add to what we're doing. For instance, right now our initial HAF plan does not include utilities or broadband...just mortgage reinstatement, HOA fees, that kind of thing. However, we can supplement the plan with Treasury as we go through it and over the years as we use it. So we don't know today what other forms we'll need—if we start paying utilities, for example, what we will need in terms of applications and attestations and evidence.

Co-Chair Wheeler: My question is not so much the specific forms being used but rather documents and procedures. One of the goals in administrative rulemaking is to enable the public to know the criteria being used—what they will be judged on—and in this case we are creating something that is very ambiguous and nebulous as to what they can expect to see. The next Section is Sec. 302.115, which effectively says that "the Authority shall make publicly accessible by publishing on its website any important information". This catches my attention because we can't make a rule that has the same weight as law and say we're going to change it whenever the agency decides it is necessary by just posting on its website. In the legislature, making law involves passing a bill and getting the governor to sign it. By contrast, you are making law by saying in effect "we're going to do our own thing on our website by just changing the content today—we're going to change it back tomorrow—because there's no procedure that says we can't do that." I'm saying this is policy outside of rule by definition. You've actually put in the rule that you're going to do what you want to as an agency outside of the parameters of the IAPA. So to me this is an emergency rule that is already in effect. An amendment to the emergency rule would be appropriate here in my opinion to wind those things back and then to stay in those lanes. Rulemaking, if you haven't done it before—I haven't done it before myself; I just get to look at them all—has to do with the fact that we are trying to protect the public. And by doing so we have to maintain a clear wall between what is inside of rule and what is outside of rule. You can't enforce things that are outside of rule.

Ms. Finn: Yes. I have been learning that. I have another set of rules I am working on for IHDA. I apologize for the pain but we appreciate the chance to hear your concerns so we can properly address them.

Co-Chair Wheeler: Part of me is probably also talking to every other agency that uses its website to make policy that is outside of rule. Because that is really outside the boundaries of what we want to do inside the IAPA.

Rep. Reick: My statement is more toward general applicability toward all of the administrative agencies and not just yours. Over the last several months, ever since this pandemic started, we have seen an awful lot of instances of policy outside of rule. And the thing that concerns me is the fact that this is becoming a habit rather than occasional deviations from the hard and fast rule. But when we start dealing with things that actually involve policy that needs to be clarified to interpret the statute correctly, we're not getting it. Let me give an example. Let's say there's an instance of a situation where we've got a person who follows a particular guidance and somehow oversteps their bounds and is subject to a clawback. And the clawback is being enforced against this person, and a good lawyer is going to look at that and say "wait a minute; this is a policy, but where in the rules or in the statute is there any kind of instance that says these are the particular things that need to be done in order for my client to have to pay you back?" Those are the things that are moving us down the road toward noncompliance with not only the rule but also the underlying statute. Now I will place a little bit of the blame—a great deal of the blame—on the General Assembly for failing to pass legislation that establishes proper guardrails to the agencies as to what their rulemaking authority is and is not. It is the function of the legislature to provide that kind of clarity to the administrative agencies. COVID's going to be the thing that gets blamed for it, but we are now in a situation where policy outside of rule is becoming a feature instead of a bug. And I would urge the administrative agencies—not just yours but throughout the entire executive branch—to be more and more aware of the fact that you're getting out over your skis here with regard to establishing policies that generally conform to what the intent of the statute was and the rulemaking authority that was granted by statute, if there was any, and then

what happens is that you guys end up sitting there with potentially egg on your face because you've established a policy that a good lawyer is going to look at and say "wait a minute—what gives you the authority to do that?" And then all of a sudden we're all in a mess. So those are the concerns that I have, and I would urge the administrative agencies to take JCAR's offer to look at this stuff before you put your rules out. That's what the staff is here for, to not only see that this stuff conforms but to give you the guidance that you need in order to make sure that those rules do exactly what the statute requires. Then we may not end up in this mess. So those are my comments.

Ms. Finn: They are well taken. And, as a lawyer, hearing you put it that way makes sense in my brain.

Co-Chair Cunningham: This has come up on a couple of occasions with your agency, so, as Representative Reick said, JCAR staff is here to help out all agencies work through these problems on the front end. We have a great deal of sympathy for the fact that maybe you're new to this, sympathy because of what you're doing due to COVID, but this just happened too often. And, frankly, if it wasn't for the importance of this matter given the pandemic we would have likely seen these rules suspended by the Committee. We don't want to do that. We want to get this right, and we think staff at JCAR can help you do that.

Ms. Finn: I believe so too.

Rep. Tarver moved, seconded by Sen. DeWitte, that JCAR object to this emergency rule because it does not meet the emergency rule criteria set forth in 1 Ill. Adm. Code 230.400(a)(2)(A) and (B). This emergency rule fails to include policies regarding program eligibility requirements, eligibility determination, and timelines for application corrections, all of which affect the private rights of persons outside the agency. Sec. 1-70 of the Illinois Administrative Procedure Act [5 ILCS 100] defines a rule as each agency statement of general applicability that implements, applies, interprets, or prescribes law or policy affecting private rights or procedures available to persons or entities outside the agency, and for all rules of agencies to be adopted in accordance with Article 5 of the IAPA. The rule also permits information that is critical to program applicants to be placed on the Authority's website instead of in rule, and the recapture of program funds for failure to meet any program document obligations. Items placed on the Authority's website and obligations within program documents could be changed by the Authority at any time without notice, which raises significant due process concerns for applicants and program participants. In addition, JCAR recommends that IHDA include in the companion proposed rule all policies it plans to enforce with respect to this program. The motion passed unanimously (9-0-0).

Department of Human Services – Child Care (89 Ill. Adm. Code 50; 45 Ill. Reg. 13098)

Sen. Muñoz moved, seconded by Rep. Reick, that JCAR recommend that DHS add references to the Grant Accountability and Transparency Act [30 ILCS 708], the Grant Funds Recovery Act [30 ILCS 705], and the federal Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (2 CFR 200), and specific consequences for failure to comply with the terms of the grant, to the companion proposed rulemaking. These additions will give recipients of these grant funds and the public advance notice of what statutes and rules apply in the event of noncompliance. The motion passed unanimously (9-0-0).

Illinois State Police – Firearm Owners' Identification Card Act (20 Ill. Adm. Code 1230; 45 Ill. Reg. 10938) and Firearm Concealed Carry Act Procedures (20 Ill. Adm. Code 1231; 45 Ill. Reg. 10961)

Department of Public Health – Emergency Medical Services, Trauma Center, Comprehensive Stroke Center and Acute Stroke Ready Hospital Code (Emergency) (77 Ill. Adm. Code 515; 45 Ill. Reg. 12108)

Co-Chair Cunningham announced that these rulemakings were removed from the No Objection List and will be considered at the Committee's December meeting.

CERTIFICATION OF NO OBJECTION

Rep. Wheeler moved, seconded by Rep. Hurley, that the Committee inform the agencies to whose rulemakings the Committee has not voted an Objection or Extension, or did not remove from the No Objection List, that the Committee considered their respective rulemakings at the monthly meeting and, based upon the Agreements for modification of the rulemaking made by the agency, no Objections will be issued. The motion passed unanimously (9-0-0).

ANNOUNCEMENT OF DECEMBER MEETING DATE

Co-Chair Cunningham announced that the next JCAR meeting is scheduled for Tuesday, December 14, 2021, at 11:00 a.m. in Room C600 of the Bilandic Building, Chicago, IL.

ADJOURNMENT

Rep. Tarver moved, seconded by Sen. Muñoz, that the meeting stand adjourned. The motion passed unanimously (9-0-0).

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