

March 11, 2015 Minutes

South Dakota Board of Medical & Osteopathic Examiners – Public Board Meeting

Board Members Present: Kevin Bjordahl, MD; Ms. Deb Bowman; Walter Carlson, MD; Mary Carpenter, MD; David Erickson, MD; Laurie Landeen, MD; Brent Lindbloom, DO; Mr. David Lust

Board Members Absent: Jeffrey Murray, MD

Board Staff Present: Margaret Hansen, PA-C; Mr. Tyler Klatt; Ms. Misty Rallis; Ms. Jane Phalen

Counsel Present: Steven Blair, Board counsel
William Golden, Staff counsel
Roxanne Giedd

Dr. Mary Carpenter, President of the Board, called the public meeting to order at 9:00 am. Roll was called, a quorum was established. Dr. Carpenter welcomed Mr. David Lust as the newly appointed public member to the Board, and congratulated Dr. Walter Carlson, Dr. Brent Lindbloom and Dr. Jeffrey Murray on their re-appointment to the Board.

SOUTH DAKOTA BOARD OF MEDICAL AND OSTEOPATHIC EXAMINERS PUBLIC HEARING ON PROPOSED ADMINISTRATIVE RULES 9:00 am

The purpose of the meeting was to conduct a public hearing on the proposed rules of the Board numbered: 20:78:07; 20:47:08; 20:78:05:09; 20:78:05:10; 20:63:04; 20:82 01; 20:82:02; 20:82:03; 20:83:01; 20:83:02; 20:83:03; 20:64:05; 20:52:02; 20:66:02; and 20:70:03.

Hearing Officer: Steven Blair, South Dakota Office of the Attorney General, Pierre South Dakota

Members of the Board in Attendance: Kevin Bjordahl, MD; Ms. Deb Bowman; Walter Carlson, MD; Mary Carpenter, MD; David Erickson, MD; Laurie Landeen, MD; Brent Lindbloom, DO; Mr. David Lust

Members of the Board Absent: Jeffrey Murray, MD

Others in Attendance: Margaret Hansen, William Golden, Roxanne Giedd, Tyler Klatt, Misty Rallis, Jane Phalen, Mark East, SDSMA; Jonathan Ellis, Argus Leader; Dr. Lars Aanning; Dayna Semchenko, PA;

Public Notices: Notice of this public hearing was published in the Rapid City Journal, Rapid City, South Dakota; Aberdeen News, Aberdeen, South Dakota; Argus Leader, Sioux Falls, South Dakota; and notice was available electronically on the State of South Dakota Administrative Rules website “Rules.SD.Gov” and the South Dakota Board of Medical and Osteopathic Examiners website “sdbmoe.gov”.

Call to Order: The hearing officer, Steven Blair, called the public hearing to order at 9:00 am. Roll was called resulting in a quorum. The first order of business was in regard to proposed rule ARSD 20:47:07 to add section “01” and “02” intended to provide recommendations for best practices for prescribers to follow when prescribing opioids and documenting the treatment of pain with opioids.

Mr. Blair informed the Board that written testimony opposing ARSD 20:47:07:01, and 02 had been received from Dr. Stephen Eckrich, Dr. Steven Giuseffi, Dr. Mike Elliott, Dr. Mary Milroy, and Dr. Michael Puumala. Discussion was held that this proposed rule should clarify the definition of “pain” as “chronic pain”, and should provide recommendations to prescribers regarding expectations for treating chronic pain with opioids. There being no further discussion, a motion by Dr. Carpenter to table ARSD 20:47:07 in order to continue working on this proposed rule was duly seconded and unanimously approved.

The hearing examiner then opened the hearing to accept all written testimony into the record. Mr. Tyler Klatt presented four (4) letters and seventeen (17) electronic messages which were received by the executive secretary of the Board prior to the posting deadline. These letters and messages were received from the following: Dr. Mary Milroy, President, South Dakota State Medical Association (Sioux Falls); Dr. James Madara, American Medical Association (letter provided by Dr. Mary Milroy); Dr. Mike Elliott, Senior Vice President Medical Affairs/CMO, Avera McKennan Hospital and University Health Center (Sioux Falls); Dr. Henry Travers (Sioux Falls); Dr. Michael Puumala (Sioux Falls); Dr. Stephen Eckrich (Rapid City); Dr. Steven Giuseffi (Rapid City); Dr. Thomas Benzoni (Urbandale, Iowa); Carinna Fehlman (Ashton, SD); Diane Marshall (Sioux Falls); Donna Riley (Rapid City); Elizabeth Phillips (Rapid City); Georgia Larson (Sioux Falls); Helen Nichols (Rapid City); Hope Witte (Hot Springs); Kibbi Conti (Rapid City); Kim Hepper (Spearfish); Lisa Stark (Sioux Falls); Michele Sturdevant (Sioux Falls); Rene Brand (Rapid City); Shelly Brandenburger (Brookings).

The hearing officer then called for any additional written testimony. Mr. Klatt presented two (2) electronic messages from April Sorensen (Faulkton) and Debra Brakke (Pierre). These comments were received by the executive secretary after the posting deadline. With the receipt of the electronic messages the written testimony portion of the rules hearing was concluded.

The hearing examiner introduced each proposed rule and opened the hearing for oral and written testimony.

ARSD 20:47:08:01,02,03 – Physicians: establish a code of ethics. There was no supporting or opposing oral testimony. Supporting written testimony was received from Dr. Mary Milroy. A motion by Dr. Erickson to approve ARSD 20:47:08:01, 02, and 03 was duly seconded and unanimously approved.

ARSD 20:78:09,10 - Board member: conflict of interest. There was no supporting or opposing written testimony. Dr. Lars Aanning (Yankton) presented opposing oral testimony. Dr. Aanning strongly recommended that the Board adopt a more transparent way of identifying Board members on its website. He presented an exhibit showing that the Minnesota Board of Medical Practice website provides a picture of each Board member, a biography listing each Board member's education, employment, all committee and board appointments, all business and advocacy memberships, and provides the dates of the Board member's current term. Dr. Aanning recommended that the South Dakota Board of Medical and Osteopathic Examiners provide this same information in a similar format on its website for the public's information. Ms. Giedd informed the Board members that these particular conflict of interest rules are being adopted by a number of different boards to provide the Board members with some guidance in a situation when a conflict of interest does or does not exist. The ultimate goal is to provide notification to parties that appear before the Board of the possibility that there might be a potential conflict. It would then be up to the parties to decide whether a conflict exists, and whether or not the parties wish to object to a Board member's participation. A motion by Dr. Lindbloom to approve ARSD 20:47:09, and 10 was duly seconded and unanimously approved.

ARSD 20:63:04 – Athletic Trainers: establish a code ethics. There was no supporting or opposing written testimony. There was no supporting or opposing oral testimony. A motion by Dr. Landeen to approve ARSD 20:63:04 was duly seconded and unanimously approved.

ARSD 20:82:01,02,03 – Genetic Counselors: definitions, licensure requirements and establish a code of ethics. There was no supporting or opposing written testimony. There was no supporting or opposing oral testimony. A motion by Ms. Bowman to approve ARSD 20:82:01,02, and 03 was duly seconded and unanimously approved.

ARSD 20:83:01,02,03 – Licensed Nutritionists and Dietitians: definitions, licensure requirements, and establish a code of ethics. Supporting written testimony was received from Georgia Larson, Hope Witte, Lisa Stark, Diane Marshall, Rene Brand, Michele Sturdevant, Kim Hepper, Kibbe Conti, Carinna Fehlman, Elizabeth Phillips, Helen Nichols, Donna Riley, Rebecca Dorsett, Stella Watson, Doug Brakke and April Sorenson. Additional written testimony was received from Shelly Brandenburger who asked that the Board consider the inclusion of the Academy of Nutrition and Dietetics (AND) Code of Ethics into the proposed rule. Mr. Klatt explained that due to a name change from the American Dietetic Association to the Academy of Nutrition and Dietetics (AND) there has been some confusion about the citation and reference in the

proposed rule; however, it is the same code of ethics regardless of the name change. Ms. Hansen informed the Board that all parties who submitted comments would receive a response from the Board staff with information and explanations about the results of the rules hearing. A motion by Dr. Landeen to approve ARSD 20:83:01,02, and 03 was duly seconded and unanimously approved.

ARSD 20:64:05 – Occupational Therapists: establish a code of ethics. There was no supporting or opposing written testimony. There was no supporting or opposing oral testimony. A motion by Ms. Bowman to approve ARSD 20:64:05 was duly seconded and unanimously approved.

ARSD 20:52:02 – Physician Assistants: establish a code of ethics. There was no supporting or opposing oral testimony. There was no supporting written testimony. There was opposing written testimony from Dr. Thomas Benzoni and Dr. Henry Travers. The Board members identified several public comments that had merit and needed to be incorporated into the rule. The hearing examiner continued the hearing on ARSD 20:52:02 to allow the staff to make the identified changes to ARSD 20:52:02, and the Board would then consider the amended rule at the end of the rules hearing.

ARSD 20:70:03 – Respiratory Care Practitioners: establish a code of ethics. There was no supporting or opposing oral testimony. There was no supporting or opposing written testimony. A motion by Dr. Erickson to approve ARSD 20:66:02 was duly seconded and unanimously approved.

ARSD 20:66:02 - Physical Therapists: establish a code of ethics. There was no supporting or opposing oral testimony. There was no supporting written testimony. There was opposing written testimony from Dr. Henry Travers and this was presented to the Board. After review, Mr. Golden explained that the physical therapists advisory committee recommended their national organization's version of the code of ethics with the accompanying annotations including their language, guidance, and core values which are referenced in the rule. After discussion regarding Dr. Traver's suggestions, Dr. Landeen moved to approve ARSD 20:66:02 as written, and to reply to Dr. Travers thanking him for his suggestions, and explaining the rationale and reasoning for the Board approving the rule as originally written. The motion was duly seconded and unanimously approved.

The hearing officer then called for return to discussion regarding 20:52:02 which was amended by staff at the instruction of the Board. The following changes were proposed to ARSD 20:52:02: 1) Nondiscrimination section: "Physician assistants ~~must~~ should not discriminate against classes or categories of patients in the delivery of needed health care"; 2) Initiation and Discontinuation of Care section: "If the patient decides to terminate the relationship, they are entitled to ~~access appropriate information contained within a copy of~~ their medical record"; 3) Reproductive Decision Making section: Physician Assistant Dayna Semchenko was present and provided testimony that physician assistants do not have concerns with this section of the proposed rule being referred to as "reproductive decision-making" as this language is directly from the AAPAs Code of Ethics. The Board then reviewed the changes as follows: "When the PA's personal values conflict with providing full disclosure or providing certain services, the PA need not become involved in that aspect of the patient's care. ~~By referring the, but must refer the patient to a qualified provider who is willing to discuss and facilitate all treatment options, the PA fulfills their ethical obligation to ensure the patient's access to all legal options~~". There being no further discussion, Mr. Lust moved to amend the rules as proposed by staff. The motion was duly seconded and unanimously approved. Ms. Bowman moved to approve 20:52:02 as amended, and this motion was duly seconded and unanimously approved.

At 11:00 am, there being no further questions or comments from the Board members, Dr. Carlson moved that the public hearing for the proposed administrative rules 20:47:08; 20:78:05:09; 20:78:05:10; 20:63:04; 20:82 01; 20:82:02; 20:82:03; 20:83:01; 20:83:02; 20:83:03; 20:64:05; 20:52:02; 20:66:02; and 20:70:03 be concluded. The motion was duly seconded and unanimously approved.

Anyone wishing to obtain a copy of the minutes of the Public Hearing, a copy of the above referenced electronic communications or the letters, or a notice of Board meetings may call (605) 367-7781, email to SDBMOE@state.sd.us, or write to the South Dakota Board of Medical and Osteopathic Examiners, 101 N. Main Ave., Suite 301, Sioux Falls, South Dakota, 57104.

Dr. Carpenter called the regular public Board meeting to order at 11:00 am.

The staff presented a petition to vacate the Declaratory Ruling ARSD 44:20:04:0:1 “Universal Precautions” which was adopted September 21, 1994. The Department of Health required all health professionals to comply with the universal precautions of the CDC pursuant to ARSD 44:20:04:01. The ruling was then repealed in December 2004. There was no supporting or opposing written or oral testimony. A motion to approve the petition to vacate Declaratory Ruling: ARSD 44:20:04:0: “Universal Precautions” was ratified by the Board (Bjordahl/unanimous).

The executive director provided an update on Senate Bill 63 announcing that the Interstate Medical Licensure Compact was passed by the South Dakota legislature, and that the bill will be signed by Governor Daugaard on March 30, 2015.

Maria Eining and Amanda McKnelly, Midwest Health Management Services (HPAP), met with the Board. Ms. Eining presented the financial report for information purposes. She then explained that their utilization continues to increase and she is seeing more voluntary and early interventions by professionals without Board mandated participation. The last item presented was that the contract with the Board is automatically renewable for a period of up to seven years unless any of the parties request changes. Midwest Health and the South Dakota Board of Nursing have not requested changes. The Board of Medicine had no changes to the contract and it was automatically renewed. The Board then requested that Ms. Eining need only appear in person at the Board meetings in September and March, and that she may just provide her report for the other Board meetings. They requested that her report provide additional information including a breakdown of the numbers and professions of the parties using HPAP, whether they are using the program for addiction, depression, or both, and how many use the program for behavioral health.

A motion to approve the minutes from the December 4, 2014, meeting was ratified by the Board (Carlson/unanimous).

The executive director presented the executive summary and the financial report which was accepted for information.

A motion to approve the new licenses, permits, certificates, and registrations issued from December 1, 2014, through February 28, 2015, was ratified by the Board (Carlson/unanimous).

The Board directed the staff to prepare and present white papers and reports at the June 11th Board meeting on the following topics: Board Certification requirements in other states, other state requirements for malpractice and malpractice insurance, physician continuing education requirements in other states, felony convictions and effect on licensure, Fishman book, and national standards for Board funds.

A motion to enter executive session at 11:45 am was ratified by the Board (Lindbloom/unanimous).

The public meeting resumed at 1:00 pm.

Advisory Committee Business:

The Board reviewed a slate of nominees for appointments and re-appointments as listed below:

New Committee member nominations:

Daniel Wagner, AT – new member of the Athletic Trainer Advisory Committee to fill the vacancy left by Josh Ellis, AT

Justin Thurman, PA – new member of the Physician Assistant Advisory Committee to fill the vacancy left by Dan Palmer, PA

Committee member nominations for re-appointment:

Mary Beth Zwart, AT – Athletic Trainer Advisory Committee – 2nd term

Robert Brockevelt, PT – Physical Therapy Advisory Committee – 2nd term

A motion to approve the slate of nominations for advisory committee appointments and re-appointments was ratified by the Board (Landeem/unanimous).

Dr. Carlson provided two articles regarding expansion of roles of certified nurse practitioners and advanced practice nurses in Michigan for information purposes.

Confidential Physician Hearings (Closed Session pursuant to SDCL 36-4-31.5 unless privilege is waived by physician). Board members assigned to a case do not deliberate or vote in that case (ARSD 27:78:05:05)

The physicians did not waive privilege so the Board entered a closed session pursuant to SDCL 36-4-31.5 *Evidence in cancellation, revocation, suspension, or limitation proceedings confidential. Testimony of a witness or documentary evidence of any kind on cancellation, revocation, suspension, or limitation proceedings are not subject to discovery or disclosure under chapter 15-6 or any other provision of law, and are not admissible as evidence in any action of any kind in any court or arbitration forum, except as hereinafter provided. No person in attendance at any hearing of the Board of Examiners considering cancellation, revocation, suspension, or limitation of a license, resident license, or certificate issued by it may be required to testify as to what transpired at such meeting. The prohibition relating to discovery of evidence does not apply to deny a physician access to or use of information upon which a decision regarding the physician's staff privileges was based. The prohibition relating to discovery of evidence does not apply to any person or the person's counsel in the defense of an action against the person's access to the materials covered under this section. Source: SL 1985, ch 297, § 21; SL 2009, ch 178, § 13; SL 2013, ch 172, § 14.*

Dr. James H. Oury (applicant for medical license). Dr. Oury appeared before the Board with his attorney Mr. Patrick Ginsbach. A motion by Mr. Lust to amend the proposed recommendations of the administrative hearing judge: Finding of Fact #1: issue the reprimand; Finding of Fact #2: modified to require Dr. Oury to complete a fitness to practice evaluation at an entity approved in advance by the Board within 6 months (September 11, 2015), release the findings of the evaluation to the Board, and appear before the Board if he wishes to request consideration for issuance of a conditioned license which would include Finding of Fact #3 that he could only practice under supervision of a licensed and practicing South Dakota licensed physician, and he must refrain from performing surgical procedures for a period of one year, or until the supervising physician deems that the supervision is no longer necessary, or in the alternative, deny the issuance of the license if the requirements are not fulfilled prior to September 11, 2015. The motion was approved by unanimous vote. The assigned Board member, Dr. Carlson, did not participate in the discussion, deliberation, or vote.

Dr. Christiana M. Lietzke (applicant for medical license). Dr. Lietzke did not appear before the Board. A motion to accept the administrative hearing judge's recommendation failed due to lack of a second. A motion by Mr. Lust to amend the proposed recommendation of the administrative hearing judge: Finding of Fact #8: modified to set the time frame of 6 months for Dr. Lietzke to complete a fitness to practice evaluation at an entity approved in advance by the Board within 6 months (September 11, 2015), release the findings of the evaluation to the Board, and appear before the Board if she wishes to request consideration for issuance of a conditioned license. The motion was approved by unanimous vote. The assigned Board member, Dr. Landeen, did not participate in the discussion, deliberation, or vote.

Public Hearings: Board members assigned to a case do not deliberate or vote in that case (ARSD 27:78:05:05)

David R. Starner (applicant for reinstatement and renewal of paramedic license). Mr. Starner did not appear before the Board. Mr. Starner's attorney, Mr. David Kroon, emailed the objections to the administrative judge's Findings of Fact and Conclusions of Law the day before the Board meeting at 4:30 pm. The objections were printed and provided to the Board members prior to discussion. A motion to accept the Findings of Fact, Conclusions of Law, and Recommendation of the administrative judge to deny the reinstatement and renewal of the paramedic license was approved (Erickson/unanimous). The assigned Board member, Dr. Carlson, did not participate in the discussion, deliberation, or vote.

The Executive Director Report was presented and included the following information: Monthly statistical reports for December 2014, January and February 2015; the Article about the Interstate Medical Licensure Compact that was published in SDSMA's *South Dakota Medicine*; the FSMB Strategic Planning Special Committee review for state board comment, Ms. Hansen will be a faculty presenter for the FSMB Annual Meeting will be in Ft. Worth, Texas, April 23 to 26, 2015, a reminder that the election of Board officers will be held at the June Board meeting and information on contested case process, administrative hearings and Board member case assignments.

A motion to enter executive session pursuant to SDCL 1-25-2(1) and (3) to consult with legal counsel and discuss personnel issues was ratified by the Board (Lindbloom/unanimous). The meeting adjourned at 3:35 pm.