



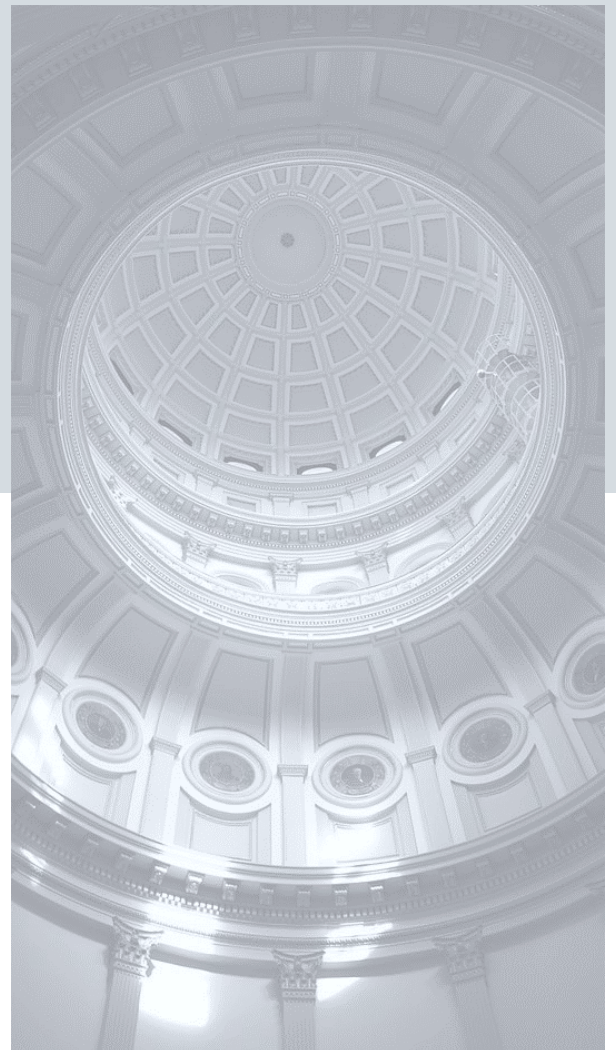
COLORADO

**Department of
Regulatory Agencies**

Colorado Office of Policy, Research &
Regulatory Reform

2023 Sunset Review

Rulemaking Authority of the
Executive Director of the
Department of Early Childhood



October 13, 2023



COLORADO

**Department of
Regulatory Agencies**

Executive Director's Office

October 13, 2023

Members of the Colorado General Assembly
c/o the Office of Legislative Legal Services
State Capitol Building
Denver, Colorado 80203

Dear Members of the General Assembly:

The Colorado General Assembly established the sunset review process in 1976 as a way to analyze and evaluate regulatory programs and determine the least restrictive regulation consistent with the public interest. Pursuant to section 24-34-104(5)(a), Colorado Revised Statutes (C.R.S.), the Colorado Office of Policy, Research and Regulatory Reform (COPRRR) at the Department of Regulatory Agencies (DORA) undertakes a robust review process culminating in the release of multiple reports each year on October 15.

A national leader in regulatory reform, COPRRR takes the vision of their office, DORA and more broadly of our state government seriously. Specifically, COPRRR contributes to the strong economic landscape in Colorado by ensuring that we have thoughtful, efficient, and inclusive regulations that reduce barriers to entry into various professions and that open doors of opportunity for all Coloradans.

As part of this year's review, COPRRR has completed an evaluation of the rulemaking authority of the Executive Director of the Department of Early Childhood (Executive Director). I am pleased to submit this written report, which will be the basis for COPRRR's oral testimony before the 2024 legislative committee of reference.

The report discusses the question of whether there is a need for the authority provided under Section 105(1) of Article 1 of Title 26.5, C.R.S. The report also discusses the effectiveness of Executive Director in carrying out the intent of the statutes and makes recommendations for statutory changes for the review and discussion of the General Assembly.

To learn more about the sunset review process, among COPRRR's other functions, visit coprrr.colorado.gov.

Sincerely,

Patty Salazar
Executive Director





Sunset Review: Rulemaking Authority of the Executive Director of the Department of Early Childhood

Background

What is the Department of Early Childhood?

The General Assembly created the Department of Early Childhood (CDEC) in 2022, following the passage of Proposition EE in 2020, which, among other things, created a funding stream for universal preschool, and the 2021 recommendation of the Early Childhood Leadership Commission to create a new cabinet level department dedicated to early childhood to consolidate the various programs that existed across state government.

How does CDEC promulgate rules?

Rulemaking authority at CDEC is vested in the Executive Director, who must consult with a Rules Advisory Council (RAC) and a County Subcommittee of the RAC. The rulemaking process at CDEC continues to evolve and become more institutionalized, with specified timeframes for rule conception, public participation and RAC feedback.

In promulgating rules, the Executive Director must, to the greatest extent possible:

- Reduce administrative burdens on families and providers in accessing programs and services, implementing programs, and providing services;
- Reduce duplication and conflicts in implementing programs and providing services;
- Increase equity in access to programs and services and in child and family outcomes;
- Increase administrative efficiencies among the programs and services provided by CDEC; and
- Ensure that rules are coordinated across

programs and services so that programs are implemented and services are provided with ease of access, quality of family and provider experience, and ease of implementation by state, local and tribal agencies.

What kinds of rules are promulgated?

The Executive Director's rulemaking authority is specifically established in more than 40 distinct statutory provisions, covering a wide variety of programs, such as local coordinating councils, early childhood councils, Early Intervention Services, quality improvement initiatives, Colorado Child Care Assistance Program, Colorado Universal Preschool Program and facility and provider licensing.

How many rules have been promulgated?

In fiscal year 22-23, the CDEC initiated 6 emergency rulemakings and 16 permanent rulemakings. Seven of the permanent proceedings were completed in the same fiscal year.

What does it cost?

In fiscal year 22-23, CDEC expenditures devoted to rulemaking amounted to \$52,842 and CDEC allotted 1.0 full-time equivalent employee to the task.

Key Recommendations

- Continue the rulemaking authority of the Executive Director for seven years, until 2031.

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Background

Sunset Criteria

Enacted in 1976, Colorado's sunset law was the first of its kind in the United States. A sunset provision repeals all or part of a law after a specific date, unless the legislature affirmatively acts to extend it. During the sunset review process, the Colorado Office of Policy, Research and Regulatory Reform (COPRRR) within the Department of Regulatory Agencies (DORA) conducts a thorough evaluation of such programs based upon specific statutory criteria¹ and solicits diverse input from a broad spectrum of stakeholders including consumers, government agencies, public advocacy groups, and professional associations.

Sunset reviews are guided by statutory criteria and sunset reports are organized so that a reader may consider these criteria while reading. While not all criteria are applicable to all sunset reviews, the various sections of a sunset report generally call attention to the relevant criteria. For example,

- In order to address the first criterion and determine whether the program under review is necessary to protect the public, it is necessary to understand the details of the profession or industry at issue. The Profile section of a sunset report typically describes the profession or industry at issue and addresses the current environment, which may include economic data, to aid in this analysis.
- To address the second sunset criterion--whether conditions that led to the initial creation of the program have changed--the History of Regulation section of a sunset report explores any relevant changes that have occurred over time in the regulatory environment. The remainder of the Legal Framework section addresses the fifth sunset criterion by summarizing the organic statute and rules of the program, as well as relevant federal, state and local laws to aid in the exploration of whether the program's operations are impeded or enhanced by existing statutes or rules.
- The Program Description section of a sunset report addresses several of the sunset criteria, including those inquiring whether the agency operates in the public interest and whether its operations are impeded or enhanced by existing statutes, rules, procedures and practices; whether the agency or the agency's board performs efficiently and effectively and whether the board, if applicable, represents the public interest.
- The Analysis and Recommendations section of a sunset report, while generally applying multiple criteria, is specifically designed in response to the fourteenth criterion, which asks whether administrative or statutory changes are necessary to improve agency operations to enhance the public interest.

¹ Criteria may be found at § 24-34-104, C.R.S.

These are but a few examples of how the various sections of a sunset report provide the information and, where appropriate, analysis required by the sunset criteria. Just as not all criteria are applicable to every sunset review, not all criteria are specifically highlighted as they are applied throughout a sunset review. While not necessarily exhaustive, the table below indicates where these criteria are applied in this sunset report.

**Table 1
Application of Sunset Criteria**

Sunset Criteria	Where Applied
(I) Whether regulation or program administration by the agency is necessary to protect the public health, safety, and welfare.	<ul style="list-style-type: none"> • Profile of Rulemaking in the Department of Early Childhood • Recommendation 1
(II) Whether the conditions that led to the initial creation of the program have changed and whether other conditions have arisen that would warrant more, less, or the same degree of governmental oversight.	<ul style="list-style-type: none"> • History of Regulation
(III) If the program is necessary, whether the existing statutes and regulations establish the least restrictive form of governmental oversight consistent with the public interest, considering other available regulatory mechanisms.	<ul style="list-style-type: none"> • Legal Summary
(IV) If the program is necessary, whether agency rules enhance the public interest and are within the scope of legislative intent.	<ul style="list-style-type: none"> • Legal Summary • Program Description and Administration
(V) Whether the agency operates in the public interest and whether its operation is impeded or enhanced by existing statutes, rules, procedures, and practices and any other circumstances, including budgetary, resource, and personnel matters.	<ul style="list-style-type: none"> • Legal Summary • Program Description and Administration
(VI) Whether an analysis of agency operations indicates that the agency or the agency's board or commission performs its statutory duties efficiently and effectively.	<ul style="list-style-type: none"> • Program Description and Administration
(VII) Whether the composition of the agency's board or commission adequately represents the public interest and whether the agency encourages public participation in its decisions rather than participation only by the people it regulates.	<ul style="list-style-type: none"> • Legal Summary • Program Description and Administration
(VIII) Whether regulatory oversight can be achieved through a director model.	<ul style="list-style-type: none"> • Not applicable
(IX) The economic impact of the program and, if national economic information is not available, whether the agency stimulates or restricts competition.	<ul style="list-style-type: none"> • Profile of Rulemaking in the Department of Early Childhood

Sunset Criteria	Where Applied
(X) If reviewing a regulatory program, whether complaint, investigation, and disciplinary procedures adequately protect the public and whether final dispositions of complaints are in the public interest or self-serving to the profession or regulated entity.	<ul style="list-style-type: none"> • Not applicable
(XI) If reviewing a regulatory program, whether the scope of practice of the regulated occupation contributes to the optimum use of personnel.	<ul style="list-style-type: none"> • Not applicable
(XII) Whether entry requirements encourage equity, diversity, and inclusivity.	<ul style="list-style-type: none"> • Not applicable
(XIII) If reviewing a regulatory program, whether the agency, through its licensing, certification, or registration process, imposes any sanctions or disqualifications on applicants based on past criminal history and, if so, whether the sanctions or disqualifications serve public safety or commercial or consumer protection interests. To assist in considering this factor, the analysis prepared pursuant to subsection (5)(a) of this section must include data on the number of licenses, certifications, or registrations that the agency denied based on the applicant’s criminal history, the number of conditional licenses, certifications, or registrations issued based upon the applicant’s criminal history, and the number of licenses, certifications, or registrations revoked or suspended based on an individual’s criminal conduct. For each set of data, the analysis must include the criminal offenses that led to the sanction or disqualification.	<ul style="list-style-type: none"> • Not applicable
(XIV) Whether administrative and statutory changes are necessary to improve agency operations to enhance the public interest.	<ul style="list-style-type: none"> • Recommendation 1

Sunset Process

Regulatory programs scheduled for sunset review receive a comprehensive analysis. The review includes a thorough dialogue with agency officials, representatives of the regulated profession and other stakeholders. Anyone can submit input on any upcoming sunrise or sunset review on COPRRR’s website at coprrr.colorado.gov.

The rulemaking authority of the Executive Director of the Department of Early Childhood (Executive Director and CDEC, respectively), as enumerated in Section 105(1) of Article 1 of Title 26.5, Colorado Revised Statutes (C.R.S.), shall terminate on September 1, 2024, unless continued by the General Assembly. During the year prior to this date, it is the duty of COPRRR to conduct an analysis and evaluation of the Executive Director pursuant to section 24-34-104, C.R.S.

The purpose of this review is to determine whether the currently prescribed rulemaking authority should be continued and to evaluate the performance of the Executive Director and CDEC. During this review, the Executive Director must demonstrate that the rulemaking authority serves the public interest. COPRRR’s findings and recommendations are submitted via this report to the Office of Legislative Legal Services.

Methodology

As part of this review, COPRRR staff interviewed CDEC staff, early childhood providers, officials with state and national industry associations, officials with county departments of human services, officials with school districts, officials of other states and other stakeholders; attended meetings of the Rules Advisory Council (RAC) and the RAC County Subcommittee (County Subcommittee); and reviewed Colorado statutes and rules.

The major contacts made during this review include, but are not limited to:

- Buell Foundation
- Colorado Association of School Boards
- Colorado Association of School Executives
- Colorado Attorney General's Office
- Colorado Children's Campaign
- Colorado Department of Early Childhood
- Colorado Head Start Association
- Colorado Human Services Directors Association
- Colorado Rural Schools Alliance
- County Subcommittee members
- David and Laura Merage Foundation
- Denver Preschool Program
- Early Childhood Education Association of Colorado
- Early Childhood Leadership Commission
- Early Childhood Council Leadership Alliance
- Executives Partnering to Invest in Children
- Parent Possible
- RAC members

Profile of Rulemaking in the Department of Early Childhood

In a sunset review, the Colorado Office of Policy, Research and Regulatory Reform (COPRRR) is guided by the sunset criteria located in section 24-34-104(6)(b), Colorado Revised Statutes (C.R.S.). The first criterion asks whether regulation or program administration by the agency is necessary to protect the public health, safety, and welfare.

To understand the need for the rulemaking authority of the Executive Director of the Department of Early Childhood (Executive Director and CDEC, respectively), it is first necessary to understand CDEC's rulemaking process.

Created in 2022, CDEC consists of four offices, as of July 2023, within which its various programs are housed:

- Executive Director's Office;
- Office of Administrative Solutions;
- Office of Business, Innovation, Technology, and Security Management; and
- Office of Program Delivery.

Not surprisingly, CDEC's rulemaking process has continued to evolve over the course of this sunset review. For example, when this sunset review began in late fall 2022, CDEC was still in the process of hiring staff to manage the rulemaking process and provide support to the Rules Advisory Council (RAC) and the RAC County Subcommittee (County Subcommittee).

In the beginning, CDEC was tasked with transferring rules from the Colorado Department of Human Services and the Colorado Department of Education to CDEC. As a result, many of CDEC's early rules were promulgated on an emergency basis. Over time, more rules were promulgated on a permanent basis.

From the beginning, CDEC has vetted rules, both emergency and permanent, with the RAC and the County Subcommittee following a fairly standard schedule. Typically, CDEC staff drafts the rules to be promulgated and then presents them to the County Subcommittee at its monthly meeting during the first week of the month. The County Subcommittee may recommend changes to the RAC, or it may recommend that the rule be adopted as drafted.

CDEC staff then presents the rule, along with the County Subcommittee's recommendations, at the RAC's monthly meeting during the second week of the month. The RAC may recommend changes to the Executive Director, or it may recommend that the rule be adopted as drafted.

Both County Subcommittee and RAC meetings follow a similar format: CDEC staff presents the rule(s) at issue, along with any proposed changes; the relevant committee discusses the rule(s) along with any proposed changes to the rule(s); the public may comment on the proposed rules; and then the relevant committee votes.

The County Subcommittee and RAC recommendations are then presented to the Executive Director at a “rulemaking hearing” during the fourth week of the month. Use of the term “rulemaking hearing” in this context is a bit of a misnomer as, at this point, the Executive Director is simply receiving input on the rules before finally promulgating them at the following month’s rulemaking hearing.

While this process has remained relatively constant throughout this sunset review, some things have improved. For example, between late fall 2022 and early winter 2023, many stakeholders complained about receiving rulemaking packets the night before a County Subcommittee or RAC meeting, as the case may be. Committee members routinely stated that they had insufficient time to digest the information or to obtain input from relevant stakeholders. Lacking sufficient foreknowledge of the rule(s) to be discussed and any CDEC-proposed changes, committee discussions were, at times, cursory.

However, by spring 2023, most of these complaints had subsided and County Subcommittee and RAC members were typically receiving rulemaking packets with sufficient time to review them before the meeting at which they were expected to vote on them. As a result, committee discussions became more robust, and more questions were asked.

These improvements can, at least in part, be attributed to the hiring of the Rulemaking and RAC Administrator, at which time the rulemaking process began to take on more structure. For example, in May 2023, CDEC released two flow charts outlining the rulemaking processes for both emergency and permanent rulemakings.

For emergency rules, CDEC adheres to the following process:

1. CDEC staff drafts the emergency rules;
2. The Office of the Attorney General (AGO) reviews and approves the draft emergency rules;
3. CDEC files a notice of permanent rulemaking with the Secretary of State’s Office (DOS) and submits the emergency rules to the Colorado Office of Policy, Research and Regulatory Reform’s (COPRRR’s) Regulatory Notice and Cost-Benefit Analysis Program;
4. Emergency rules are presented to the County Subcommittee;
5. Emergency rules are presented to the RAC;
6. Emergency rulemaking hearing is held;
7. AGO reviews final emergency rules and issues an opinion;
8. Emergency rules are filed with DOS and the Office of Legislative Legal Services (OLLS);

-
9. Permanent rules are presented to the County Subcommittee;
 10. Permanent rules are presented to the RAC;
 11. Permanent rulemaking hearing is held;
 12. AGO reviews final permanent rules and issues an opinion;
 13. Permanent rules are filed with DOS and OLLS; and
 14. Permanent rules take effect.

For permanent rules, CDEC adheres to the following process:

1. CDEC staff conceives of the rules and conducts internal discovery meetings;
2. CDEC staff engages with stakeholders;
3. CDEC staff drafts the permanent rules;
4. AGO reviews and approves the draft permanent rules;
5. CDEC files a notice of permanent rulemaking with DOS and submits the permanent rules to COPRRR's Regulatory Notice and Cost-Benefit Analysis Program;
6. Permanent rules are presented to the County Subcommittee;
7. Permanent rules are presented to the RAC;
8. Permanent rulemaking hearing is held;²
9. AGO reviews final permanent rules and issues an opinion;
10. Permanent rules are filed with DOS and OLLS; and
11. Permanent rules take effect.

In mid-July 2023, CDEC released the "CDEC Rule Tracker" (Rule Tracker) on its website, in an effort to provide real-time and historical information on the rulemaking process. The Rule Tracker provides various types of information in a spreadsheet format, including:

- The CDEC program impacted by the rulemaking;
- The Colorado Code of Regulations citation;
- A summary of the proposed revisions;
- A CDEC tracking number;
- The type of rulemaking at issue, such as whether it is an emergency rule or a permanent rule, and the level of stakeholder engagement;
- The status of the rule vis-à-vis the rulemaking process;
- Identification of stakeholder engagement opportunities;
- A link to the relevant rulemaking documents;
- The dates on which the RAC and the County Subcommittee will discuss the proposed rule, as well as the dates on which the Executive Director will receive public input and actually consider promulgation of the proposed rule;
- The effective date of the proposed rule; and
- The expiration date of any emergency rules.

² Depending on the nature and complexity of the rules at issue, this rulemaking hearing may actually be held in two parts. For more complex rules, the first part may provide an opportunity for the Executive Director to receive information and public comment regarding the rule, while the second part, held a month later, would involve the actual promulgation and adoption of the final rule. For less complex rules, such as those that simply renumber various sections, only the second part may occur.

The ninth sunset criterion questions the economic impact of the program and, if national economic information is not available, whether the agency stimulates or restricts competition. One way this may be accomplished is to review the economic impacts of investing in early childhood education.

Not surprisingly, no research could be located specific to the economic impact of the Executive Director's rulemaking authority, which is the subject of this sunset review.

However, research indicates every dollar spent on early childhood care, education or both yields a return of between \$7.30 and \$8.60 in economic returns.^{3, 4}

³ First Five Years Fund. *Why it Matters: Economic Impact*. Retrieved June 6, 2023, from www.ffyf.org/why-it-matters/economic-impact/

⁴ Washington Center for Equitable Growth. *Factsheet: What the research says about the economics of early care and education*. Retrieved June 6, 2023, from www.equitablegrowth.org/factsheet-what-the-research-says-about-the-economics-of-early-care-and-education/

Legal Framework

History of Regulation

In a sunset review, the Colorado Office of Policy, Research and Regulatory Reform (COPRRR) is guided by the sunset criteria located in section 24-34-104(6)(b), Colorado Revised Statutes (C.R.S.). The first sunset and second sunset criteria question:

Whether regulation or program administration by the agency is necessary to protect the public health, safety, and welfare; and

Whether the conditions that led to the initial creation of the program have changed and whether other conditions have arisen that would warrant more, less or the same degree of governmental oversight.

One way that COPRRR addresses this is by examining why the program was established and how it has evolved over time.

In November 2020, Colorado voters approved Proposition EE, which, among other things, provided a funding stream for what has become known as universal preschool, or UPK.

In 2021, the Early Childhood Leadership Commission (Commission) recognized that,

the lack of authority to fully integrate funding streams, service delivery, and data systems across the full spectrum of early care and learning programs and services has led to an often inequitable and overly complex patchwork of access for children and families, especially for those furthest from opportunity.⁵

As a result, the Commission recommended,

the creation of a new cabinet level state agency dedicated to early childhood that consolidates the various authorities, programs, and funding streams that currently exist across state agencies and focuses on a unified vision of comprehensive early childhood service delivery for all children birth to age five.⁶ {emphasis in original}

⁵ Early Childhood Leadership Commission. *ECLC Recommendation on Governance of an Early Childhood System in Colorado*. Retrieved January 3, 2023, from <https://static1.squarespace.com/static/5679be9605f8e24bd8be467a/t/606cceb28188da7a1525592b/1617743539248/ECLC+Governance+Recommendation+-+Final.pdf>

⁶ Early Childhood Leadership Commission. *ECLC Recommendation on Governance of an Early Childhood System in Colorado*. Retrieved January 3, 2023, from <https://static1.squarespace.com/static/5679be9605f8e24bd8be467a/t/606cceb28188da7a1525592b/1617743539248/ECLC+Governance+Recommendation+-+Final.pdf>

Following this recommendation, the General Assembly created the Department of Early Childhood (CDEC) by way of House Bill 22-1295 (HB 1295). Among the topics debated during the hearings on the bill were the governance structure of the new department and whether rulemaking authority should be vested in a policy autonomous board, similar to the State Board of Human Services, with which most stakeholders were familiar, or in the Executive Director of CDEC (Executive Director).

In the end, the General Assembly opted to vest this authority in the Executive Director and scheduled this authority to sunset in 2024, with this sunset review taking place in 2023. In addition, the bill scheduled CDEC to undergo a second external review by November 2025.

In doing so, however, the General Assembly also created a Rules Advisory Council (RAC) and the RAC County Subcommittee (County Subcommittee) to institutionalize stakeholder input in the rulemaking process. Since the RAC is scheduled to sunset in 2032, following a sunset review to be conducted in 2031, it lies beyond the scope of this sunset report. Nevertheless, it is discussed throughout this sunset report since it is an integral part of the Executive Director's rulemaking process.

Legal Summary

The third, fourth, fifth and seventh sunset criteria question:

Whether the existing statutes and regulations establish the least restrictive form of governmental oversight consistent with the public interest, considering other available regulatory mechanisms;

Whether agency rules enhance the public interest and are within the scope of legislative intent;

Whether the agency operates in the public interest and whether its operation is impeded or enhanced by existing statutes, rules, procedures, and practices and any other circumstances, including budgetary, resource, and personnel matters; and

Whether the composition of the agency's board or commission adequately represents the public interest and whether the agency encourages public participation in its decisions rather than participation only by the people it regulates.

A summary of the current statutes and rules is necessary to understand whether regulation is set at the appropriate level and whether the current laws are impeding or enhancing the agency's ability to operate in the public interest.

CDEC is created in Title 26.5, Colorado Revised Statutes (C.R.S.). The Executive Director is vested with the authority to promulgate all rules for the administration of CDEC, in accordance with the State Administrative Procedure Act.⁷

The Executive Director's rulemaking authority is specifically established in more than 40 distinct statutory provisions throughout Title 26.5, C.R.S. These provisions cover a wide variety of programs and subjects, including but in no way limited to:

- Local Coordinating Organizations,
- Early Childhood Councils,
- Early Intervention Services,
- Quality Improvement Initiatives,
- Colorado Child Care Assistance Program,
- Colorado Universal Preschool Program, and
- Facility and Provider Licensing.

In promulgating such rules, the Executive Director must, to the greatest extent possible:⁸

- Reduce administrative burdens on families and providers in accessing programs and services, implementing programs, and providing services;
- Reduce duplication and conflicts in implementing programs and providing services;
- Increase equity in access to programs and services and in child and family outcomes;
- Increase administrative efficiencies among the programs and services provided by CDEC; and
- Ensure that rules are coordinated across programs and services so that programs are implemented and services are provided with improved ease of access, quality of family and provider experience, and ease of implementation by state, local, and tribal agencies.

Additionally, CDEC is authorized to adopt guidelines and procedures to assist in the implementation and delivery of programs and services, and to differentiate among communities based on community capacity and readiness for implementing such programs and services.⁹

The Executive Director must also convene the 15-member RAC for consultation and advice in promulgating rules, to be appointed by the Executive Director. Individuals appointed to the RAC must be diverse in terms of perspective, experience and programmatic background.¹⁰

⁷ § 26.5-1-105(1)(a), C.R.S.

⁸ § 26.5-1-105(1)(a), C.R.S.

⁹ § 26.5-1-105(1)(b), C.R.S.

¹⁰ §§ 26.5-1-105(2)(a) and (b), C.R.S.

In addition to the RAC, statute also creates the County Subcommittee consisting of representatives of up to 12 county departments of human or social services to, among other things, provide information and advice to the RAC “concerning the development and implementation of early childhood and family support programs that impact” counties.¹¹

When promulgating rules, the Executive Director must solicit feedback from and consider the recommendations of the RAC. If the Executive Director does not follow the RAC’s recommendations, the Executive Director must provide a written explanation for doing so.¹²

Finally, CDEC is required to secure the services of an independent evaluator to evaluate, among many other things:

The effectiveness and efficiency of the governance structure and organization of [CDEC], including whether to create a type 1 policy board within [CDEC] to be appointed by the Governor with the consent of the Senate and transfer rulemaking authority and oversight of [CDEC] from the Executive Director to the policy board;¹³

The independent evaluator’s report is due by November 1, 2025.¹⁴

¹¹ § 26.5-1-105(2)(g), C.R.S.

¹² § 26.5-1-105(2)(j), C.R.S.

¹³ § 26.5-1-112(1)(a)(II), C.R.S.

¹⁴ § 26.5-1-112(1)(c), C.R.S.

Program Description and Administration

In a sunset review, the Colorado Office of Policy, Research and Regulatory Reform (COPRRR) is guided by sunset criteria located in section 24-34-104(6)(b), Colorado Revised Statutes (C.R.S.). The fifth and sixth sunset criteria question:

Whether the agency operates in the public interest and whether its operation is impeded or enhanced by existing statutes, rules, procedures, and practices and any other circumstances, including budgetary, resource, and personnel matters; and

Whether an analysis of agency operations indicates that the agency or the agency's board or commission performs its statutory duties efficiently and effectively.

In part, COPRRR utilizes this section of the report to evaluate the agency according to these criteria.

This sunset report is subject to several important limitations. First, it is the result of a review of the rulemaking authority of the Executive Director of the Department of Early Childhood (Executive Director and CDEC, respectively) only. It is not the result of a review of CDEC itself or any of its individual programs.

Next CDEC began operations July 1, 2022, with the first rules being promulgated in September 2022. As such, only a single fiscal year's worth of data is available to report and analyze in this sunset report.

Regardless, in fiscal year 22-23, CDEC expenditures devoted to rulemaking amounted to \$52,842 and CDEC allotted 1.0 full-time equivalent (FTE) employees, the Rulemaking and Rules Advisory Council (RAC) Administrator, to that task. As an Administrator V, the Rulemaking and RAC Administrator is primarily responsible for, among other things:

- Managing CDEC's rulemaking process, including those systems for accessing and implementing those rules;
- Guiding regulatory changes through the complete rulemaking process, from issue development to final adoption;
- Providing professional support to the RAC, including managing all logistics for the RAC, RAC County Subcommittee (County Subcommittee) and rulemaking meetings, including developing and posting agendas and minutes, and developing recommendations on behalf of the RAC;
- Providing guidance to CDEC leadership to analyze the impacts of proposed rules;
- Serving as CDEC's subject matter expert on rulemaking by providing direction, input and training for CDEC leadership throughout the rulemaking process;
- Engaging with stakeholders, service providers and other state agencies on the rulemaking process and opportunities to participate in the process; and

-
- Ensuring compliance with the state’s Administrative Procedure Act and Colorado Open Meetings Law.

To assist the Executive Director in promulgating rules, the General Assembly created the RAC and County Subcommittee, each of which meets once per month (generally one week apart). All such meetings in fiscal year 22-23 were held virtually, save one that was held under a hybrid model.

The Early Childhood Leadership Commission is tasked with nominating individuals for the Executive Director to consider in making the appointments. The RAC consists of 15 members comprising:¹⁵

- At least one representative from a school-based preschool provider;
- At least one representative from a private early childhood provider;
- At least one representative who provides childcare as a nonparental family member, friend or neighbor;
- At least two representatives of county departments of human or social services from diverse geographic areas of the state who are knowledgeable of and responsible for implementing child protection programs and the Colorado Child Care Assistance Program and have expertise in fiscal matters;
- At least one representative of a foundation, business or early childhood advocacy organization;
- At least one representative who is an expert in the funding for and federal rules regarding early childhood and family support programs and services, including those pertaining to children with disabilities;
- At least one representative of institutions of higher education; and
- At least one early childhood health-care or mental health-care professional.

At least eight RAC members must come from at least one of the following categories:¹⁶

- Parents, families or caregivers of children who are in enrolled in school- and community-based preschool programs and public and private early childhood programs;
- Members of the early childhood workforce; and
- Members of historically underserved and under-resourced communities.

According to CDEC staff, 114 individuals initially applied to serve on the RAC, demonstrating significant interest.

The General Assembly also created the County Subcommittee, which comprises representatives from up to 12 county departments of human or social services. Members are appointed by the Colorado Human Services Directors Association and must

¹⁵ § 26.5-1-105(2), C.R.S.

¹⁶ § 26.5-1-105(2)(c), C.R.S.

be representative of the diversity of counties in the state, including large and small, as well as urban and rural.¹⁷

Both entities typically meet on a monthly basis, and in fiscal year 22-23, the RAC met 12 times and the County Subcommittee met 10 times. While the number of people attending RAC meetings fluctuates greatly, from a low of approximately 40 to a high of approximately 100, just under 20 people typically attend County Subcommittee meetings, including committee members and CDEC staff.

Rulemaking

The fifth and sixth and sunset criteria question:

Whether the agency operates in the public interest and whether its operation is impeded or enhanced by existing statutes, rules, procedures, and practices and any other circumstances, including budgetary, resource, and personnel matters; and

Whether an analysis of agency operations indicates that the agency or the agency's board or commission performs its statutory duties efficiently and effectively.

In part, COPRRR utilizes this section of the report to evaluate the program according to these criteria.

Since the focus of this sunset review is the Executive Director's rulemaking authority, it is reasonable to focus on CDEC's rulemaking process. In May 2023, CDEC released two flow charts outlining the rulemaking processes for both emergency and permanent rulemakings.

For emergency rules, CDEC adheres to the following process:

1. CDEC staff drafts the emergency rules;
2. The Office of the Attorney General (AGO) reviews and approves the draft emergency rules;
3. CDEC files a notice of permanent rulemaking with the Secretary of State's Office (DOS) and submits the emergency rules to the Colorado Office of Policy, Research and Regulatory Reform's (COPRRR's) Regulatory Notice and Cost-Benefit Analysis Program;
4. Emergency rules are presented to the County Subcommittee;
5. Emergency rules are presented to the RAC;
6. Emergency rulemaking hearing is held;
7. AGO reviews final emergency rules and issues an opinion;

¹⁷ § 26.5-1-105(2)(g), C.R.S.

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8. Emergency rules are filed with DOS and the Office of Legislative Legal Services (OLLS);
 9. Permanent rules are presented to the County Subcommittee;
 10. Permanent rules are presented to the RAC;
 11. Permanent rulemaking hearing is held;
 12. AGO reviews final permanent rules and issues an opinion;
 13. Permanent rules are filed with DOS and OLLS; and
 14. Permanent rules take effect.

For permanent rules, CDEC adheres to the following process:

1. CDEC staff conceives of the rules and conducts internal discovery meetings;
2. CDEC staff engages with stakeholders;
3. CDEC staff drafts the permanent rules;
4. Office of the Attorney General (AGO) reviews and approves the draft permanent rules;
5. CDEC files a notice of permanent rulemaking with DOS and submits the permanent rules to COPRRR's Regulatory Notice and Cost-Benefit Analysis Program;
6. Permanent rules are presented to the County Subcommittee;
7. Permanent rules are presented to the RAC;
8. Permanent rulemaking hearing is held;¹⁸
9. AGO reviews final permanent rules and issues an opinion;
10. Permanent rules are filed with DOS and OLLS; and
11. Permanent rules take effect.

In fiscal year 22-23, the only complete fiscal year for which any data are available, CDEC:

- Initiated and completed six emergency rulemakings, and
- Initiated 16 permanent rulemakings and completed 7 of them.¹⁹

These 22 rulemakings addressed the following program areas:

- Colorado Child Care Assistance Program (CCCAP),
- Early Childhood Councils,
- Early Intervention Colorado Program,
- School Readiness Quality Improvement Program, and
- Universal Preschool Program.

¹⁸ Depending on the nature and complexity of the rules at issue, this rulemaking hearing may actually be held in two parts. For more complex rules, the first part may provide an opportunity for the Executive Director to receive information and public comment regarding the rule, while the second part, held a month later, would involve the actual promulgation and adoption of the final rule. For less complex rules, such as those that simply renumber various sections, only the second part may occur.

¹⁹ This means that 9 of the 16 permanent rulemakings initiated in fiscal year 22-23 should be completed in fiscal year 23-24.

Keeping in mind that CDEC began operations in July 2022, and commenced its first rulemaking process in September 2022, the department’s stakeholder process demonstrates evidence of one that continues to evolve. For example, in six instances, CDEC made no formal efforts to engage with stakeholders. However, in 10 other instances, stakeholder engagement consisted of email campaigns soliciting input.

In other instances, CDEC conducted more robust stakeholder processes. For example, with regard to rules packages pertaining to the Early Intervention Colorado Program, CDEC utilized a stakeholder process in which three working group meetings were conducted and two town hall sessions were held. According to CDEC staff, approximately 60 individuals participated in each of the five events.

Additionally, CDEC hosts a monthly town hall-style meeting pertaining to CCCAP. During at least three of those meetings, CCCAP rules were discussed:

- In August 2022, 138 people attended, representing 44 counties;
- In September 2022, 124 people attended, representing 50 counties; and
- In April 2023, 152 people attended, representing 46 counties.

Thirteen distinct rulemaking packages were presented to the RAC in fiscal year 22-23, and the RAC recommended that the Executive Director adopt the rules as written in eight (61.5 percent) of those instances. This means that the RAC recommended changes to the proposed rules five times.

In two instances, the Executive Director adopted the RAC’s recommended changes in their entirety:

- In the Universal Preschool Program rules, clarify the number of hours of eligibility, and funding and how to calculate the number of children a provider may serve in the Universal Preschool Program; and
- In the Early Intervention Colorado Program rules, replace the term “parent” with the term “guardian.”

In three instances, the Executive Director did not adopt the RAC’s entire recommendation but may have adopted a portion of multi-part recommendations.

If the Executive Director does not follow the RAC’s recommendations, statute requires the Executive Director to provide a written explanation for doing so.²⁰

The following summarizes the three rules packages in which the Executive Director did not adopt the RAC’s entire recommendation, and also summarizes the Executive Director’s written justification:

²⁰ § 26.5-1-105(2)(j), C.R.S.

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- In the Early Childhood Council rules, the RAC recommended that the rule be changed to: 1) alter the membership of early childhood councils to include a Head Start Representative rather than a representative from a Head Start Policy Council; 2) require early childhood councils to produce annual financial reports; and 3) require early childhood councils to recruit members from diverse organizations when possible. The Executive Director explained, in writing 1) that altering the membership of early childhood councils as recommended would conflict with statute and so they did not adopt the RAC’s recommendation; and 2) that requiring annual financial reports would be inconsistent with statute, and so they did not adopt the RAC’s recommendation. The Executive Director did adopt the RAC’s recommendation pertaining to the recruiting of members from diverse backgrounds.²¹
 - In the Universal Preschool Program rules, the RAC recommended that the rule be changed to require school districts to conduct an annual request for proposal process to identify community partners to serve three-year-olds in community-based settings. The Executive Director explained, in writing, that such a requirement is outside their statutory authority and would, thus, violate statute, and so they did not adopt the RAC’s recommendation.²²
 - In the Universal Preschool Program rules, the RAC recommended that the rule be changed to: 1) rename a section of the rules from “Eligibility” to “Access”; 2) regarding eligibility, replacing the term “foster care” with the phrase “children in imminent risk of out of home placement”; and 3) add to the list of qualifying factors, those experiencing homelessness. The Executive Director explained, in writing 1) that the section of rule should be retitled “Program Purpose” rather than “Access,” and so partially adopted the RAC’s recommendation; and 2) that determining whether a child is at imminent risk of out of home placement would unnecessarily burden local community organizations, but they did agree to include “non-certified kinship care” along with foster care, and so partially adopted the RAC’s recommendation. The Executive Director did adopt the RAC’s recommendation pertaining to those experiencing homelessness.²³

Giving partial credit for those individual RAC recommendations that were partially adopted, in the end, the Executive Director implemented approximately 63.6 percent of the RAC’s recommended changes.

²¹ See Letter from L. Roy to RAC, May 15, 2023. Retrieved August 28, 2023, from <https://drive.google.com/file/d/1pnW4fQPg-UVdUdA5aT9CiNEQHrMbe78v/view>

²² See Letter from L. Roy to RAC, December 1, 2022. Retrieved August 28, 2023, from <https://drive.google.com/file/d/1Jt7LBnFh0iAUtCgp1Tuo6nYu2cPAjdk3/view>

²³ See Letter from L. Roy to RAC, October 7, 2022. Retrieved August 28, 2023, from https://drive.google.com/file/d/1W5vySBroqEUzo6ik8h_G2rmRjHVpmzEF/view?pli=1

Stakeholder Engagement

The seventh sunset criterion questions, in part, “whether the agency encourages public participation in its decisions rather than participation only by the people it regulates.”

In part, COPRRR utilizes this section of the report to evaluate the program according to this criterion.

While CDEC’s stakeholder engagement process related to individual rulemakings remains nascent, the department has undertaken numerous initiatives to engage with stakeholders, including:

- Created a centralized rulemaking inbox to solicit and share stakeholder comments;
- Updated the CDEC rulemaking webpage to include all CDEC rulemaking information, including upcoming meetings, public comments and CDEC’s regulatory agenda;
- Created public folders to enable stakeholders to track the development of each proposed rule throughout the process;
- Created the CDEC Rule Tracker to serve as a real-time regulatory agenda, enabling stakeholders to view pertinent information and containing links to additional information; and
- Posts all recordings of the RAC, County Subcommittee and rulemaking hearings on the CDEC website.

According to CDEC staff, as of July 10, 2023, 996 individuals had registered with CDEC to receive notices of rulemakings and the CDEC website receives an average of 750.4 visits each month.

Analysis and Recommendations

The final sunset criterion questions whether administrative and statutory changes are necessary to improve agency operations to enhance the public interest. The recommendations that follow are offered in consideration of this criterion, in general, and any criteria specifically referenced in those recommendations.

Recommendation 1 – Continue the rulemaking authority of the Executive Director of the Department of Early Childhood for seven years, until 2031.

The General Assembly created the Department of Early Childhood (CDEC) by way of House Bill 22-1295 (HB 1295), relevant portions of which took effect on July 1, 2022. Among the topics debated during the hearings on the bill were the governance structure of the new department and whether rulemaking authority should be vested in a policy autonomous board, similar to the State Board of Human Services, with which most stakeholders were familiar, or in the Executive Director of CDEC (Executive Director).

In the end, the General Assembly opted to vest this authority in the Executive Director and scheduled this authority to sunset in 2024, with this sunset review taking place in 2023. In addition, the bill scheduled CDEC to undergo a second external review by November 2025.

In creating CDEC, the General Assembly also created a Rules Advisory Council (RAC), with which the Executive Director is required to consult during rulemaking, and a RAC County Subcommittee (County Subcommittee). The RAC is scheduled to sunset in 2032, and, as such, is not the focus of this sunset review. Rather, the scope of this sunset review is confined to the Executive Director's rulemaking authority.

This sunset review is unique in at least two ways. First, it is rare, though not unheard of, for a sunset review to focus so singularly on a single function. Second, this is a sunset review of a function that was only months old when the review began and continued to evolve throughout the review process.

The first sunset criterion asks whether program administration by the agency is necessary to protect the public health, safety and welfare. Placed in context, the question this sunset review must answer is whether rulemaking by the Executive Director, not just rulemaking in general, is necessary to protect the public.

To answer this question, the Colorado Office of Policy, Research and Regulatory Reform (COPRRR) engaged in an extensive and robust stakeholder process by attending multiple meetings of the RAC and the County Subcommittee and interviewing over 50 individuals representing a diverse array of interests including state government, county government, childcare providers of all types and sizes, school districts and many more. Not surprisingly, the result of this process revealed that, just as when CDEC was created

and rulemaking authority was granted to the Executive Director rather than an autonomous policy-making board, there remains little to no consensus on this matter, though on balance, preserving this authority is important to ensuring the agency can function well and be adaptable to the needs of the agency and stakeholders. Sunsetting this authority could disrupt program development and improvement, and harm universal preschool delivery.

While there are varying views on policy, the rulemaking process, including stakeholder engagement strategies, and regulatory structure, many maintain that the new department needs the agility to adapt quickly to changing situations, necessitating a strong Executive Director and adequate authority to promulgate rules as needed to meet the diverse needs of students and providers.

While the RAC is not the focus of this sunset, the Executive Director's rulemaking authority cannot be examined in a vacuum. According to the legislation, the Executive Director must consider the recommendations of the RAC. If the Executive Director deviates in the final decision from the RAC's advice, they must explain their decision in writing. These checks and balances have been beneficial.

The RAC is a diverse group representing school districts, counties, community-based providers and other stakeholders. On balance, the Executive Director has taken the recommendations of the RAC in most instances. Where exceptions have been made, the Executive Director has explained their decisions. Stakeholders acknowledged this structure and these checks as a way to balance the need to move quickly while taking into account stakeholder feedback.

A common refrain was heard throughout the course of this sunset review and that is that CDEC is building the ship or airplane while simultaneously sailing or flying it. There is a grain of truth to this, as this sunset review occurred during CDEC's infancy, as it was just beginning to create systems and processes. Given the magnitude of the job and the urgency with which CDEC needed to become operational, the aforementioned metaphors are apt, but on balance supports continuing this authority.

Further, this review is tasked specifically to determine whether the Executive Director's rulemaking authority is necessary to protect the public. In granting the Executive Director their authority, the General Assembly issued five directives to the Executive Director in promulgating rules:²⁴

- Reduce administrative burdens on families and providers in accessing programs and services, implementing programs, and providing services;
- Reduce duplication and conflicts in implementing programs and providing services;
- Increase equity in access to programs and services and in child and family outcomes;

²⁴ § 26.5-1-105(1)(a), C.R.S.

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- Increase administrative efficiencies among the programs and services provided by CDEC; and
 - Ensure that rules are coordinated across programs and services so that programs are implemented and services are provided with improved ease of access, quality of family and provider experience, and ease of implementation by state, local, and tribal agencies.

To ascertain the extent to which the Executive Director has complied with these directives, COPRRR staff asked as much of the stakeholders with which the office engaged. While most acknowledged that CDEC and the Executive Director are attempting to comply with these directives and have made progress on many, the results have been, overall, mixed. Once again, there is no consensus.

In the end, this sunset review occurred too soon. The task of evaluating such a vital function of government while it was in the early stages of development was monumental. Stakeholder interviews in November and December 2022 indicated a perception that the rulemaking process lacked transparency and was being rushed. Stakeholder interviews in April and May 2023 indicated a perception that the process was beginning to take shape. The CDEC Rulemaking Tracker, released in July 2023, provided a greater degree of transparency on the topics being considered, how to participate and the general timeframe within which important events would take place.

For all these reasons, it is impossible for this sunset review to conclude one way or the other whether rulemaking by the Executive Director is necessary to protect the public. All of this argues in favor of a short continuation period, one that would allow sufficient time for the Executive Director to finish building the ship or airplane and to see how it performs, but one that is short enough to make any necessary corrections as was originally envisioned by the General Assembly with the original sunset date.

However, CDEC is required to secure the services of an independent evaluator to evaluate, among many other things:

The effectiveness and efficiency of the governance structure and organization of [CDEC], including whether to create a type 1 policy board within [CDEC] to be appointed by the Governor with the consent of the Senate and transfer rulemaking authority and oversight of [CDEC] from the Executive Director to the policy board[.]²⁵

The independent evaluator's report is due November 1, 2025.²⁶ It is reasonable to conclude that legislation will result from that report in the 2026 legislative session, so another sunset review prior to such time would be superfluous and a needless expenditure of resources. Rather a new sunset date of 2031, which is five years following the 2026 legislative session, would provide adequate time for any changes

²⁵ § 26.5-1-112(1)(a)(II), C.R.S.

²⁶ § 26.5-1-112(1)(c), C.R.S.

made in 2026 to take effect and produce enough useable data for a meaningful sunset review.

For all these reasons, the General Assembly should continue the Executive Director's rulemaking authority for seven years, until 2031.