

MINUTES OF THE MEETING  
PUBLIC HEALTH, WELFARE AND SAFETY COMMITTEE  
MONTANA STATE SENATE

FEBRUARY 9, 1983

The meeting of the Public Health, Welfare and Safety Committee was called to order by Chairman Tom Hager on Wednesday, February 9, 1983 in Room 410 of the State Capitol Building.

ROLL CALL: All members were present. Woody Wright, staff attorney was also present.

Many visitors were also in attendance. See attachments.

CONSIDERATION OF HOUSE BILL 96: Representative Dan Yardly of House District 74 in Livingston, the chief sponsor of House Bill 96, gave a brief resume of the bill. This bill is an act to clarify and law relating to junkyards along roads by amending the provisions relating to motor vehicle graveyards, motor vehicle wrecking facilities, garbage dumps, and sanitary landfills to conform to the applicable provisions of Title 75, Chapter 10, MCA and by clarifying the provisions on additional screening.

Larry Mitchell, representing the Department of Health and Environmental Sciences, stood in support of the bill. He stated that Montana presently has two laws which regulate the location screening and licensing of wrecking yards: The Highway Department's Junkyards Along Roads Act, and the Health Department's Motor Vehicle Recycling and Disposal Act. The Health Department's law is more restrictive in that it requires screening and licensing of all motor vehicle wrecking facilities. The Highway law is concerned only with those wrecking facilities and junkyards within 1000 feet of federal primary or interstate highways. The Health Department licenses all wrecking facilities but has no authority over junkyards which are not wrecking facilities. Federal law requires that the states control junkyards, including motor vehicle wrecking facilities, along federal primary or interstate highways or face a possible 10% reduction in federal highway aid. Except for the Health Department's lack of authority over non-wrecking facility junkyards, Title 75, Chapter 15, Part 2, MCA, could be repealed in its entirety without affecting the state's highway funding.

The next best solution is offered by this bill. It takes wrecking facilities and solid waste disposal areas out of the Highway's definition of junk or junkyards and clarifies that those activities are and will remain regulated under the existing authority of the Health Department. With the passage of this bill, it will be clear that Montana has one law which regulates the establishment and operation of wrecking facilities administered

PUBLIC HEALTH  
PAGE TWO  
FEBRUARY 9, 1983

by the Department of Health, and one law which regulates other junkyards, as required by federal law, administered by the Highway Department. Solid Waste disposal sites will continue to be regulated by the Department of Health under Title 75, Chapter 10, Part 2, MCA, 1979.

Bill Romine, representing the Wrecking Yards, stated that the wrecking yards would prefer having to deal with only one agency, rather than two. Right now there are two sets of rules, one for those within 1,000 feet of an interstate or primary and for those elsewhere. It only makes sense to have only one set of rules rather than two.

Beate Golda, representing the Department of Highways, stood in support of the bill. Ms. Golda handed in written testimony to the Committee for their review. See exhibit 1.

With no further proponents, the chairman called on the opponents, hearing none the meeting was opened to a question and answer period from the Committee.

Senator Himsl asked about page 2 the different definitions of junkyards, motor vehicle wrecking facility.

Representative Yardley closed. He stated that the purpose of the bill is to clarify an existing problem.

CONSIDERATION OF SENATE BILL 289: Senator Bill Norman of Senate District 47, the chief sponsor of SB 289, gave a brief resume of the bill. This bill is an act to establish qualifications for persons who represent themselves as dietitians or registered dietitians; to prohibit persons who do not meet the qualifications from representing themselves as such; and to provide a penalty for violation.

Senator Norman stated that this is being administered by the Department of Health.

Mary Mimsel, representing the Department of Health, stood in support of the bill. She offered a letter from Dr. John Drynan for the record. See exhibit 2.

Minkie Medora, representing the Montana Dietetic Association, stood in support of the bill. She stated that strict standards are need for the protection of the people of Montana. She brought several letters to be entered into the record. See exhibits 3 through 7.

PUBLIC HEALTH  
PAGE THREE  
FEBRUARY 9, 1983

Kenneth Edden, Past President of the Lewis and Clark Medical Association and he himself an internist, stood in support of the bill. This bill if passed would make his job a lot easier.

Jerome Loendorf, of the Montana Medical Association and also the hospital health care facilities, offered an amendment on page 2, line 5. He asked that the Committee amended the bill to say dietetics or other related field that the baccalaureate is received in from college.

Frank Davis, representing the Montana Pharmaceutical Association, stood in support of the bill.

With no further proponents, the chairman called on the opponents, hearing none the meeting was opened to a question and answer period from the Committee.

Senator Marbut asked about the education specifics and the tighter standards.

Senator Norman closed. He stated that this a very good bill and urged the Committee to give is a favorable recommendation.

At this point Senator Hager turned the chair over to Senator Marbut while he presented his bill.

CONSIDERATION OF SENATE BILL 293: Senator Tom Hager of Senate District 30, chief sponsor of SB 293, gave a brief resume of the bill. This bill is an act to generally revise and clarify the laws relating to certificates of need for health care facilities; amending Sections 50-5-101, 50-5-301, 50-5-302, 50-5304 through 50-5 304 through 50-5-306 and 50-5-308, MCA, and providing an immediate effective date.

Senator Hager read a letter from George Fenner, Administrator, of the Division of Health Services and Medical Facilities of the Department of Health, which stated that SB 293 is an act to generally revise and clarify the laws relating to Certificate of Need for health care facilities. Revisions of the Certificate of Need law was last made by the 46th Legislature in 1979. We all know there have been considerable changes in health care technology, health facility demands, and health care costs since 1979. Mr. Fenner's letter was handed out to the Committee for their review. See exhibit 8.

Steve Purlmutter, attorney for the Department of Health, stated that he was responsible for helping draft the bill. He then reviewed the bill for the Committee. He urged the Committee to give the bill a "DO PASS" recommendation on the bill.

PAGE FOUR  
PUBLIC HEALTH  
FEBRUARY 9, 1983

John LaFaver, Director of the Department of Social and Rehabilitation Services, stood in support of the bill. He stated that this bill is essential to allow the department of SRS to control Medicaid costs. The Medicaid program will spend \$200 million next biennium. Because of its magnitude, cost control is essential for the state's continued financial viability. The bill will assure that the number of nursing home beds remains consistent with the number allowed and funded during the legislative process.

Ada Weeding, representing the Montana Health Systems Agency, stood in support of the bill. She is the chairman of the Eastern Montana Subarea Advisory Council and a member of the governing board of the Montana Health Systems Agency. She stated that she also represents the consumer interests as a member of the governor's statewide health coordinating council. It is very important that, as a consumer, she have some input as to the health care system in this state and more importantly in her own local area. The Certificate of Need process affords the opportunity for consumers to provide necessary testimony and statements which help direct the decision-making processes regarding the health care system and delivery of services.

Ken Rutledge, representing the Montana Hospital Association, offered two pages of amendments for the Committee to review. He then took each one separately and reviewed it for the benefit of the Committee. See Exhibit 9.

Rose Skoogs, representing the Montana Health Care Association, stood in support of the bill. She offered a written amendment to the Committee for their review. It would inset into the bill on page 21, line 24. that "The department may adopt rules for the imposition of such conditions, but only if the secretary of the United States Department of Health and Human Services has approved an amendment to the state's medicaid plan adopted pursuant to 42 USC 1396a, allowing for the imposition of such conditions." Mrs. Skoogs stated that she would like to have a legal opinion raised from Washington D.S. See exhibit 10.

Judy Olson, representing the Montana Nurses Association, stood in support of the bill.

Jerome Loendorf, Montana Medical Association, stood in support of the bill.

PAGE FIVE  
PUBLIC HEALTH  
FEBRUARY 9, 1983

George Fenner, of the Department of Health, stood in support of the bill. He stated that the Committee now has the results of two months of negotiations and compromises in SB 293, such organizations as the Department of Health, the Montana Hospital Association, the Montana Nurses Association, the Montana Medical Association, the Department of SRS, the Governor's Office and the Montana Health Systems Agency have all cooperated on this project. All too often legislators are expected to balance the needs of conflicting interests. The Department was pleased to have contributed to the development of this compromise legislation and urge for its approval.

Dr. John Drynan, director of the Department of Health, stood in support of the bill.

Steve Browning, Montana Association of Homes for the Aged, stood in support of the Skoog amendment.

Doug Olson, representing the Montana Senior Citizens Advocacy, stood in support of the proposed amendment.

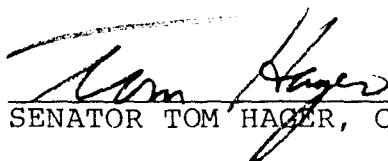
With no further proponents, the vice chairman called on the opponents. Hearing none, the meeting was opened to a question and answer period from the Committee.

All of the proposed amendments were discussed. John LaFavre stated that he did not like amendment #6 of the proposed amendments by Mr. Rutledge.

Senator Hager closed. He stated that this is a compromise bill and applauded the efforts of the all groups involved in working together. He asked the Committee for favorable consideration of the bill.

ANNOUNCEMENTS: The next meeting of the Public Health, Welfare and Safety Committee will be held on Friday, February 11, 1983 in Room 410 of the Capitol to consider SB 349 and SB 31.

ADJOURN: With no further business the meeting was adjourned.

  
SENATOR TOM HAGER, CHAIRMAN

ROLL CALL

PUBLIC HEALTH, WELFARE, SAFETY COMMITTEE

48th LEGISLATIVE SESSION -- 1983

Date 2/9/8

[illegible]

## VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One	
			Support	Oppose
Adewale Ogunwole	HPA			
Gabri Reeves	Mt Health Systems Agency			
Charles Adly	" "	293		
Ada Speeding	" " " "	293	✓	
Mary Minie	MT SDHES	289	✓	
Jean Charles	_____	289	✓	
John T. Lundy	M. N. A.	289 289	✓	
Mary Ellen Holverson	MDA	289	✓	
B. V. Romine	wrecking yards	HB 96	✓	
Lindy Brown	MDA	HB 289	✓	
Lauri Solo	MDA	HB 289	✓	
Ruth Bayl	MDA	"	✓	
Beate Galda	Dept. of Highways	HB 96	✓	
LEE TICKELL	SRS	SB 293	✓	
John Larson	SRS	SB 293	✓	
Charles Gagnier	SDHES	SB 293	✓	
George M. French	SDAES	SB 293	✓	
Frankie Andera	<del>SB 289</del> MDA	SB 289	✓	
Steve Rulmutter	DHES	SB 293	✓	
John J. Olan	M. N. A.	293	✓	
Frank Davis	MT. ST. PHARA. ASSN.	289	✓	
Pat Hennessy	MT. Tenth. Assoc.	SB 289	✓	
Larry Mitchell	PHES	HB 96	✓	
John LaFaver	SRS	SB 293	✓	
Edward Lackman	Robb's Mont. Pub. Hlth Assn	SB 293	✓	

(This sheet to be used by those testifying on a bill.)

NAME: LARRY MITCHELL DATE: 2-9-83

ADDRESS: Cogswell Bldg

PHONE: 2821

REPRESENTING WHOM? DHES

APPEARING ON WHICH PROPOSAL: HB 96

DO YOU: SUPPORT? ☒ AMEND? ☐ OPPOSE? ☐

COMMENTS: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

## DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES



TED SCHWINDEN GOVERNOR

COGSWELL BUILDING

## STATE OF MONTANA

HELENA, MONTANA 59620

FORTY-EIGHTH LEGISLATURE  
HOUSE BILL 96

Montana presently has two laws which regulate the location, screening and licensing of wrecking yards: the Highway Department's Junkyards Along Roads Act (Title 75, Chapter 15, Part 2, MCA) and the Health Department's Motor Vehicle Recycling and Disposal Act (Title 75, Chapter 10, Part 5, MCA). The Health Department's law is more restrictive in that it requires screening and licensing of all motor vehicle wrecking facilities. The Highway law is concerned only with those wrecking facilities and junkyards within 1000 feet of federal primary or interstate highways. The Health Department licenses all wrecking facilities but has no authority over junkyards which are not wrecking facilities. Federal law requires that the states control junkyards (including motor vehicle wrecking facilities) along federal primary or interstate highways or face a possible 10% reduction in federal highway aid. Except for the Health Department's lack of authority over non-wrecking facility junkyards, Title 75, Chapter 15, Part 2, MCA, could be repealed in its entirety without affecting the state's highway funding.

The next best solution is offered by this bill. It takes wrecking facilities and solid waste disposal areas out of the Highway's definition of junk or junkyards and clarifies that those activities are and will remain regulated under the existing authority of the Health Department. With the passage of this bill, it will be clear that Montana has one law which regulates the establishment and operation of wrecking facilities administered by the Department of Health, and one law which regulates other junkyards, as required by federal law, administered by the Highway Department. Solid waste disposal sites will continue to be regulated by the Department of Health under Title 75, Chapter 10, Part 2, MCA, 1979.

Submitted by,

A handwritten signature in dark ink, appearing to read "Larry D. Mitchell".

Larry D. Mitchell  
Solid Waste Management Bureau  
Telephone: 449-2821

WITNESS STATEMENT

NAME Bill Romine BILL No. H.B. 96  
ADDRESS Helena DATE 2-9-83  
WHOM DO YOU REPRESENT wrecking yards  
SUPPORT X OPPOSE \_\_\_\_\_ AMEND \_\_\_\_\_

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments: The wrecking yards would prefer having to deal with only one agency, rather than two. Right now there are two sets of Rules. One for those within 1,000 ft of an interstate or primary, and for those elsewhere. It only makes sense to have only one set of rules.

(This sheet to be used by those testifying on a bill.)

NAME: Deate Galda DATE: 2/9/83

ADDRESS: 2701 Prospect Ave., Helena

PHONE: 449-2584

REPRESENTING WHOM? Dept. of Highways

APPEARING ON WHICH PROPOSAL: H/B 96

DO YOU: SUPPORT? X AMEND? \_\_\_\_\_ OPPOSE? \_\_\_\_\_

COMMENTS: See attached

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

*Exhibit 1*

HOUSE BILL NO. 96

TESTIMONY FOR THE DEPARTMENT OF HIGHWAYS

The Department of Highways supports House Bill 96. Because the Junkyards Along Roads Act, administered by the Department of Highways, and the Motor Vehicle Recycling and Disposal Act, administered by the Department of Health and Environmental Sciences, regulate some of the same facilities, there has been confusion regarding the relationship of the two acts. This bill clarifies the scope of the Junkyards Along Roads Act.

The bill excludes motor vehicle wrecking facilities, motor vehicle graveyards, garbage dumps and sanitary landfills from regulation under the Junkyards Along Roads Act because these facilities are licensed and regulated by the Department of Health and Environmental Sciences. The bill continues to include them in the provisions for grandfathered facilities concerning compensation and additional screening, as is required by federal law. This is in compliance with the federal junkyard provisions and does not jeopardize federal funding for highways.

The change in section 3 of the bill relating to additional screening clarifies the amendment of the act in 1979. One motor vehicle wrecking facility has interpreted the provision

to include any additional screening required even if the facility was never in compliance with screening requirements. The intent of the 1979 act was that the State would pay for any screening in addition to that required by Department of Highways' rules if the federal law required more screening than current state regulations. This amendment clarifies the 1979 amendment of the act.

Beate Galda  
Staff Attorney  
Department of Highways

pz/9N

STATEMENT OF INTENT  
SENATE BILL 289  
48th LEGISLATURE

A statement of intent is required for Senate Bill 289 because it gives the Department of Health and Environmental Sciences authority to:

(1) adopt academic, experience, and training requirements which must be met by anyone representing himself or herself as a dietitian or registered dietitian; and

(2) specify the independent agency or agencies whose endorsement of an individual as a dietitian or registered dietitian prior to October 1, 1983, is sufficient to bring that individual into compliance with the act; and which are qualified to set academic, experience, and training standards for dietitians, give qualifying examinations to registered dietitians, and establish continuing education requirements.

It is the intent of the Legislature that the American Dietetic Association and/or any equivalent professional organization will be designated the "authorized agency" called for by the act, and that the academic requirements, clinical experience, and continuing education requirements of the ADA Commission on Registration Standards will be adopted.

(This sheet to be used by those testifying on a bill.)

NAME: Mary Munn DATE: 2-9-83

ADDRESS: 504 Power, Helena, MT 59624

PHONE: 442-4428

REPRESENTING WHOM? MT SDHES

APPEARING ON WHICH PROPOSAL: SB 289

DO YOU: SUPPORT? ✓ AMEND?        OPPOSE?       

COMMENTS:       

I wish to place into the record a letter from  
Dr John Dugan, Director, SDHES, in support of SB 289.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

*E. J. Pulit 2*

January 31, 1983

Senator Tom Hager, Chairman  
Senate Public Health, Welfare and Safety Committee  
Capitol Building  
Helena, Montana 59620

Dear Senator Hager:

The Montana State Department of Health and Environmental Sciences supports S.B. 289, An Act to establish qualifications for persons who represent themselves as dietitians or registered dietitians.

In summary, this legislation encourages private practice by registered dietitians offering professional nutrition services to the public. As State and local governments experience reductions in health care personnel, and as the public interest in nutrition information and consultation increases, we need a qualified group of nutrition professionals in our communities to take on this work. Whereas the Department has protected the public in the past by employing registered dietitians in public health nutrition positions, the citizen does not have similar assurance when seeking nutritional health advice in the private sector.

This legislation is a title act. The Department will name the American Dietetic Association as the authorized agency defined in Section 1.

We recommend your favorable consideration of S.B. 289.

Sincerely,

John J. Drynan, M.D.  
Director

JJD/var

cc: Senator Bill Norman, M.D.  
Representative Jay Fabrega

(This sheet to be used by those testifying on a bill.)

NAME: MINKIE MEDORA DATE: 2/9/83

ADDRESS: 645 EVANS, MISSOULA, MT 59801

PHONE: 549-3413

REPRESENTING WHOM? MONTANA DIETETIC ASSOC.

APPEARING ON WHICH PROPOSAL: SB 289

DO YOU: SUPPORT? ☒ AMEND? ☐ OPPOSE? ☐

COMMENTS: \_\_\_\_\_

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

*Exhibit 3*

# Montana Dental Association

P. O. Box 513 Butte, Montana 59703 Phone (406) 782-9333

Constituent: AMERICAN DENTAL ASSOCIATION

February 3, 1983

Senator Tom Hager, Chairman  
Senate Public Health, Welfare & Safety Committee  
State Capitol  
Helena, MT 59620

Dear Senator Hager:

I am writing to you in support of Senate Bill 289. A bill for an act entitled: "An act to establish qualifications for persons who represent themselves as dietitians or registered dietitians; to prohibit persons who do not meet the qualifications from representing themselves as such; and to provide a penalty for violation."

I personally support this type of legislation in that it serves the best interests of the public, particularly the less knowledgeable and uninformed who may be misled and taken advantage of by unscrupulous persons purporting to be "dietitians." I would like to point out further that it has always been the policy of the Montana Dental Association, of which I am president, to support legislation which is in the best interest of the health and well being of the public and the people of the state of Montana.

Sincerely,

*Gary L. Mihelish*

Gary L. Mihelish, D.M.D.  
President of Montana Dental Association  
GLM:mc

**CLANCY L. CONE, M.D., P.C.**

Internal Medicine

2825 FORT MISSOULA ROAD  
MISSOULA, MONTANA 59801  
Phone 721-1510

February 3, 1983

Senator Tom Hager, Chairman  
Senate Public Health Committee  
Helena, MT 59601

Dear Sir:

I am writing in support of SB 289 - a bill to establish qualifications of a registered dietitian.

Nutritional services are an integral part of health care. The goal of these services is not only to improve nutritional health of those who are ill, but for the generally healthy population as well.

Dietitians provide a vital service for such areas as weight control, diabetes, high blood pressure, and cancer. They use anthropometric, biochemical, clinical, and dietary measures to plan nutrition care.

At a time when consumer demands have brought increased need for nutrition services, this type of legislation would be most beneficial in protecting the public. Such a bill would assure the consumer of a qualified nutrition professional when they seek out a dietitian.

Sincerely,

A handwritten signature in cursive script that reads "Clancy L. Cone M.D.".

Clancy L. Cone, M.D., P.C.

CLC:jbk

**SUSAN T. BERTRAND, M.D., P.C.  
DEAN E. ROSS, M.D.**

PHYSICAL MEDICINE AND REHABILITATION  
2825 FORT MISSOULA ROAD  
MISSOULA, MONTANA 59801  
(406) 721-5294

Senator Tom Hager, Chairman  
Senate Public Health Committee  
Helena, MT 59601

Dear Mr. Hager,

I am writing in support of SB 289 - a bill to establish qualifications of a registered dietitian.

Nutritional services are an integral part of health care. The goal of these services is not only to improve nutritional health of those who are ill, but for the generally healthy population as well.

Dietitians provide a vital service for such areas as weight control, diabetes, high blood pressure, and cancer. They use anthropometric biochemical, clinical and dietary measures to plan nutrition care.

At a time when consumer demands have brought increased need for nutrition services, this type of legislation would be most beneficial in protection the public. Such a bill would assure the consumer of a qualified nutrition professional when they seek out a dietitian.

Sincerely,

  
Susan T. Bertrand, M.D.

dt

*Exhibit 6*

S. F. SPECKART, M.D., P.C.  
*Hematology - Oncology*  
2825 Ft. Missoula Road  
Missoula, Montana 59801  
Phone (406) 728-2539

February 4, 1983

Senator Tom Hager  
Chairman  
Senate Public Health Committee  
Helena, MT

Dear Senator Hager:

I am writing in support of SB-289, a bill to establish qualifications of a registered dietitian.

Nutritional services are an integral part of health care. The goal of these services is not only to improve nutritional health of those who are ill, but for the generally healthy population as well.

Dietitians provide a vital service for such areas as weight control, diabetes, high blood pressure, and cancer. They use anthropometric biochemical, clinical and dietary measures to plan nutrition care.

At a time when consumer demands have brought increased need for nutrition services, this type of legislation would be most beneficial in protecting the public. Such a bill would assure the consumer of a qualified nutrition professional when they seek out a dietitian.

Sincerely,

  
Stephen F. Speckart, M.D.

SFS: jlp

*Exhibit 7*

**SUSAN T. BERTRAND, M.D., P.C.  
DEAN E. ROSS, M.D.**

PHYSICAL MEDICINE AND REHABILITATION  
2825 FORT MISSOULA ROAD  
MISSOULA, MONTANA 59801  
(406) 721-5294

Senator Tom Hager, Chairman  
Senate Public Health Committee  
Helena, MT

Dear Mr. Hager,


I am writing in support of SB 289 - a bill to establish qualifications of a registered dietitian.

Nutritional services are an integral part of health care. The goal of these services is not only to improve nutritional health of those who are ill, but for the generally healthy population as well.

Dietitians provide a vital service for such areas as weight control, diabetes, high blood pressure, and cancer. They use anthropometric biochemical, clinical and dietary measures to plan nutrition care.

At a time when consumer demands have brought increased need for nutrition services, this type of legislation would be most beneficial in protecting the public. Such a bill would assure the consumer of a qualified nutrition professional when they seek out a dietitian.

Sincerely,

  
Dean E. Ross, M.D.

dt

(This sheet to be used by those testifying on a bill.)

NAME: Jerome T. Lendorf DATE: 2-9-82

ADDRESS: Helena, Mt.

PHONE: 442-8350

REPRESENTING WHOM? Mt. Medal ASS

APPEARING ON WHICH PROPOSAL: 5289

DO YOU: SUPPORT? ☒ AMEND? ☐ OPPOSE? ☐

COMMENTS: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

## DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES



TED SCHWINDEN, GOVERNOR

COGSWELL BUILDING

## STATE OF MONTANA

HELENA, MONTANA 59620

January 27, 1983

TO: Senator Tom Hager

FROM: George M. Fenner  
Administrator  
Division of Health Services  
and Medical Facilities

SUBJECT: Certificate of Need Legislation

Senate Bill 293 is an act to generally revise and clarify the laws relating to Certificate of Need for health care facilities. Revision of the Certificate of Need law was last made by the 46th Legislature in 1979. We all know there have been considerable changes in health care technology, health facility demands, and health care costs since 1979. For example, the most recent available Consumer Price Index (CPI) data shows that nationally costs of all goods and services have increased about 5 percent in the past year while costs for medical care have risen about 11 percent. There is no question that some of that health care increase has been brought about by advancements in diagnosis and treatment technology. A good part of what Certificate of Need is all about is to see that those sizeable financial investments in technology and new services are made in a fair and logical manner in Montana.

Certificate of Need provides a means of dealing with health care cost containment in Montana. The bill we have before us essentially conforms

with federal requirements but has been written to deal with problems and issues in Montana.

There are eight principal amendments proposed. They are:

1. A change in the thresholds for reviewability. The existing threshold is \$150,000 for any capital expenditure. The proposal is to amend that to \$500,000 for equipment acquisition and \$750,000 for facility construction.

Intent: To change the threshold so that greater emphasis can be placed on high cost projects.

Result: (a) Considerably fewer projects will be subject to review. In the past two years, many of these reviews had been conducted as abbreviated reviews and this change will eliminate their requirement for review. (b) Routine replacement of medical equipment (such as X-ray equipment) will likely fall below the threshold and not be subject to review.

2. The inclusion of review of major medical equipment exceeding the expenditure threshold regardless of the location of the equipment.

Intent: To include in review the acquisition of major medical equipment regardless of location.

Result: Acquisition of major medical equipment by health facilities is already subject to review. This provision will, in addition, include equipment acquisitions by clinics, private practitioners, or other organizations. Major medical equipment has an impact on all health care costs, both in the nature of their initial cost to purchase and operate, but particularly if it results in a duplication of existing services.

There are few major medical equipment purchases which take place outside of hospitals, but we wish to insure that those few are consistent with the public health care needs.

3. A new term and process brought into the law is "batching." The intent of "batching" is to outline the process whereby applicants with competing applications have an opportunity for a comparative review.

Intent: To provide a formal process where applicants with competing applications have a fair opportunity for comparative review.

Result: A formal process of comparative review will be set up by rule. In circumstances where the granting of a Certificate of Need to one applicant would substantially prejudice another, the comparative review that would result from batching gives each applicant a fair and equitable chance for approval.

4. The exclusion from review of non-medical and non-clinical facilities unrelated to the operation of the health care facility.

Intent: To exclude from review non-medical and non-clinical facilities unrelated to the operation of the health care facility.

Result: Capital expenditures by health care facilities for facilities and services unrelated to operation of the health care facility will not go through review. Examples could be physicians' office buildings or parking garages. The exclusions for non-medical facilities and state-owned facilities are contrary to federal requirements. In the event federal sanctions (loss of federal funds) are imposed, the Department would have the authority to adopt rules for Certificate of Need review of such facilities. However, any such rules would expire within two years of adoption unless ratified by the Legislature.

5. Exclude from review those state government health facilities approved through the long-range building program.

Intent: Exclude from review those projects of state government which have been approved by the Legislature through the long-range building program.

Result: Opportunity for consumer and provider input will have been offered through the legislative hearing process. This process should not be duplicated by Certificate of Need review.

6. The addition of authority to consider the availability of Medicaid funding in imposing conditions to a Certificate of Need for new long-term care beds.

Intent: To make clear the Department's authority to place conditions on Certificate of Need for long-term care beds when there may not be sufficient Medicaid funding to cover reimbursement for care provided in those beds.

Result: One possible result would be a Certificate of Need approval with the condition that the new beds would not be certified for Medicaid until such time as they were included in Medicaid appropriations.

7. Some general reduction in the length of time to request and hold appeals hearings plus an opportunity for the requestor of an appeals hearing to bypass the reconsideration hearing and proceed directly with the appeal to the Board of Health.

Intent: The intent of this amendment is to generally streamline the review and appellate process.

Result: This amendment will result in a reduction in the length of time to request and hold appeals hearings. Also, by allowing an affected party to bypass the reconsideration hearing and proceed directly to a hearing before the Board, considerable time in the appeals process could be saved.

8. Mandatory approval of expenditures necessary to eliminate safety hazards or to comply with licensure requirements.

Intent: To assure Certificate of Need approval for projects necessary to eliminate safety hazards or comply with licensure requirements.

Result: If the facility in which such corrections are proposed is found to be needed, the expenditures must be approved and a Certificate of Need must be issued.

There are numerous other amendments which appear throughout SB 293 which essentially are a reorganization of current provisions into a more logical format. Specifics of all these amendments were worked out in a series of meetings held between Department of Health staff, the Montana Hospital Association, the Montana Medical Association, the Montana Health Care Association, the Montana Nurses Association, and the Montana Health Systems Agency.

To answer specific questions you might have, there are present staff of the Department of Health.

SENATE BILL 293 HEARING  
BEFORE THE SENATE PUBLIC HEALTH COMMITTEE  
FEBRUARY 9, 1983  
12:30 P.M. - ROOM 410

COMMITTEE MEMBERS

TOM HAGER, CHAIRMAN  
A. REED MARBUT  
MATT HIMSL  
STAN STEPHENS  
B.F. CHRIS CHRISTIAENS  
JUDY H. JACOBSON  
BILL NORMAN

- INTRODUCTION - STEVEN PERLMUTTER, ATTORNEY, DEPARTMENT OF HEALTH  
AND ENVIRONMENTAL SCIENCES
- TESTIMONY - JOHN LA FAVER OR LEE TICKELL, DEPARTMENT OF SOCIAL  
AND REHABILITATION SERVICES
- ADA WEEDING, CHAIRMAN, EASTERN SUBAREA ADVISORY  
COUNCIL; MEMBER MONTANA HEALTH SYSTEMS AGENCY  
GOVERNING BOARD; MEMBER STATEWIDE HEALTH COOR-  
DINATING COUNCIL
  - KEN RUTLEDGE, VICE PRESIDENT, MONTANA HOSPITAL  
ASSOCIATION
  - ROSE SKOOG, EXECUTIVE DIRECTOR, MONTANA HEALTH CARE  
ASSOCIATION
  - JUDY OLSON OR SHIRLEY THENNIS, MONTANA NURSES'  
ASSOCIATION
  - JERRY L. BENDORF, ATTORNEY, MONTANA MEDICAL ASSOCIATION
  - GEORGE FENNER, ADMINISTRATOR, DIVISION OF HEALTH  
SERVICES AND MEDICAL FACILITIES, DEPARTMENT OF  
HEALTH AND ENVIRONMENTAL SCIENCES

(This sheet to be used by those testifying on a bill.)

NAME: Steve Perlmutter DATE: 2/7/83

ADDRESS: 1021 5th Ave. Holmdel, NJ

PHONE: 409-2630

REPRESENTING WHOM? Dept. Health & Soc. Sec.

APPEARING ON WHICH PROPOSAL: 50230

DO YOU: SUPPORT? ☒ AMEND? ☐ OPPOSE? ☐

COMMENTS: \_\_\_\_\_

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

(This sheet to be used by those testifying on a bill.)

NAME: JOHN LAFAUR DATE: 2/9/83

ADDRESS: 8805 DOUGLAS CR HELONA

PHONE: 458-9618 - 449-5622

REPRESENTING WHOM? SRS

APPEARING ON WHICH PROPOSAL: SB 293

DO YOU: SUPPORT? X AMEND?        OPPOSE?       

COMMENTS: The bill is essential to allow the  
Department of SRS to control Medicaid  
costs. The Medicaid program will spend  
\$200 million next biennium. Because of its  
magnitude, cost control is essential for the  
state's continued financial viability.

The bill will assure that the number  
of nursing home beds remains consistent with  
the number allowed and funded during  
the legislative process.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

(This sheet to be used by those testifying on a bill.)

NAME: Ada Skedding DATE: 2-9-83

ADDRESS: Gordon, mt. 59337

PHONE: 557-2557

REPRESENTING WHOM? MT Health Systems Agency

APPEARING ON WHICH PROPOSAL: 293

DO YOU: SUPPORT? ☒ AMEND? ☐ OPPOSE? ☐

COMMENTS: \_\_\_\_\_

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

I AM ADA WEEDING. MY HUSBAND AND I OPERATE A RANCH OUTSIDE  
OF JORDAN, MONTANA.

I AM CHAIRMAN OF THE EASTERN MONTANA SUBAREA ADVISORY COUNCIL  
AND A MEMBER OF THE GOVERNING BOARD OF THE MONTANA HEALTH SYSTEMS  
AGENCY. I ALSO REPRESENT CONSUMER INTERESTS AS A MEMBER OF THE  
GOVERNOR'S STATEWIDE HEALTH COORDINATING COUNCIL.

I THINK IT IS VERY IMPORTANT THAT, AS A CONSUMER, I HAVE SOME  
INPUT AS TO THE HEALTH CARE SYSTEM IN THIS STATE, AND MORE  
IMPORTANTLY, IN MY OWN LOCAL AREA.

THE CERTIFICATE OF NEED PROCESS AFFORDS THE OPPORTUNITY FOR  
CONSUMERS TO PROVIDE NECESSARY TESTIMONY AND STATEMENTS WHICH  
HELP DIRECT THE DECISION-MAKING PROCESSES REGARDING THE HEALTH  
CARE SYSTEM AND DELIVERY OF SERVICES.

THANK YOU.

*107 Kilut 9*

SENATE BILL NO. 293  
(MHA Proposed Amendments)

MR. CHAIRMAN:

I move to amend Senate Bill No. 293 as follows:

1. On pages 7 and 8, definition of "major medical equipment" amended to read:

"(27) "Major medical equipment" means a single unit of medical equipment or a single system of components with related functions which is used to provide medical or other health services."

2. On page 12, subsection (1)(d) amended to read:

"(d) the acquisition by any person of major medical equipment, provided such acquisition would have required a certificate of need pursuant to subsection (1)(a) or (1)(c) of this section if it had been made by or on behalf of a health care facility."

3. On page 16, subsection (1)(e) by deleting the following:

"expansion of existing services,".

4. On page 17, subsection (4), lines 8 through "additional information" on line 13 by substituting in lieu thereof:

"(4) Within 15 calendar days after receipt of the application, the department shall determine whether it is complete. If the application is found incomplete, the department shall request the necessary additional information within 5 ~~working~~ days. Upon receipt of the additional information from the applicant, the department shall have 15 days to determine if the application is complete. If the department fails to make a determination as to the completeness of the application within the prescribed 15 day period, the application shall be deemed to be complete."

5. On page 18, subsection (6), by adding the following:

"(6) The department shall, after considering all comments received during the review period, issue a certificate of need, with or without conditions, or reject deny the application. The department shall notify the applicant of its decision within 5 working days after termination of the review period. If the department fails to make a decision and notify the applicant of its decision by the end of the review period, the application shall be deemed to have been approved."

6. On page 12, subsection 1(c) by striking \$50,000 on line 23 and replacing it with \$100,000.

7. On page 17, by adding the following subsections to Section 13:

"(3) On July 1, 1987, Sections 50-5-301 through 50-5-308, MCA, and Section 8, Section 9 and Section 10 hereof, are repealed unless reenacted by the legislature.

(4) On July 1, 1987, Section 50-5-101, MCA is amended by deleting subsections (3), (5), (6), (8), (9), (10), (13), (14) and (27) unless reenacted by the legislature.

(5) On July 1, 1987, Section 50-5-106, MCA is amended to read as follows, unless reenacted by the legislature:

"50-5-106. Records and reports required of health care facilities - confidentiality. Health care facilities shall keep records and make reports as required by the department. Before February 1 of each year, every licensed health care facility shall submit an annual report for the preceding calendar year to the department. The report shall be on forms and contain information specified by the department. Information received by the department or board through reports, inspections, or provisions of parts 1 and 2 may not be disclosed in a way which would identify patients. A department employee who discloses information which would identify a patient shall be dismissed from employment and subject to the provision of 45-7-401, unless the disclosure was authorized in writing by the patient, his guardian, or his agent. Information and statistical reports from health care facilities which are considered necessary by the department for health planning and resource development activities will be made available to the public and the health planning agencies within the state. Applications-by-health-care-facilities-for-certificates-of-need and-any-information-relevant-to-review-of-these-applications, pursuant-to-part-3, shall-be-accessible-to-the-public."

(6) On July 1, 1987, Section 50-5-206, MCA is amended to delete subsection (3), which provides:

"(3)-The-denial,-suspension,-or-revocation-of-a-health-care facility-license-is-not-subject-to-the-certificate-of-need requirements-of-part-3."

AMENDMENT TO SB-293

Page 21, line 24.

Following: "need."

Insert: "The department may adopt rules for the imposition of such conditions, but only if the secretary of the United States department of health and human services has approved an amendment to the state's medicaid plan, adopted pursuant to 42 USC 1396a, allowing for the imposition of such conditions."

(This sheet to be used by those testifying on a bill.)

NAME: George M. Jernan DATE: 2-9-83

ADDRESS: 2201 Lockey Ave Helena Mt.

PHONE: 442-4844 449-2037

REPRESENTING WHOM? Dept of Health + Env Aff

APPEARING ON WHICH PROPOSAL: SB 293

DO YOU: SUPPORT? ☒ AMEND? ☐ OPPOSE? ☐

COMMENTS: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

TESTIMONY BY GEORGE M. FENNER ON SENATE BILL 293 - February 9, 1983

THIS COMMITTEE NOW HAS THE RESULTS OF TWO (2) MONTHS OF  
NEGOTIATIONS AND COMPROMISES IN SENATE BILL 293. SUCH  
ORGANIZATIONS AS THE DEPARTMENT OF HEALTH, THE MONTANA HOSPITAL  
ASSOCIATION, THE MONTANA NURSES ASSOCIATION, THE MONTANA MEDICAL  
ASSOCIATION, THE DEPARTMENT OF SOCIAL AND REHABILITATION  
SERVICES, THE GOVERNOR'S OFFICE AND THE MONTANA HEALTH SYSTEMS  
AGENCY HAVE ALL COOPERATED ON THIS PROJECT.

ALL TOO OFTEN LEGISLATORS ARE EXPECTED TO BALANCE THE NEEDS  
OF CONFLICTING INTERESTS. WE ARE PLEASED TO HAVE CONTRIBUTED  
TO THE DEVELOPMENT OF THIS COMPROMISE LEGISLATION AND WE URGE  
ITS APPROVAL BY THIS COMMITTEE.

THANK YOU VERY MUCH.

*effort  
on  
compromise bill*

(This sheet to be used by those testifying on a bill.)

NAME: Jeanne T. Lendart DATE: 2-9-83

ADDRESS: Heleno; Mt.

PHONE: 447-6350

REPRESENTING WHOM? At the Mont. Medical Assoc

APPEARING ON WHICH PROPOSAL: S 293

DO YOU: SUPPORT? ✓ AMEND? \_\_\_\_\_ OPPOSE? \_\_\_\_\_

COMMENTS: \_\_\_\_\_

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

Testimony of Wade Wilkison

LOW INCOME SENIOR CITIZENS ASSOCIATION, Helena

SENATE BILL 293

The Low Income Senior Citizens Association is concerned about Section 2, page 2, of this legislation.

This provision has the potential of limiting access by low income seniors to needed health care. This provision would allow low income, medicaid eligible citizens who need long term care to be denied access to that care because needed beds will not be approved for medicaid certification.

Once beds are determined to be in fact "needed" according to the State Health Plan and the certificate of need process, those beds should be equally available to those needing them--whether those needing them are medicaid recipients or private paying individuals.

We feel this provision is contrary to both Health Planning requirements--which require access to health care for traditionally underserved populations (such as low income persons), and Federal medical requirements which prohibit denying access to covered services strictly on the basis of budget considerations.

We support the amendment offered by the Montana Health Care Association, and urge your consideration and approval of this amendment.

Thank you for the opportunity to testify.

*Pierson, Bull & Gould*  
*Client Memorandum*

TO: American Health Care Association  
DATE: February 3, 1983  
RE: Validity of State Legislation Limiting  
Certification of Medicaid Beds Through  
Certificate Of Need Authority

-----

You have requested our opinion as to the legality under federal law of legislation currently being proposed in Montana. This legislation would effectively authorize the state to place a limitation on the number of Medicaid-certified beds in long-term care facilities through use of the state's certificate of need authority. Under this proposal, the state would, under certain circumstances, be permitted to restrict the beds available for Medicaid beneficiaries. Ostensibly, the state would accomplish this through its certificate of need legislation and would not amend its Medicaid state plan, thereby attempting to circumvent the plan approval authority of the Secretary of the United States Department of Health and Human Services ("Secretary"). Montana's proposed legislation raises many of the same issues posed in several other states when authority was sought, through an amendment to the Medicaid state plan, to establish a cap on the number of Medicaid-certified beds.

Montana's proposed legislation and similar proposals pending in other states raise the following questions which are addressed in this memorandum: (1) whether a state that seeks to restrict Medicaid certification of long term care beds through its certificate of need authority must reflect this restriction in a Medicaid state plan amendment and, if not, whether such a restriction is still reviewable under Medicaid statutory and regulatory requirements; (2) whether, assuming the appropriateness of Medicaid reviewability, such a restriction conforms to Medicaid requirements (and who bears the burden of establishing conformity or lack of conformity); and (3) whether such a restriction, if either not reviewable under Medicaid requirements or in conformity with those requirements, violates federal health planning laws. In each section discussing these issues, we have summarized the legal arguments that would be relevant to resolution of these issues.

I. Reviewability Of The Proposed  
Legislation Under Medicaid Requirements

Section 50-5-304(2) of the proposed Montana legislation provides in effect that, as to new long term care beds, the state department of social and rehabilitation services may restrict the number of Medicaid-certified beds by inserting a "certified bed" limitation in the facility's certificate of need if the department finds that an increase in certified

beds would produce increased Medicaid utilization for long term care facilities, causing the state to exceed its Medicaid budget. Under the proposed legislation, the availability of Medicaid funding could be the basis for imposing such a condition, but it could not be the sole basis for denying a certificate of need.

It may be argued that this proposal cannot become effective unless it is incorporated into and approved by the Secretary as part of the state's Medicaid plan. Under 45 C.F.R. § 205.5(a):

A State plan under title...XIX of the Social Security Act must provide that the plan will be amended whenever necessary to reflect...material change in any phase of State law, organization, policy or State agency operation.

Imposing a limitation on Medicaid-certified beds in long term care facilities arguably constitutes a "material change" in state law because of its potential effect on eligible Medicaid beneficiaries who may require nursing care but are precluded from receiving such care due to the unavailability of certified beds resulting from certificate of need limitations. Thus, the proposed law seems to represent a material change that must be reflected in the state plan as an amendment if the state wishes to continue participating in the Medicaid program. See also Kentucky Association of Health Care Facilities v. Department for Human Resources, No. 80-49 (E.D. Ky. Mar. 31, 1981), reported in CCH Medicare & Medicaid Guide

¶ 30,995 (1981-1 Transfer Binder) (where, although Court did not rule on merits, it suggested that there was probably a violation of federal law because of failure to submit Medicaid bed quota as Medicaid plan amendment for Secretary's approval).

In addition, under 42 U.S.C. § 1396c, the Secretary is empowered to review the operation and administration of Medicaid state plans to ensure that they comply with legal requirements. Thus, even if the Secretary did not review the proposed restriction as part of a Medicaid plan amendment, the Secretary could nevertheless use Medicaid requirements to evaluate that restriction as it affects the operation of the Medicaid plan. See also PIQ-MMB-77-5 (Aug. 18, 1977) at pp. 2-3 (in which the Secretary, in response to an inquiry concerning Medicaid certification limits, stated that the Medicaid program -- rather than certificate of need authorities -- is responsible for decisions concerning providers).

## II. Limitations On Medicaid-Certified Beds May Be Illegal Under Medicaid Law

The restrictions on Medicaid-certified beds proposed under the Montana legislation and under similar legislative schemes in other states could conflict with Medicaid law and thus be illegal, regardless of whether they are properly introduced as an amendment to a state plan.<sup>\*/</sup> The applicable

---

<sup>\*/</sup> It should be noted that the Secretary has disapproved proposed amendments to the state plans of Mississippi and South Carolina where those amendments would have authorized the state to limit the number of Medicaid-certified beds. In each instance, the state requested a hearing as to the disapproval but ultimately withdrew the proposal. Kentucky proposed a similar limitation but withdrew it before the Secretary reviewed it. The legal arguments discussed in this section were the bases for the Secretary's actions.

each service that a state provides under its Medicaid program must be sufficient in amount, duration, and scope to achieve its purpose. Under this regulation:

- (c) The Medicaid agency may not arbitrarily deny or reduce the amount, duration, or scope of a required service...to an otherwise eligible recipient solely because of the diagnosis, type of illness, or condition.

Most states, including Montana, provide both skilled nursing and intermediate care in their Medicaid plans. Where they are part of a state's Medicaid plan, these services must be made available in sufficient amount, duration, and scope to achieve their purposes. If a medical determination is made that a particular beneficiary requires long term nursing care, but such care is not readily available because of state limitations on Medicaid-certified beds, the duration of that beneficiary's ultimate stay could be reduced substantially. Such a reduction in duration of a required Medicaid service would be arbitrarily applied to patients in need of long term care (as opposed to beneficiaries in need of other types of care or services) and, therefore, would be contrary to this Medicaid regulation.

C. Required Certification Absent Good Cause

In the Mississippi and South Carolina cases, the Secretary took the position that the Medicaid regulation governing provider agreements with certified facilities, 42 C.F.R.

each service that a state provides under its Medicaid program must be sufficient in amount, duration, and scope to achieve its purpose. Under this regulation:

- (c) The Medicaid agency may not arbitrarily deny or reduce the amount, duration, or scope of a required service...to an otherwise eligible recipient solely because of the diagnosis, type of illness, or condition.

Most states, including Montana, provide both skilled nursing and intermediate care in their Medicaid plans. Where they are part of a state's Medicaid plan, these services must be made available in sufficient amount, duration, and scope to achieve their purposes. If a medical determination is made that a particular beneficiary requires long term nursing care, but such care is not readily available because of state limitations on Medicaid-certified beds, the duration of that beneficiary's ultimate stay could be reduced substantially. Such a reduction in duration of a required Medicaid service would be arbitrarily applied to patients in need of long term care (as opposed to beneficiaries in need of other types of care or services) and, therefore, would be contrary to this Medicaid regulation.

C. Required Certification Absent Good Cause

In the Mississippi and South Carolina cases, the Secretary took the position that the Medicaid regulation governing provider agreements with certified facilities, 42 C.F.R.

§ 442.12(d), requires a State either to enter into a provider agreement for all certifiable beds in a facility or to decline to enter into a provider agreement at all. A state may refuse to enter into a provider agreement with a facility only for "good cause." According to the Secretary, "good cause" to refuse to enter into a provider agreement may be found under only three circumstances:

1. a facility fails to meet certification requirements (i.e., conditions or standards of program participation);
2. the facility is located in an "overbedded" area; or
3. the facility charges excessively high rates.

A state's budgetary constraints, therefore, are not a recognized reason for refusing to certify a facility or its certifiable beds. Since Montana's proposal and similar pending legislation are tied to budgetary concerns, this is not sufficient reason to refuse to certify "certifiable" beds in a facility.

#### D. Burden Of Proof

In the Mississippi and South Carolina proceedings as well as in PIQ-MMB-77-5 (Aug. 18, 1977), the Secretary indicated that, in instances where the state imposes restrictions on Medicaid certification of beds, the state bears the burden of proving that these restrictions do not violate Medicaid requirements. This means that such restrictions will not be

approved unless the state first demonstrates through relevant data and evidence that the restrictions will not contravene the requirements that have previously been discussed.<sup>\*/</sup> Mere undocumented assertions by the state that the restrictions are not unlawful are not sufficient to obtain approval.

### III. Legal Considerations Under Federal Health Planning Requirements

Assuming that proposed legislation like Montana's is either not subject to review under Medicaid requirements or is held to conform to those requirements, there is still substantial question whether it meets federal health planning requirements. Under these requirements, the state -- in deciding whether to issue certificates of need -- must consider the effect which its actions would have on the population's accessibility to health care and, in particular, the accessibility which traditionally underserved groups (including low income groups) would have to such care.

For example, in the Congressional findings contained in the National Health Planning and Development Act, Congress stated that there was an inadequate supply or distribution of health resources, that equal access for everyone to such

---

<sup>\*/</sup> In PIQ-MMB-77-5 (Aug. 18, 1977), the Secretary also suggested that the state would have to show as well that the restriction: (1) does not discriminate against patients requiring nursing care; (2) does not interfere with patients' freedom of choice of provider (see 42 U.S.C. §§ 1396a(a)(23) and 1396n); (3) does not violate the requirement that the plan be statewide in operation, including providing reasonable access on a geographic basis (42 U.S.C. § 1396a(a)(1)); and (4) does not discourage, by virtue of fee structures, enlistment of sufficient providers to assure that beneficiaries receive care at least to the extent it is available to the general population (42 C.F.R. § 447.204).

resources was not a reality, and that a maldistribution of health care facilities and manpower existed. 42 U.S.C. § 300k(a)(2) and (3)(B). Congress also specified that, in addition to any other regulatory criteria established by the Secretary, health systems agencies, state health planning and development agencies, and statewide health coordinating councils were to consider, among other things, the need that the population to be served has for the proposed services and the extent to which the proposed services would be accessible to all residents in the service area. 42 U.S.C. § 300n-1(c)(3) and (6)(E).

In the federal regulations governing state certificate of need laws like Montana's, the Secretary has enumerated a number of criteria which the states must consider when administering those laws. Although the states have flexibility to add additional criteria, those provisions may not be inconsistent with the Secretary's criteria. 42 C.F.R. § 123.402(a). Among the Secretary's criteria are the following considerations (42 C.F.R. § 123.412(a)(5)(i) and (6)):

the extent to which all residents of the area, and in particular low income persons, racial and ethnic minorities, handicapped persons, and other underserved groups and the elderly, are likely to have access to those services.

\* \* \*

[t]he contribution of the proposed service in meeting the health related needs of members of medically underserved groups which have traditionally experienced difficulties in obtaining equal access to health services (for example, low income persons, racial and ethnic minorities, women and handicapped persons)....

Moreover, detailed findings as to access must be made. 42 C.F.R. § 123.413.

It may be argued that Montana's proposed legislation contravenes these requirements because it essentially compels the state to deny or delay low income persons (i.e., Medicaid beneficiaries) access to long term care in instances where there is an undeniable need for such care. Under federal law, the need for such care is supposed to be one of the factors employed when a certificate of need is issued. Montana's proposal, however, would require that where there is a finding of need, coupled with an impending budget crisis, access of certain groups to that care should be curtailed. In sum, it is difficult to square Montana's proposal -- which would restrict access when there is a utilization need -- with federal laws seeking to assure access if there is a demonstrated need for care.<sup>\*/</sup>

---

<sup>\*/</sup> Montana may argue that its proposal does not prevent issuance of a certificate of need but merely imposes certain conditions on it. As to low income groups, however, a certificate of need which forbids or seriously limits Medicaid participation differs in no material respect from an outright denial of the certificate of need. Interestingly, a comparison of Montana's proposed certificate of need criteria (Section 5-5-304(1)(a)-(n), MCA) with the Secretary's regulatory criteria (42 C.F.R. § 123.412(a)(1)-(21)) shows that the proposal has, in fact, deleted much of the language concerning the access criterion.

IV. Summary

In the absence of detailed findings and evidence of which we are unaware, it is doubtful that Montana's proposed legislation complies, either on its face or as it would be applied in particular instances, with federal Medicaid and health planning requirements.

STATEMENT OF INTENT

*Senate* Bill No. 293 [LC 1071]

A statement of intent is required for this bill because it delegates rulemaking authority to the Department of Health and Environmental Sciences. This bill generally revises Montana's Certificate of Need program for review of health care facilities. This program is conducted by the Department under the provisions of Title 50, Chapter 5, part 3. With limited exceptions, the specific intent of this bill is to clarify the Department's authority to bring the state's Certificate of Need program into compliance with the minimum standards of the National Health Planning and Resources Development Act (42 USC 300K, et. seq.), as amended, and with the provisions of 42 CFR 123.401 through 123.413.

The Department has already been granted general rulemaking authority for the implementation of a Certificate of Need (C/N) program which complies with federal requirements. (See the statement of intent adopted with Ch. 347, L. 1979.) It is intended that the general rulemaking authority presently existing in 50-5-103(1), be extended to the provisions of this bill.

In some instances, however, the statutory authority to implement specific aspects of the federal requirements was not clear. It is the intent of this bill to make that authority clear in the following areas: establishment of "batching periods" for comparative review of competing applications; joint scheduling of C/N reviews; and review of acquisition of major medical equipment and health care facilities. It is the intent of the Legislature that the Department's rules be designed to comply with the provisions of 42 CFR 123.401 through 123.413.

Other rulemaking mentioned in this bill includes:

Section. 2: 50-5-301(2)(b): Exemptions for Health Maintenance Organizations (HMOs). The intent is to provide such exemptions as may be necessary to comply with 42 USC 300k et seq., as amended.

50-5-301(5)(b): Thresholds for review. The intent is to allow the Department to raise review thresholds if necessary to remain in compliance with federal law and to continue to receive federal health planning grants.

Section 3: 50-5-302(1): The rulemaking authority mentioned here simply clarifies specific aspects of the authority already granted pursuant to 50-5-103(1).

Section 9: Subsection (1) of section 9 excludes certain categories of expenditures from C/N review. These exclusions are not consistent with current federal requirements. However, at present the federal government has waived imposition of sanctions (loss of federal funds) for noncompliance with federal requirements. In the event those sanctions are ever imposed, subsection (2) of section 9 authorizes the Department to adopt rules providing for review of those excluded categories. Any such rules must be ratified by the next Legislature meeting after adoption of the rules.

SB274

It is difficult to estimate what requiring all companies that write health coverage to pay for the services of "professional counselors" would cost. California requires coverage for family and marriage counselors but good cost figures are hard to come by. The feeling is that it is an expensive benefit.

However, one can make some estimates. The potential number of licensees is unknown but testimony at the hearing indicated over 500, many of whom are school counselors. If such a group wanted only to take come \$15,000 per person (one would assume that many school counselors would work parttime during the school year and fulltime in the summers) that would amount to \$7,500,000 per year.

On a very conservative note, if we assume that coverage would cost 25 cents per month per person covered (assuming 600,000 people have health coverage in Montana ) that would amount to \$1.8 million per year.

The cost for this type of service will not eliminate any other type of cost. The persons treated are not "sick" but rather have problems. Any suggestion that requiring coverage for counselors will not cost Montanans more money is unfounded.