MINUTES

MONTANA HOUSE OF REPRESENTATIVES
54th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN BOB CLARK**, on February 9, 1995, at 7:00 AM.

ROLL CALL

Members Present:

Rep. Robert C. Clark, Chairman (R)
Rep. Shiell Anderson, Vice Chairman (Majority) (R)
Rep. Diana E. Wyatt, Vice Chairman (Minority) (D)
Rep. Chris Ahner (R)
Rep. Ellen Bergman (R)
Rep. William E. Boharski (R)
Rep. Bill Carey (D)
Rep. Aubyn A. Curtiss (R)
Rep. Duane Grimes (R)
Rep. Joan Hurdle (D)
Rep. Deb Kottel (D)
Rep. Linda McCulloch (D)
Rep. Daniel W. McGee (R)
Rep. Brad Molnar (R)
Rep. Debbie Shea (D)
Rep. Liz Smith (R)
Rep. Loren L. Soft (R)
Rep. Bill Tash (R)
Rep. Cliff Trexler (R)

Members Excused: NONE

Members Absent: NONE

Staff Present: John MacMaster, Legislative Council
Joanne Gunderson, Committee Secretary

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing:	HB 186, HB 366, HB 371, HB 429
Executive Action:	HB 55 DO PASS AS AMENDED
	HB 296 DO PASS

EXECUTIVE ACTION ON HB 55

Motion: REP. BRAD MOLNAR MOVED HB 55 DO PASS.

Motion: REP. MOLNAR MOVED TO AMEND HB 55 ON PAGE 2, LINES 6 THROUGH 8 BY STRIKING "$500" THROUGH "PAY," INSERTING "$100" AND FOLLOWING "WHO" ON LINE 11 INSERTING "KNOWINGLY."

Discussion: REP. JOAN HURDLE spoke against the amendments on the basis of those situations where the employer and employee might collaborate to bypass the law.

REP. MOLNAR explained the consequences of violations which would preclude such situations.

Vote: The motion carried 15 - 1, REP. HURDLE voted no. (REPS. ANDERSON, AHNER and BERGMAN were absent at the time of the vote.)

Motion: REP. MOLNAR MOVED HB 55 DO PASS AS AMENDED.

Discussion: REP. LIZ SMITH recommended that those who would be present at the next legislative session consider a more positive approach to solving this situation such as a tax credit for those who cooperate in hiring and paying

Vote: The motion carried 15 - 4, REPS. MC GEE, BOHARSKI, CLARK and BERGMAN voted no. (REP. AHNER voted by proxy.)

EXECUTIVE ACTION ON HB 296

Motion: REP. MOLNAR MOVED HB 296 DO PASS.

Discussion: REP. WILLIAM BOHARSKI recalled that the Department of Justice was going to submit information to the committee. That information had been supplied to **REP. DUANE GRIMES** who presented it to the committee. In summary the report shows there are mixed reviews from other states' experiences with this legislation, it really doesn't seem to hurt the process, but does not go quite as far as the proponents would like. Part of the study involved comparisons between different types of offenses showing how the fully informed jury affected the outcomes. In cases where the jury could sympathize with the defendant such as in DUI cases, the sentences were somewhat less; in those in which they could not sympathize, they hedged toward stiffer sentences.

REP. SHIELL ANDERSON asked the committee to resist this bill. He felt the grounds for it were nebulous when the proponents quoted from an old, old Webster's dictionary definition as a basis for a fully informed jury. He was going to vote against it also because of the potential for extension of time for trials. From a victim's rights perspective, he felt it had the potential for inequitable settlement because of jury sympathy. He said it could also work the other way. Jurors on the list have no

ongoing accountability to society having been simply selected from voter registration roles. His perception was that the proponents were bringing this legislation because they were upset with the outcome of a particular trial and felt Montana law shouldn't be changed because of that motivation.

REP. AUBYN CURTISS thought that the committee should not be considering the cost of justice. Testimony was that several states' constitutions contain this language and that 20 other states have this language in their statutes. She suggested that the sponsor be asked how it is working in other states. The committee objected. She felt one of the most important things to Americans was the entitlement to good juries and that they should not be sold short. Oftentimes the interests of the system aren't always the interests of the individual, she said. She strongly supported the bill.

REP. BILL CAREY agreed with **REP. ANDERSON.** He asked that the proponents address the question disturbing him; i.e., that it was suggested that laws which are being passed would become suggested rules of conduct rather than laws.

REP. GRIMES spent some time as a neutral party studying it and did not find a danger but rather an opportunity to give some rights back to the average citizen. He felt the answer to the question was that juries are not picked by happenstance; they are thoroughly reviewed by both sides of the case. He did not believe this was saying the jurors could overturn laws, but that they had the right to see if that particular law applied to the case. He felt citizens are intelligent enough to deliberate the facts and deliberate the consequences of applying the law.

REP. BILL TASH said he had a lot of faith in due process especially because of the way they are instructed. But he spoke against this bill. He thought it was a burden on juries to expect them to reach their decisions without all the information and resources they would need. He said too often jury and court decisions are being made not necessarily on what is right or wrong, but on technicalities and legal correctness.

REP. SMITH asked if there was any way to simplify this by offering more information. She said it is not the people who rule, but rather the interpretations of the law which rules by expertise. Though this expertise is valued, she believed there needs to be a checkmate (sic) and they need the information to provide that balance.

REP. DIANA WYATT called the committee's attention to line 22 on page 1, to see the potential of an increase in hung juries. Though the intention is valid and supporting of the jury system as it is desired to work, she did not believe it would work that way.

REP. MOLNAR said the purpose of the bill was being overlooked. The jury has the right, but the question before the committee was, "Are we going to tell them that they have it?" He compared that to a defendant being informed of his full rights to an attorney or to remain silent for instance. He wanted to know how far they would go to see that the criminal had every right explained; and frankly thought the jury had the same right to be informed. It was admitted in testimony that people carry their prejudices with them and the judge does not discharge them by saying they can't consider certain points. Additionally the law is quite often being applied by the interpretation of a previous judge. If the jury does not want to find a person guilty by reason of the abusive interpretation of a law, they have a right to do that. The purpose is to give the jury the full knowledge of their rights as is given the criminal.

REP. BOHARSKI remembered asking the question during testimony if a juror found that they had the right to judge the law as not applying to a case and the result was a hung jury, would there be any remedy. He remembered **Mr. Connor** answering, "No." Evidence from other states was that this had not produced highly negative results and was not something to be afraid of. So his question was why would they not inform the jury they have the right to do it.

REP. DEB KOTTEL agreed that juries have the right to see how the law applies to the facts. But she said they do not have a right to determine the law itself. She said that the application in other states through jury instruction is to be informed that they have the duty to apply law to fact. They may decide that the facts don't fit under the law. She said that is what the jury should do and what Webster was defining but not to rule on constitutionality and other issues. She agreed with **REP. WYATT** in asking why, in a representative democracy, would they allow people to vote them in, allow 150 people to reach consensus on whether a law is good, allow a governor to execute that law and then let the tyranny of one person override the wishes of the majority of the society.

REP. DANIEL MC GEE had done a lot of reading about what the founding fathers had said about what a jury meant and was convinced that they had in mind that a jury was the last line of defense against an unjust law. In the legislative process there will be some laws which are unconstitutional or have other flaws. From evidence he had examined, he determined that the jury has the right to judge the law. His experience as foreman on two criminal juries was that he was informed that he could not judge the law but could only judge the evidence. He disagreed with it and though it could create some problems, he felt it could eliminate someone from being criminally charged and prosecuted who was innocent. He said he would support the bill.

REP. CLIFF TREXLER asked **REP. ANDERSON** if this would affect jury selection.

REP. ANDERSON said the problem was subjective and would affect jury selection. He described the voir dire portion of the trial, which means to tell the truth, wherein the defense attorney will try to find at least one juror who will be morally or circumstantially sympathetic. He felt that this would extend the process by appealing to even more aspects of the juror's potentially sympathetic leanings.

REP. GRIMES read a portion from a Maryland law review which revealed that most support the nullification instruction even if they don't support the theory. It said that the impact on juries had been marginal. The conclusion of the law review was that the traditional deference to the judge's authority was not seriously if at all diminished. He did not believe it should affect or threaten the legislature. He reiterated his faith in the citizens to exercise the latitude.

REP. WYATT interpreted what was read differently. She felt it was saying that judges did it, but did not necessarily agree with it.

REP. SMITH believed that the interpretation of the law was in control of the society and citizens. She echoed and restated her concerns. She felt there was an imbalance which could be helped by having well-informed juries.

REP. LINDA MC CULLOCH voiced her concern with this bill that juries would be encouraged to use their prejudices. She felt this tied into the favored-son philosophy and would encourage inconsistency in law.

REP. ANDERSON said there were two sides of the argument that the jury has the right to determine the law. The right they currently have is to say they can't decide. But he did not think they had the right to bend the law to suit the case. He felt they would have protracted debates by attorneys over the constitutionality of the law during trials. He felt that being tough on law was contrary to setting up a situation where deadlocked juries would result.

REP. BOHARSKI asked, "Can we pass a law that will have this sort of an impact on an individual and stay within the confines of the Constitution. We are making a proactive statute in order to put some sort of government bind on an individual, that's not necessarily bad. That's good, that's what we are hired to do. What this bill would allow the jury to do is not the same thing, it is the opposite. It is that they would be able to say, 'In this case, we do not want it to apply.'" He used the Brady law disputes and how those are being argued and dealt with by legislatures as examples to prove his point.

REP. MC GEE testified of a case with the committee to show that it could work both ways.

Vote: The DO PASS motion on HB 296 carried 11-8 by roll call vote.

{Tape: 1; Side: B}

HEARING ON HB 429

Opening Statement by Sponsor:

REP. BRAD MOLNAR, HD 22, offered HB 429 for the committee's consideration. He stated that the bill was written by a youth court judge from Missoula. The bill would provide for the opening of youth court records to the public. Many of the protections afforded youth are retained under this bill. The victims of juvenile perpetrators would be kept informed of the disposition of the cases involving them. Though there is no retribution allowed for juvenile offenders, the publication of their offenses would provide protection for the victims and general public as well as apply pressure on the youth toward reformation

Proponents' Testimony:

Charles Walk, Executive Director, Montana Newspaper Association, supported HB 429 which would revise the youth court confidentiality provision. They believed this bill adhered to the criteria they follow in opening more information to public business and interest while providing reasonable protection for privacy consideration.

Mike Voeller, Lee Newspapers of Montana, supported and echoed the previous testimony. He submitted written testimony. **EXHIBIT 1**

Opponents' Testimony:

Mary Ellerd, Executive Secretary, Montana Juvenile Probation Officers Association, recommended that, because of their complexity, the revisions in this bill be included in an all encompassing study of the youth court act such as proposed in HB 240.

Richard Meeker, Chief Juvenile Probation Officer, First Judicial District, opposed the bill and explained his specific concerns throughout the bill. To him the bill indicated that there would be no confidentiality at all. In particular he addressed those who are in the youth-in-need-of-supervision category. Many of the offenses charged in that category would not be violations if the person were over 18 or 21, such as truancy, running away, etc. Many times these children come from dysfunctional backgrounds of neglect or abuse. The bill indicated that the social background would not be released to the public, but the public would be permitted to attend the hearing where the information could be disseminated to the court and the public.

Often with children in this category, they deal with competing interests between parent and child. This bill would provide that a parent or attorney could request a jury trial. It might not be in the best interests of the child to hold a jury trial in which the general public would again be privy to information they do not need to know and that could be contrary to the best interests of the child. He had no problem with the concept of notification of the victims, but his concern did involve funding to accomplish it as fully as was being potentially mandated.

He gave the history of the responsibilities and functions of Managing Resources Montana (MRM). He felt that the backgrounds of many of the children they serve should not become public knowledge.

Questions From Committee Members and Responses:

REP. ELLEN BERGMAN asked if this bill wasn't concerned with reporting crime and publication of the names of those committing those crimes.

Mr. Meeker said the bill would provide for opening the records on offenses such as runaways which are not technically crimes.

REP. BERGMAN compared it with handling of adult background information when a crime is reported.

Mr. Meeker said that defense attorneys in juvenile cases use the background information to present cause for the behavior, while in adult cases that is not a factor.

REP. BERGMAN asked if it had the effect of protecting the parents.

Mr. Meeker felt it would protect the parents as well as the youth. What they have done may not be totally illegal.

REP. LOREN SOFT noted that **Mr. Meeker** had differentiated between youths in need of supervision and the juvenile delinquent. He asked if the section on youths in need of supervision could be removed.

REP. MOLNAR said the intent was for the court to focus on what is known; i.e. the crime, and to overlook the unproven allegations of child abuse or neglect, keeping those confidential. He felt that a youth in need of supervision quite often will have other problems though they may not be charged beyond a status offense. Often they run because they do not want to obey their parents and not because they are being abused or neglected though they may allege such a problem as the cause.

REP. TASH asked if media announcements would help in the notification-of-victims process.

Mr. Meeker responded that there is existing statute to cover notification of media sources and this bill did not increase that, but it did break it down to a different category of children. In his view, this category did include children who are themselves victims and it would be unfruitful to expose their problems to the public through the press. He suggested as a remedy for the issue eliminating the particular section which allows for a substitute petition (youth in need of supervision) for a youth who had committed a felony offense.

REP. HURDLE reflected on the testimony which was that 80% of the youths in need of supervision are neglected or abused. She asked if there were cases where this is being kept secret and thus protecting the parents who are committing the neglect or abuse.

Mr. Meeker said many of the children in this category are well known in the system. Though he agreed parents should be held accountable, he thought that they needed to consider any benefit to the child or any reasonable benefit to the public to know what the background of the child has been. He had examples where this information had been used to exploit the situation and increase the dysfunction. On the other hand, withholding it has been beneficial in future reconciliation with the parents and restoration of individuals' lives.

REP. HURDLE asked if it didn't serve to protect those who hadn't reformed.

Mr. Meeker said, "Without a doubt, without a doubt, but again the question I would have is what purpose does it give to the public to know that this person is neglecting the child, who is still alcoholic, who still uses drugs or alcohol, who still abuses the child. What purpose does it do the public." If the public would respond to help the children, he felt it would make sense; but he did not think they would respond.

REP. HURDLE wondered if the reason the public has become immune to it is that the information is so objective, while the public might feel differently if they knew who it was.

Mr. Meeker said it was a philosophical question and did not serve the public well to know.

REP. CHRIS AHNER asked if it would not be a benefit to the people involved to be exposed and to admit their wrongdoing. She based that on AA principles.

Mr. Meeker said that his experience was that alcoholics admit their problem in certain places where they are accepted and where the acceptance would provide incentive. He did not think the general public is an AA meeting.

REP. AHNER thought that these people who have transformed their lives would benefit the lives of others as encouragement to do the same.

Mr. Meeker did not know whether the people he knew of would want to tell their story in public. Though their stories might inspire the public, the child involved still is scarred and how would that affect the child.

REP. AHNER wondered if since the whole gist of the bill was in reporting the crime and not exposing the background, they shouldn't be held accountable for what they have done. She wanted to know if it had a place in helping to stop the behavior.

Mr. Meeker said many of the kids in that category have not actually committed a crime, but rather a status offense. He said that the system does hold youths in need of supervision accountable for their actions and he explained with examples how that is done. He maintained that putting their names in the paper was a questionable method for holding them accountable.

REP. AHNER asked for clarification of the style of accountability that is required.

Mr. Meeker gave a scenario example of what that would mean.

REP. CAREY asked if he understood the way the bill was written the court would not have discretion to keep some of the information private.

REP. MOLNAR said that the court shall allow them to be public and it would up to someone else to disseminate. The press would not be mandated that they must publish the information, but it would be available. The protections included would keep the information focused on the crime.

REP. CAREY asked why the sponsors would not want to give the court some discretion in deciding whether some information could be made public.

REP. MOLNAR said he and the judge had disagreed in the handling of this issue and this drafting reflected the judge's preference.

REP. SOFT asked if **Mr. Meeker** thought public disclosure might help in some cases.

Mr. Meeker reiterated that his concern was for some of the children who would not receive any therapeutic benefit from it.

REP. SOFT asked if he would agree that there is no fine line in determining which child is purely one in need of supervision and solely a delinquent in behavior.

Mr. Meeker agreed.

CHAIRMAN CLARK asked if the information could still be sealed under 41-5-604, MCA.

Mr. Meeker said it could at a certain age. He was concerned that the hearings would be open. Social summaries and psychological reports are sealed, but in the hearings with the public permitted to be there the same information could come out even though it would be in written form.

CHAIRMAN CLARK asked if information concerning a victim's stolen property is given to the victim. He cited current law which says if the court says it cannot be given, that information must be withheld.

Mr. Meeker replied that under the Youth Court Act, if the victim acknowledges his involvement in the crime, the identity of the suspect can be released to the victim. This provides the victim recourse for reimbursement for the loss. Though they can release the name of the suspect and their parents, not all information can be released.

CHAIRMAN CLARK asked if **Mr. Meeker** was aware of a recent case which was alluded to in testimony. **Mr. Meeker** was not familiar with it.

REP. HURDLE asked **Mr. Walk** if he interviewed a victim who had been given the name of the perpetrator, could he then publish the name of the perpetrator.

Mr. Walk said it depended on the disposition of the case according to the youth court judge. The missing element would be the discretionary powers built into the Youth Court Act for the judge. He felt that HB 240 was important for that reason.

REP. HURDLE re-asked the question.

Mr. Walk said he believed he could release the name of the suspect after interviewing the victim, but the prudent newspaper would check with the probation officer or with the youth court judge to determine the disposition of the case.

Closing by Sponsor:

REP. MOLNAR closed by challenging points made by the opponents of HB 429. He believed that the time for studies had passed and that the current Youth Court Act needs drastic adjustments. He reiterated his arguments for the changes which would be enacted through the passage of this bill. The intent of the bill was to provide immediate and enforceable consequences for offenses committed by youth. He addressed the issue of youths alleging abuse in cases where the youth needed restraint to control behavior which would harm himself or another.

{Tape: 2; Side: A}

CHAIRMAN CLARK relinquished the chair to **VICE CHAIR ANDERSON.**

HEARING ON HB 371

Opening Statement by Sponsor:

REP. LIZ SMITH, HD 56, opened with her remarks on HB 371 which increased the penalty for harming or killing a police dog and provide restitution by the offender to the law enforcement agency. She distributed a letter as support for the bill and also distributed suggested amendments. **EXHIBITS 2 and 3**

Proponents' Testimony:

Roy Brock, Jr., Powell County Sheriff's Department, had requested this bill be introduced because he felt these dogs used in law enforcement are underprotected by current law. He felt that this bill would not only enhance the protection, but also their upkeep which is often paid out-of-pocket by those using them in service for law enforcement. He reviewed the uses of the canine services. He showed a video to the committee to reinforce his support of the bill.

CHAIRMAN CLARK resumed the chair.

Paul Craft, Dillon Police Department, shared an incident which illustrated the need for this legislation.

Beth Baker, Department of Justice, gave supporting remarks and talked about the use of a dog in investigation of arson for the state. She urged support of the bill and the amendments. **EXHIBIT 4**

Opponents' Testimony:

None

Questions From Committee Members and Responses:

REP. BERGMAN asked why a bill was needed to protect a police dog.

REP. SMITH said this bill would increase and expand the penalty as well as request restitution. There is a law presently in place which only provides for their protection while under supervision. She cited various examples of the expense in training and maintaining these dogs and their value in law enforcement and search and rescue situations.

{Tape: 2; Side: A; Approx. Counter 20.5.}

REP. MOLNAR agreed with the intent of the bill, but wondered if it would not be wise to lower the fine and not to exceed a one-

year sentence in the county jail for the offense so it would be treated as a misdemeanor.

REP. SMITH said she would oppose treating it as a misdemeanor and stated the need to carry a strong message that it would be a felony because of the value of the animals. She cited increase of staff to replace the animal as well as the time invested in training and its upkeep.

REP. MOLNAR'S concern in the level of punishment called for in the bill was that the prison is overcrowded now and this would not be enforceable for that reason.

REP. SMITH suggested that they could delete the words, "state prison," and change it to "the Department of Corrections may sentence appropriately." She would reject the reduction in the fine.

REP. TASH supported the legislation, but said penalties on line 18 should reflect the value of the dog rather than the ability of the offender to pay.

REP. SMITH said she tended to agree.

CHAIRMAN CLARK asked how they could address the use of bloodhounds in search and rescue which might extend to their use in law enforcement.

REP. SMITH felt the amendments attempted to address that. She was open to adding language to cover those possibilities.

Closing by Sponsor:

REP. SMITH felt this bill would help address the increased demands on law enforcement agencies and to increase their effectiveness.

HEARING ON HB 186

Opening Statement by Sponsor:

REP. BETTY LOU KASTEN, HD 99, related that HB 186 would be a general revision of laws relating to child protection services. She reviewed with the committee the provisions of each section of the bill. She said if they understood the changes in HB 186, the committee would understand HB 366. The two were companion bills.

Proponents' Testimony:

Hank Hudson, Director, Department of Family Services (DFS), spoke in favor of both HB 186 and HB 366 as being bills requested by DFS. He described the purpose of the bills and the response to needs of the department as well as the people they serve. They

were attempting to strike a balance in the need to protect confidentiality of the clients.

Ann Gilke, Staff Attorney, DFS, provided the committee with written testimony and proposed amendments to HB 186. **EXHIBIT 5** She intended to testify for the companion bill, HB 366, at this time as well, which she did in part. She expanded on the sponsor's explanation of the bill section by section as well as the proposed amendments.

{Tape: 2; Side: A; Approx. Counter: 44; Comments: The witness provided written information for both HB 186 and HB 366 at this time, the secretary has separated the items pertinent to each bill.}

Mary Alice Cook, Advocates for Montana's Children, strongly supported HB 186.

Laurie Koutnik, Executive Director, Christian Coalition of Montana, found this bill to especially address the issues most effectively and directly covering the concerns their organization has. They supported the amendments.

Opponents' Testimony:

Monte Beck, Bozeman Attorney, objected to a portion of the bill at page 10 which granted immunity to department employees. He said the ramification would be to allow DFS employees to be totally and completely unaccountable and not responsible for any wrongful or incompetent actions they might take in their attempt to protect children. He provided written documents from a court case and testified regarding the case to substantiate his objection. **EXHIBITS 6, 7, 8, 9 and 10**

{Tape: 2; Side: B}

Russell Hill, Montana Trial Lawyers Association (MTLA), focused his opposition on the immunity provision on page 10 and on the first amendment. He suspected that the committee might be confused about the significance of the amendment. He referred to 41-3-202, MCA, which he urged the committee to read and to ask themselves what the point would be for one section of law of this legislature to impose duties of thorough investigation and affirmative and aggressive duties in instances of child abuse and then in another section immunize them.

Questions From Committee Members and Responses:

REP. SOFT assumed the language on line 30 would cover evidence of maliciousness or bad faith actions on the part of the employees.

Mr. Beck said those would be hard to prove. The standard should be negligence and incompetence.

REP. SOFT asked how this could be corrected.

Mr. Beck directed the committee to page 10, line 27 and recommended that they list the people to whom immunity would be granted and to remove police officers and department employees (he thought county attorneys would already be immune) from that list. He felt doctors and teachers would be among those who would be immune.

REP. SOFT asked **Ms. Gilke's** response to the above recommendation and also for her to tell the committee what her rationale was in listing those people.

Ms. Gilke pointed out from her testimony that the immunity section was disclosed. They were reflecting on this list what is already in law under 41-3-202, MCA. She felt that if they took out the amendment it would include those same people since they are authorized under that section of current code to investigate. The department would be more comfortable with going back to the original statute than listing them individually.

REP. SOFT asked if **Mr. Beck's** testimony had merit in regard to granting immunity in such a case as he presented during testimony.

Ms. Gilke said the department is in the position of defending their actions in placing that child in the foster home where she received abuse and the department was not granted immunity. Immunity is limited to protecting people involved in the investigation. Department employees, police officers and county attorneys need to have the protection from being sued every time they investigate allegations of child abuse.

REP. SOFT asked if there was a way to re-write it to grant the immunity so that it would be more clear.

Ms. Gilke said she would not have an answer without reflecting on it and would be willing to work with the committee on it.

REP. SOFT offered a suggestion at the top of page 11 and **Ms. Gilke** agreed that might be the solution to refer to gross negligence.

REP. HURDLE referred to the reporting in section 10 and asked if it applied after conviction.

Ms. Gilke said they were civil laws and there may or may not be a conviction. Page 11, line 18 reflected existing law.

REP. HURDLE asked if that meant someone having been reported for suspected child abuse would have a case record. **Ms. Gilke** affirmed that was so.

REP. HURDLE asked if that record could be released to someone who might want to hire that person.

Ms. Gilke said the department had developed a policy that if they investigate suspected child abuse and determine that it is substantiated, a letter is sent to the perpetrator listing the ramification which may impact their ability to become a day care provider or foster parent and gives them a description of the process to challenge the record. She described how the department would handle inquiries from prospective employers.

REP. HURDLE asked if it was based on substantiation within the department. **Ms. Gilke** affirmed it was.

REP. HURDLE asked for clarification of the criteria for that substantiation.

Ms. Gilke said it was outlined under the legal definitions of abuse and neglect.

REP. HURDLE asked if there was any outside agency or court of law which contributes to the substantiation. She was concerned that there could be arbitrary discrimination because of a personal grudge.

Ms. Gilke said that with the internal checks and balances along with the letter, having to justify the allegations within the legal definitions and because of review within the department with the regional administrator and the department head, it could not happen.

REP. HURDLE asked again, "The substantiation does occur just within the department with no outside input."

Ms. Gilke agreed and added that there are sometime parallel court activities which would make a finding that there has been enough evidence to confirm the allegations.

REP. HURDLE asked if there are no court proceedings, were they still authorized based on department information to notify a potential employer that the person may be an offender.

Ms. Gilke answered that was true.

REP. KOTTEL asked for an understanding of the intent on page 11, lines 3 through 6. In the case of a person who is fired or has been refused employment based on an allegation, would the employer be immune from any civil liability even though the information was unsubstantiated.

Ms. Gilke said pursuant to 41-3-205, MCA, covered that and limited the immunity to mandatory reporters.

REP. KOTTEL insisted that the wording led her to believe that it is not limited to mandatory reporters.

Ms. Gilke explained the reasoning behind the wording and clarified it.

REP. HURDLE asked for detail about how the substantiation of child abuse is reached within the department if there is no court case.

Mr. Hudson described the process. He said that there would soon be a third category, "unfounded," added beyond "substantiated or unsubstantiated" which would allow the department to destroy the records. The social worker communicates with the supervisor in making the determination as well as how to proceed in each case. They have to petition the court for investigative authority or ongoing involvement when the determination is made that abuse or neglect has occurred. A hearing is held, the parties are represented and the court takes over due process. If a substantiation is made and the department and family come to an agreement, there is an opportunity for a less formal arrangement to be made. He described the additional internal processes in appeal of the determination.

REP. HURDLE asked if she understood that during the process of substantiation, they could inform the person's employer that there is a charge of child abuse prior to finishing the process.

Mr. Hudson said he understood that if there is an ongoing appeal, they would delay. **Ms. Gilke** concurred.

REP. KOTTEL said she had experience with a DFS employee in a classroom situation who had said that "children at all costs should be kept with the family" and that "when sexual molestation takes place and it's not too bad, we always leave the kids there because it is worse to remove the child." In cases of neglect, the person said, "if you did that, Deb, that would be neglect; but these people live like that and so the fact that the child had no clothes, there was feces all over the floor of the house and sanitation was a little less than might be expected, that is not neglect because that's how these people live and so it is better for the child to stay." She was not comfortable with differing standards for substantiation because the bill wouldn't solve any of that and immunity just would make it worse. She asked for assurance that the department is moving toward a balance that is more palatable in protection of the children and the protection of parents who are falsely accused.

Mr. Hudson suggested that the department can make sure they are asking their workers to do something that is humanly possible--not to juggle 40 cases at once, to carry beepers with them every second day--and they could staff their department. He felt that was a decision which rested with the legislature. They could also train people adequately on in-depth issues which is a budget issue resting with the legislature. Third, they can make sure supervisors supervise adequately, which is a department issue. They need to be accountable and encourage a public dialogue about

the kind of work they do and he recommended some of the ways that could be done. He viewed DFS as an agency of community values and he felt they need to encourage debate.

REP. BOHARSKI asked if the different levels of proof were adequate.

Ms. Gilke responded with her understanding of the different levels of the burden of proof. She would not suggest any statutory changes to them.

REP. BOHARSKI understood that some action needed to occur within 48 hours.

Ms. Gilke said the reference to 48 hours was in regard to an emergency removal of a child. If there is imminent risk of harm to a child, the agency may remove the child for up to 48 hours prior to a county attorney filing a petition to have the court review the case.

REP. BOHARSKI asked if probable cause is established, could the department hold the child for 20 days.

Ms. Gilke said that was right.

REP. BOHARSKI felt it should require something beyond probable cause to be able to pull a child out of the home for that period of time. He asked to be convinced otherwise.

Ms. Gilke believed the probable cause level is adequately high at that initial stage of involvement by the agency. The court must grant the department the authority to remove the child and place the child. Should the court believe there is enough evidence to authorize the child's removal while the department completes the investigation, she felt there were adequate checks and balances at the probable cause standard.

Closing by Sponsor:

REP. KASTEN closed with the hope that they would not leave "anyone" in the statute in section 9.

HEARING ON HB 366

Opening Statement by Sponsor:

REP. BETTY LOU KASTEN, HD 99, asked the committee's indulgence to hear a proponent immediately since his time in the area was short. The committee agreed and further agreed to question him immediately after his testimony if needed.

Proponents' Testimony:

Clifford Murphy, President, Montana Advocacy Program, submitted written testimony. **EXHIBIT 11**

Hank Hudson, Director, DFS, declared the department's support.

Paula Crumb presented written testimony. **EXHIBIT 12** .

Hal Wallis Melcher, Helena Attorney, Executive Director of Helena Industries, Montana Association for Independent Disabilities Services, and member of the Abuse Prevention Task Force, spoke in favor of HB 366 which would provide them with another tool for acquiring information in hiring persons who would serve the people properly.

{Tape: 3; Side: A}

Their only concern with the legislation was that the investigative process should be thorough and aggressive, but follow due process principles. They felt that having a third party outside DFS would provide objectivity in the investigative process.

Mary Gallagher, Montana Advocacy Program (MAP), presented testimony in favor of HB 366 and HB 186 with opposition to sections mandating reporting to DFS. She said in reality MAP refers most of the complaints of abuse and neglect to DFS for investigation, but there are times when DFS is perceived, rightly or wrongly, as being either too busy or impartial (sic) and would not be preferred as an agency for referral. There are times when MAP must maintain its independent status in discretion in conducting investigations. She asked the committee to amend both bills to exclude the mandatory reporting requirement and to pass the balance of the bills. **EXHIBIT 13**

Informational Testimony:

A letter with attached proposed amendments from DFS is submitted as **EXHIBIT 14**

An outline of DFS Adult Protective Services is submitted as **EXHIBIT 15**

A letter from **Judith Carlson**, is included as support of HB 366. **EXHIBIT 16**

Andree' Larose, Staff Attorney, MAP, read a letter from **Jack Sands, Board of Directors of MAP,** as a proponent of the bills, with opposition to the mandatory reporting requirements to MAP. **EXHIBIT 17**

A letter from **Curtis Decker, Executive Director, National Association of Protection & Advocacy Systems,** outlining the

objection to the mandatory requirement as referred to in the exhibit above. **EXHIBIT 18**

Opponents' Testimony:

None

Questions From Committee Members and Responses:

REP. SMITH expressed concern about the statistics for abuse cases being from 90-107 and wanted to learn what standards are used to determine abuse.

Ms. Crumb said the figure was an estimate because tracking and recording abuse in people with disabilities was not done separately from other populations and sometimes was non-existent.

REP. MC GEE asked what constitutes abuse.

Ms. Crumb said for research purposes it is very broadly defined as any physical or mental injury to any person with developmental disabilities (DD).

REP. MC GEE sensed there was a turf battle between a state funded entity and a federally funded entity from the opponents' request that mandatory reporting be eliminated from the bill. He asked if he was right.

Mr. Hudson replied that he would call it a minor turf battle and that they work very well together in most instances. He gave his perspective that he wanted to know about any reports of abuse.

REP. MC GEE asked the same question of the sponsor.

REP. KASTEN said if she had opened on the normal note, she would have told the committee that when she looked at the drafts addressing the same statutes she told the two entities that they must work it out because she would only carry a bill which had been worked out in advance. Had she carried two bills, when it came time to codify them, they would not have fit together. She said there was a turf battle going on.

REP. MC GEE appreciated the candor.

REP. BERGMAN asked for clarification of **Ms. Gallagher's** position and if MAP is a private entity which receives federal funding. She asked where they get their authority and if they only work with DD people.

Ms. Gallagher explained the authorizing provisions for MAP, which are all in federal statutes dealing with protection and advocacy systems for DD, mental illness, other physical disabilities,

race-related issues related to physical disabilities as well as a vocational rehabilitation assistance program.

REP. BERGMAN inquired about the requirements for membership in the group.

Ms. Gallagher answered that it was basically a program which addresses the mandates spelled out in regulations which address abuse and neglect in institutions. There are various criteria for each of the five programs.

REP. BERGMAN asked if a private citizen could also report to DFS. She asked if MAP is a "watchdog for DFS."

Ms. Gallagher said any report of abuse or neglect could go to MAP. In each state there is one designated eligible system for this program.

REP. BERGMAN asked who MAP answers to.

Ms. Gallagher said it reports annually to the federal government and in individual instances of abuse, they may report to DFS or a county attorney.

REP. BERGMAN asked if they have anyone in authority over them to be sure they are complying and making proper decisions.

Ms. Gallagher said their line of authority is to answer to the agencies which fund them such as Department of Education and Department of Health and Human Services.

REP. GRIMES asked if she had said that this legislation would allow them to pursue additional legal opportunities for their clients.

Ms. Gallagher answered, "No, in fact it would create no other authorities or duties than currently exist under federal law.

REP. GRIMES asked if the basic outcome would be to take federal law and make it state statute.

Ms. Gallagher said that was correct. She said there had been a conflict in a few access statutes.

REP. GRIMES asked if they deal with the Boulder facility and she replied that they do.

REP. GRIMES asked if this bill was drafted at the suggestion of the advocacy group or if it was a DFS request or jointly considered.

Mr. Hudson said the part that codifies the federal and state laws had been assessed with MAP for some time. Its purpose was to clarify access to records. The mandatory reporting part was

something the department pursued and it had come up in discussion with provider groups. The purpose of that provision was to solve the question for those provider groups when all abuse and neglect cases would be reported to DFS. The department pursued that and negotiated and discussed at length with MAP how to resolve it. They decided to resolve it through legislation.

REP. GRIMES asked if this access issue would affect the facility at Boulder.

Bob Anderson, Administrator, Special Services, Department of Corrections and Human Services (DCHS), had reviewed the portion of the bill being discussed and they were concerned about the duplications of laws under federal statutes. MAP currently has the authority to access records through federal statutes and sections 9 through 12 contain language which repeats language currently in the federal statute. They think that is a duplication and unnecessary. MAP indicated that they need more clarity because they ran into trouble regarding issues related to files. He said that when they have needed files at the Boulder institution, they have pointed out the federal law and Boulder is quick to comply.

Down the road, there might be more problems because Congress has changed the funding and state statute will remain and then MAP may come in asking for funding to comply. By putting this language in this current bill, it would bless their authority under state statute to continue their lawsuit against the state regarding Eastmont to move and force those residents out of Eastmont by court order into community programs. By putting this in state law, they would have authority to access state records to proceed with their lawsuit against the state.

REP. GRIMES asked if **Mr. Melcher** had ever needed information from the Montana Developmental Center (MDC) facility, and if so had they ever had trouble getting that information.

Mr. Melcher clarified the relationship by saying that the Montana Association for Independent Disabilities Services is an advocate for all DD persons within the state. MDC is not a member of the association. He had never had a problem getting information from MDC and would only be in that relationship when a person was going to leave the institution and go into community services where the providers involved would be discussing the case with them.

REP. SMITH asked if MAP responds primarily to individual concerns and if that was the only referral source they receive.

Ms. Gallagher said that was true and that they might get a complaint about someone not being able to receive services or being neglected in the community. They are individual referrals.

REP. SMITH asked if they would also provide the service in residential facilities.

Ms. Gallagher replied that MAP was supposed to address any facility that is a care and treatment facility.

REP. SMITH asked if she agreed that the primary concern would be to prevent ongoing abuse or neglect and **Ms. Gallagher** agreed.

REP. SMITH asked if not reporting to DFS would actually hinder that potential to prevent ongoing abuse or neglect.

Mr. Gallagher answered, "There are more incidences (sic) where, for instance, neglect has been referred to us as a possible issue. And we are more used to responding to those sorts of situations where there is not, for instance, an imminent threat to someone. I can't recall a situation where we have an abuse referral at the moment it happens. Their situation would be responding to abuse where they saw it, certainly using DFS, in fact for most of the primary investigations. But if there was some situation where there was a conflict with our client, and we were not able to report because of our confidentiality requirement under the federal statutes, that would be the only situation that I can think of in an abuse situation...."

REP. SMITH said, "Then primarily you are dealing with judicial litigation, you may communicate with the department, they may respond and yet you will go ahead and pursue it then in a litigation."

Ms. Gallagher said that was not correct. Their main emphasis is on a resolution toward the solution. Litigation would come way down the line. They address it at a systemic level, she said.

REP. BOHARSKI felt the only area which was contentious was the sharing of information though the working relationship is pretty good. He could imagine the situation where a less-than-model employee in the field would disclose information inappropriately. He felt it might be impossible to function as an advocate if they had to disclose everything to the department. He thought they would want the agency to operate independently from DFS.

Mr. Hudson replied that was the issue the committee would be struggling with in balancing the value of having an independent advocate against the value of the efficiency or duplication in sharing information. He believed that the information received by the department would be handled in such a way as to not allow an employee to use the information to intimidate anyone or hide anything.

REP. BOHARSKI made clear that the groups are not doing the same thing and there is generally a good working relationship.

Mr. Hudson agreed, but said that it did not relieve him of the need to share information on abuse and neglect.

REP. BOHARSKI asked if DFS would find out about the cases sooner or later and **Mr. Hudson** said that was correct.

REP. BOHARSKI asked if there were cases where it would be in the interests of the client that the information was not immediately available to DFS.

Mr. Hudson said they did not think so, but they would benefit from knowing every one.

REP. GRIMES reflected on **Mr. Anderson's** comment regarding the Eastmont lawsuit and asked for further information on how the bill would affect that situation.

Mr. Anderson said that if Eastmont did not close, MAP would force clients out of the institution into community programs for basically the same reasons DCHS requested Eastmont be closed. The lawsuit will proceed if Eastmont doesn't close and MAP has authority to do that and to access records under federal law. Sections 9 through 12 of this bill repeat that authority under state law and that would bless their authority to do it while they already have authority under federal law. It really wouldn't make any difference if it were in this bill, except that it would be a duplication and there is no need for state statute when they already have federal authority.

Closing by Sponsor:

REP. KASTEN referenced testimony and asked **REP. KOTTEL** to review page 9 of HB 366 and compare it with HB 186. She said the definition of abuse is found in section 4 of this bill. Section 17 would require a two-thirds vote because of the immunity granted in the bill. She asked the committee to settle the turf battle discussed during the hearing.

Motion: **REP. MC CULLOCH MOVED TO ADJOURN.**

{Comments: This set of minutes is complete on three 60-minute tapes.}

ADJOURNMENT

Adjournment: The meeting was adjourned at 12:05 PM.

Bob Clark
BOB CLARK, Chairman

Joanne Gunderson
JOANNE GUNDERSON, Secretary

BC/jg

HOUSE OF REPRESENTATIVES

Judiciary

ROLL CALL DATE 2/9/95

NAME	PRESENT	ABSENT	EXCUSED
Rep. Bob Clark, Chairman	✓		
Rep. Shiell Anderson, Vice Chair, Majority	✓ late ~~E~~		
Rep. Diana Wyatt, Vice Chairman, Minority	✓		
Rep. Chris Ahner	✓ late ~~E~~		
Rep. Ellen Bergman	✓ late ~~E~~		
Rep. Bill Boharski	✓		
Rep. Bill Carey	✓		
Rep. Aubyn Curtiss	✓		
Rep. Duane Grimes	✓		
Rep. Joan Hurdle	✓		
Rep. Deb Kottel	✓		
Rep. Linda McCulloch	✓		
Rep. Daniel McGee	✓		
Rep. Brad Molnar	✓		
Rep. Debbie Shea	✓		
Rep. Liz Smith	✓		
Rep. Loren Soft	✓		
Rep. Bill Tash	✓		
Rep. Cliff Trexler	✓		

HOUSE STANDING COMMITTEE REPORT

February 9, 1995

Mr. Speaker: We, the committee on **Judiciary** report that **House Bill 55** (first reading copy -- white) **do pass as amended**.

Signed: Bob Clark
Bob Clark, Chair

And, that such amendments read:

1. Page 2, lines 6 through 8.
Strike: "$500" on line 6 through "pay" on line 8
Insert: "$100"

2. Page 2, line 11.
Following: "who"
Insert: "knowingly"

-END-

DS

Committee Vote:
Yes 15, No 4.

341412SC.Hbk

HOUSE STANDING COMMITTEE REPORT

February 9, 1995

Mr. Speaker: We, the committee on **Judiciary** report that **House Bill 296** (first reading copy -- white) **do pass.**

Signed: Bob Clark

Bob Clark, Chair

Committee Vote:
Yes 11, No 8.

341410SC.Hbk

HOUSE OF REPRESENTATIVES

ROLL CALL VOTE

Judiciary Committee

DATE 2/9/95 BILL NO. 296 NUMBER _____

MOTION: Do Pass

NAME	AYE	NO
Rep. Bob Clark, Chairman	✓	
Rep. Shiell Anderson, Vice Chairman, Majority		✓
Rep. Diana Wyatt, Vice Chairman, Minority		✓
Rep. Chris Ahner	✓	
Rep. Ellen Bergman	✓	
Rep. Bill Boharski	✓	
Rep. Bill Carey		✓
Rep. Aubyn Curtiss	✓	
Rep. Duane Grimes	✓	
Rep. Joan Hurdle		✓
Rep. Deb Kottel		✓
Rep. Linda McCulloch		✓
Rep. Daniel McGee	✓	
Rep. Brad Molnar	✓	
Rep. Debbie Shea		✓
Rep. Liz Smith	✓	
Rep. Loren Soft	✓	
Rep. Bill Tash		✓
Rep. Cliff Trexler	✓	

HOUSE OF REPRESENTATIVES

ABSENTEE VOTE

Date 2-9-95

Mr. Chairman/Mr. Speaker:

I, the undersigned member, hereby vote absentee on:

HB Bill No. 55

Representative Chris Ahner voting Yes
(aye or no)

EXHIBIT 1
DATE 2/9/95
HB 429

Feb. 9, 1995
Testimony of Mike Voeller on House Bill 429

Mr. Chairman, members of the committee. For the record, my name is Mike Voeller and I represent Lee Newspapers of Montana.

We support House Bill 429 and the testimony presented by Charles Walk of the Montana Newspaper Association. I would also like to present some additional testimony.

In the 1960s the late District Judge Lester Loble of Helena established a national reputation for his tough stance on handling juvenile offenders and his insistence that their names be a matter of public record. Today, the names of juvenile offenders, for the most part, are shrouded in secrecy.

I retired last August after 30 years with the Helena Independent Record and 36 years in the newspaper business. Most of my experience has been as an editor and/or editorial page editor. I don't know how many times during those 36 years that I have heard people express frustration with the secrecy surrounding offenses committed by juveniles.

This is just one of many cases in point. In November 1980 I wrote an editorial headlined "There oughtta be a law" which invited readers to submit their ideas for proposed legislation. I was surprised at the number of people who wrote, "Publish the names of juvenile offenders." Early in the 1981 session I discussed the issue and the concerns expressed by readers who responded to my editorial with former Gov. Stan Stephens who was then serving in the Montana Senate from Havre. Stephens sponsored legislation that eventually became Section 2 of 41-5-601. It states that when a petition is filed under 41-5-501, publicity may not be withheld regarding any youth formally charged or proceeded against as or found to be a delinquent youth as a result of the commission of any offense that would be punishable as a felony if the youth were an adult. My recollection is that some teen-agers testified in support of this legislation.

But does the law work in every case? Yesterday I was discussing HB429 with a Helena businessman who expressed his frustration with juvenile crime and secrecy. He told me that last spring the windows of his business as well as the windows of three nearby businesses were shot out with BB guns. The damage totaled $4,800. When the businessman later asked authorities about his case he was told four juveniles had been arrested and placed on probation. When he asked for their names, he was told they were confidential.

Under current law names of juveniles are public record if they are cited for traffic offenses, including DUI. However, if juveniles are charged with illegal possession their names are not a matter of public record. What's the difference?

I readily admit that my opinion that the names of juvenile offenders should be published is based on anecdotal evidence. However, I think it has validity worthy of consideration and that the public would applaud passage of House Bill 429.

EXHIBIT 2
DATE 2/9/95
HB 371

FEBRUARY 6, 1995

Representative Liz Smith
House District #56
Capital Station
Helena, Mt. 59620

Dear Representative Smith,

For the last 16 years, I have been employed by the Missoula County Sheriff's Department. In that time, I have been involved in many situations that required the use of a K9 and his officer. During those times when a K9 was available, his assistance was invaluable. I have had the pleasure to see first hand what a trained K9 is capable of doing whether it be tracking, drug detection or officer protection. I am well aware of the time and effort that is required to train and care for a K9. I feel strongly that K9 units should play a bigger role in law enforcement or possibly at correction facilities in the state of Montana.

Please accept this letter as my support to update Section 45-8-209, MCA, Harming a police dog--penalty. I have reviewed a draft of the amendments to the present code. It is my opinion that the penalties should be more severe than the amendments indicate.

Thank you for your time and attention to this legislation.

Sincerely,

Larry Jacobs

Detective Larry Jacobs
Missoula County Sheriff's Department
200 West Broadway
Missoula, Mt. 59802

EXHIBIT 3
DATE 2/9/95
HB 371

Amendment to House Bill 371
First Reading Copy

Requested by Representative Liz Smith
Prepared by Beth Baker, Department of Justice

1. Title, line 5.
Following: "DOG;"
Insert: "CLARIFYING THE DEFINITION OF POLICE DOG;"

2. Page 1, line 12.
Following: "dog"
Strike: all of line 13 through "manner" on line 14.

3. Page 1, line 24.
Strike: "law enforcement"
Insert: "criminal justice"
Strike: ", as defined in 7-32-201,"

4. Page 1, line 25.
Following: "work"
Insert: ", including but not limited to detection by scent of bombs, explosives, narcotics, or accelerants, or the location of a missing or escaped person"

5. Page 1, line 26.
Following: "(iii)"
Insert: "owned, possessed, or"

6. Page 1, line 26.
Following: "control"
Insert: "or supervision"

7. Page 1, line 26.
Following: "officer"
Insert: "or an authorized representative of a criminal justice agency."

EXHIBIT 4
DATE 2/9/95
HB 371

Exhibit 4 is an oversized poster. The original is stored at the Historical Society at 225 North Roberts Street, Helena, MT 59620-1201. The phone number is 444-2694.

EXHIBIT 5
DATE 2/9/95
HB 186

DEPARTMENT OF FAMILY SERVICES

MARC RACICOT, GOVERNOR

(406) 444-5900
FAX (406) 444-5956

STATE OF MONTANA

HANK HUDSON, DIRECTOR

PO BOX 8005
HELENA, MONTANA 59604-8005

February 9, 1995

DEPARTMENT OF FAMILY SERVICES TESTIMONY IN SUPPORT OF HB 186
PRESENTED BY ANN GILKEY

The department has drafted a bill to generally revise the statutes pertaining to child protective services. The most significant amendments to existing law include the following provisions:

- Section 6 deletes the definition of "dependent youth." This definition is overly broad and not necessary to carry out the agency mandate to protect abused and neglected children. Sections 1 through 4, 7, 14, 17, 18, 23 and 26 simply delete reference to this term and other "clean-up" language.

- Section 6 also defines "parent" to include biological, adoptive and step parents to describe the type of families with which DFS routinely deals.

- Section 8 adds advocates and guardians ad litem, including "CASA" volunteers, as mandatory reporters of suspected child abuse or neglect.

- Section 9 clarifies immunity for social workers or officials investigating reports of suspected child abuse or neglect, or reporting child abuse. New subsection (2) provides limited immunity for people providing or using information regarding risks posed by a potential employee or volunteer who will have unsupervised contact with children.

- Section 10 expands the list of persons to whom DFS records may be released. The majority of the amendments are based on recommendations from federal regulations including the release of information to the state's advocacy program, foster and adoptive families, the alleged perpetrator, a person engaged in research, a child fatality review team, and limited disclosure to the media. We have also included release of limited, relevant information to an employer regarding a prospective employee or volunteer who will have unsupervised contact with children.

- Sections 11 and 12 delete the outdated references to "county welfare department" and "office of human services."

- Section 13 allows a child's hearsay statements to be introduced at administrative hearings regarding licensing to prevent the trauma of young witnesses having to testify.

- Section 15 clarifies that DFS or a licensed child-placing agency must study the home of a prospective placement of a child.

- Section 16 revamps the authority of courts to order limited emancipation of an eligible youth.

- Section 19 clarifies that upon termination of parental rights custody of the child may be granted to the department, a licensed adoption agency or other individual who has been approved by the agency and has received agency consent for the transfer of custody.

- Section 21 clarifies that a parent whose rights have been terminated does not have the right to his or her child's departmental records.

- Section 22, 24 and 25 clarify that the agency not only licenses child care and day care facilities, but in some instances registers such facilities.

EXHIBIT 5
DATE 2-9-95
HB 186

Amendments to HB 186

1. Page 9, line 30.
Following: "advocate"
Strike: "or"
Insert: ", including the state protection and advocacy program unless disclosure would violate provisions of state of federal law; or (j) a"

2. Page 12, line 3.
Following: "by"
Insert: "29 U.S.C. 794(e), 42 U.S.C.10805 and"

3. Page 16
Following: line 4
Insert: "(d) A child may not be removed from his or her home based solely on an anonymous, uncorroborated allegation of child abuse or neglect."
Renumber: subsequent sections

EXHIBIT 6
DATE 2/9/95
HB 186

DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES
CLIENT DATABASE SYSTEMS: PROTECTIVE SERVICES CASE SCREEN

ACTION S

IDENT SSN 100021050 NAME KUIPERS COLTER

REFERRAL DATE 031287
REFERRAL TYPE A
CASEWORKER 01605
COUNTY 16
ALT CASEWORKER ____
(CASE) NUMBER 1604891
CASE NAME KUIPERS
REFERRAL SOURCE 01
CASE STATUS E

CASE DETERMINATION (U OR S):

COMPLAINT TYPE:		
PHYSICAL ABUSE	X	S
EMOTIONAL ABUSE	—	—
SEXUAL ABUSE	—	—
PHYSICAL NEGLECT	—	—
EMOTIONAL NEGLECT	—	—
MEDICAL NEGLECT	—	—
EDUCATION NEGLECT	—	—
FATALITY	—	—
EXPLOITATION	—	—

COMPLAINT RESULT —

NEXT CLIENT SSN _____ —

PERPETRATOR REL TO CLIENT A

INVES START DATE 031287
INVES COMP DATE 031987

SERVICES PROVIDED B C _ _ _ _ _ _

CF SEARCH REQUESTED _

MESSAGE:

HIT PF1 FOR CLIENT SCREEN/PF2 FOR SERVICE SCREEN/PF5 FOR SEARCH SCRREN
Aa B0--SESSION1 R 3 C 78 14:25 7/03/91

COPY

PLAINTIFF'S EXHIBIT
66

P.R. 88-10-2-05

VOLUNTARY STATEMENT

(Not Under Arrest)

EXHIBIT 7
DATE 2/9/95
HB 186

I, Mildred Stewart, am not under arrest for, nor am I being detained for any criminal offenses concerning the events I am about to make known to Officer Saxon. Without being accused or questioned about any criminal offenses regarding the facts I am about to state, I volunteer the following information of my own free will, for whatever purpose it may serve. I understand that this statement may be used in a court of law if deemed necessary by the prosecuting attorneys.

I am 58 years of age and I live at 118 N. Front Livingston, Mt.

My home phone # is: 222-2436 My business phone # is ____.

Who was involved? a man, a little girl maybe 2 years old and a boy about 6 or 7.

When? outside + inside of Ray restaurant in Bozeman

Where? on Sunday Oct 2 about 2 oclock p.m.

What was involved? (Details of incident) My husband + I were having lunch in the restaurant when we saw a dark, slim, smaller man bringing a very nicely dressed little girl, by the hand up the walk beside our window. The girl started to cry a bit and the man picked her up, stalked back to a maroon van with shaded windows and opened the side door throwing her into the back seat area. He then closed the door & we could see him raising his hands over his head & seemed to be hitting her again + again. We saw him then open the van door. Jerked the girl from the floor & stood her near the door holding and ... he appeared to raise the dress & looked at her panties took her out of the van. We observed she was not crying but her face was [illegible] (use back if needed)

I have read each page of this statement consisting of 1 pages(s), each page of which bears my signature, and corrections, if any, bear my initials, and I certify that the facts contained herein are true and correct. Dated at Livingston this 4 day of Oct, 1988.

____
WITNESSED BY OFFICER

Mildred A Stewart
Signature of person giving the Voluntary Statement

BOZEMAN POLICE DEPARTMENT

COPY

P.R. No. _____

her cheeks

swollen and appeared to have black marks on them. The girl seemed to have no expression at all & made no sounds but she was able to appear to scared very silently. He then came into the restaurant where 3 ladies & two boys about 6-7 & 10 or so were sitting in the dining area - the boys got up & went up the steps near the salad bar. The man quickly & very angry caught the smaller boy by the upper arm & shook him - The boy came around the salad bar near us - he was rubbing his arm & pressing as if in pain & the man then brought an ice cream cone & all three children sat down at a table -

A young couple was sitting at a table at the end of the restaurant directly in front of the van - The young man came to our table & asked if we would tell what we saw as he had already taken the license number and had seen what was happening also.

M Hurst

The above coincides with my observations.

Wm Stewart

P.R. # 88-10-4-05

Exhibit 8

DATE 2/9/91

HB 186

VOLUNTARY STATEMENT

(Not Under Arrest)

I, Jay M. Provenzano, am not under arrest for, nor am I being detained for any criminal offenses concerning the events I am about to make known to Officer Sanem. Without being accused or questioned about any criminal offenses regarding the facts I am about to state, I volunteer the folbwing information of my own free will, for whatever purpose it may serve. I understand that this statement may be used in a court of law if deemed necessary by the prosecuting attorneys.

I am 24 years of age and I live at 402 Nelson Story.
My home phone # is: 587-2761 My business phone # is 586-4423.
Who was involved? Hyspanic looking male in his late 30's early 40's, with black short hair + glasses with a red print shirt.
When? 2:30 p.m on Oct. 2, 1988.
Where? Rax Restaurant outside the parking lot in vehicle.
What was involved? (Details of incident) Redish, maroon van pulled up outside of Rax. We were sitting at a table inside looking out at the parking lot. People got out of a van + Stated to enter restaurant except for the man with glasses + a hispanic looking little girl around 3 or 4 years old + she was crying. She wouldn't stop so he grabbed her arm + pulled her back into the van + sat her down + her back. He hit her with his hand ~~[illegible]~~ on her head ~~[illegible]~~ then he laid her down + at first I thought maybe he was spanking her but then I saw he wasn't using his hand but his fist. >

(use back if needed)

I have read each page of this statement consisting of 1 pages(s), each page of which bears my signature, and corrections, if any, bear my initials, and I certify that the facts contained herein are true and correct. Dated at _____ this 2nd day of October, 1988.

Sanem

WITNESSED BY OFFICER

Jay M. Provenzano

Signature of person giving the Voluntary Statement

BOZEMAN POLICE DEPARTMENT

P.K. No. _____

And it looked like he hit her 4 or 5 times. Then he quit & he opened the door & started brushing her hair. They both got out of the van & I saw bruises on her face. She stopped crying but she looked frightened. We heard two people behind us about the incident also, so Sam went to talk to them & they saw the same thing. Then they went into the restaurant with nothing in there hands. His wife who was Caucasion also had two other Caucasion kids. The little boy said that she needed her diaper Changed but the dad just grabbed the little girl & put her in the high chair without Changing her diaper. The wife then went back out to the van to get the checkbook. That was the time that Sam decided to talk to the other couple who saw what we did and we got their name. Then we left the restaurant.

P.R. . 88-10-0-05

9

DATE 3/9/95

HB 186

VOLUNTARY STATEMENT

(Not Under Arrest)

I, SALVATORE F PROVENZANO, am not under arrest for, nor am I being detained for any criminal offenses concerning the events I am about to make known to Officer Sorem. Without being accused or questioned about any criminal offenses regarding the facts I am about to state, I volunteer the following information of my own free will, for whatever purpose it may serve. I understand that this statement may be used in a court of law if deemed necessary by the prosecuting attorneys.

I am 23 years of age and I live at 402 NELSON Story towers.
My home phone # is: 587-2761 My business phone # is N/A.
Who was involved? Identity is not SFP KNOWN, ADULT MALE (Hispanic) 7'10" (sic) Black Hair, Black Mustache, w/sunglasses, SMALL female child 3-4 yrs old (Hispanic
When? 2 OctOber 1988
Where? Rax Restaurant Parking lot
What was involved? (Details of incident) while sitting in Rax Restaurant (window seat) the previously mentioned Male dragged (by the arm), then carried the previously mentioned female child But into the parking lot and into a new 86-88 ford escort (Maroon color) License No. 6-81241. The Male then hit the female 3 times in the head area. Then He layed her across the rear seat and repeatedly hit the child. These "Hits" were with a closed fist. After the Male hit the female approx. 10 times he yanked her from the SFP vehicle and brought her into the restaurant. He took her into the restroom where they remained for approx. 5 min. When they came out of the restroom they walk within 2 feet of where I was sitting. The small child SFP looked very frighted beyond the point of crying. Her face was swollen or Puffy and Bruises were all over (her face). They sat down with.

(use back if needed)

I have read each page of this statement consisting of _____ pages(s), each page of which bears my signature, and corrections, if any, bear my initials, and I certify that the facts contained herein are true and correct. Dated at _____ this _____ day of _____, 198___.

T Sorem.
WITNESSED BY OFFICER

Signature of person giving the Voluntary Statement

BOZEMAN POLICE DEPARTMENT

P.R. No. _____

the rest of the family and the younger boy made comment to the fact that her diper was dirty and that someone should change + The ADULT MALE (father) grabbed the small female child and said "don't worry about it. go get something to eat!" His tone was angry. While the Adult male was bringing the small female child into her (after the beating) the mother went out to the vehicle and looked for something. When she returned it seemed like she was carrying a checkbook. While this incident was taking place, the mother seemed oblivious to what was happening. After this happened I walked over to the table next to mine, (also a window seat) and talked with Bill & Mickey Stewart of Livingston MT. They said they had seen exactly what I had seen, and had no qualms about giving me their Name and address. They urged me to call the police as soon as possible. I was shaking while I wrote there address down because I was so angry at what had just happened. I went back and called the Bozeman police Dept. and reported what I had seen to officer SANEM. I did so appox. 30 min after the event took place.

(Note: after beating the child, the father opened the door of the van and held the child's face in his hand. He then started to [illegible] her hair.)

EXHIBIT 10
DATE 2/9/95
HB 186

REPORT OF INVESTIGATION

SUBJECT: Report of Investigation of Domestic Abuse

REFERENCE: Complaint #88-10-02-05 (#_____)

Complainant: Sam Provenzano

SUSPECT(S): Name: Arthur Dennis KUIPERS
Address: 200 E. Rosebud Belgrade, Mt
Date of Birth: 3/7/52
Social Security Number:

10-2-88 DETAILS OF COMPLAINT/INVESTIGATION:

At approximately 1445 hrs. this investigating officer, Linda Sanem, received a call on the emergency line from Sam (Salvatore) Provenzano who stated that he wanted to report a case of child abuse. Over the phone he told me that a hispanic looking man had taken a small child, approx. 3 yrs. old, into a maroon van license #6-81861 and beaten her with several strikes with a closed fist. He stated he thought they were still at Rax where the incident occurred. I responded with Officer Paul Erickson to investigate the complaint. The van was still there on our arrival. Officer Erickson asked the suspect to go with him. Officer Erickson spoke with the suspect identified as Arthur Dennis KUIPERS. I observed a child matching the description the compl. had given and asked to speak with the child's mother. A woman in a dress with blondish hair accompanied me the a back hallway carrying the child. The child was dressed in a blue sailor suit and there were several bruises on the child's face. I identified myself to the female and told her that we were investigating a complaint of possible domestic abuse. I asked her what the child's name was and how her face became bruised. She told me the child was recently adopted and had been "falling down alot". I asked the female her name. She replied, "I don't know if I should give it to you or just call my attorney". After telling her again why I was there and she had to give me her name she gave her name as "Martha". She reluctantly gave me her address and phone # but refused to give me her date of birth. She also told me the child's name was Carly and that social workers already know about the bruises. She was very uncooperative and defensive at times stating that she saw nothing in reference to Carly being hit. She told me that she went to the van to get a diaper. At times she was calm and seemed appreciative of what I was telling her about her husband and at times was upset that I was interfering. She demanded to know why I was there after I had already told her why I was there. Officer Quam and Officer Erickson heard part of my conversation with "Martha". Officer Erickson advised her that our report and witness statements would be turned over to SRS who would investigate the complaint further. We then left the restaurant.

Following that I met with Sam and Joy Provenzano at the station and obtained statements from them. So far I have been unable to obtain written statements from the other two witnesses, William and Mickey Stewart in Livingston. I spoke briefly with Mrs. Stewart on the phone and I am sending them statements to fill out.
As of 1630 hrs. 10-2-88 this concludes this officer's investigative report.

Officer Linda Sanem

Linda Sanem.

EXHIBIT 11
DATE 2/9/95
HB 366

MONTANA ADVOCACY PROGRAM, Inc.

316 North Park, Room 211
P.O. Box 1680
Helena, Montana 59624

(406)444-3889
1-800-245-4743
(VOICE - TDD)
Fax #: (406)444-0261

February 9, 1995

Bob Clark, Chairperson
House Judiciary Committee
State Capitol
Helena, Montana

Re: HB 366 and HB 186

Dear Chairman Clark and Members of the Committee:

For the record, my name is Clifford Murphy and I am the President of the Board of Directors for the Montana Advocacy Program. I am also a member of the Mental Health Association of Montana, the State and Local Youth Advisory Councils of the Department of Family Services and the Montana Committee for Emotionally Disturbed Children.

Testimony in Support of HB 366

Montana Advocacy Program is a private, non-profit organization designated by the State of Montana to protect and advocate the rights of persons with disabilities. MAP is fully federally funded and thus, has the rare distinction of being a "funded federal mandate."

The Board of Directors of MAP is a group of persons from various walks of life and with varied outlooks on social events, but with a common interest in advocating for the rights of persons who are seriously disabled. We volunteer our time. By law, my duty and the duty of my colleagues is to determine policy for the agency within the limits of federal laws governing the program and to attempt to develop the specific program so as to achieve maximum effectiveness in providing protection and advocacy for persons with disabilities.

On behalf of this Board, I urge you to support HB 366 to help us achieve greater effectiveness.

HB 366 codifies in state law the duties and authorities of two MAP programs, the Protection and Advocacy for Persons with Developmental Disabilities (PADD) program and the Protection and Advocacy for Individual Rights (PAIR) program. When Montana received funds under the protection and advocacy statutes, the Governor gave assurances that our program has these authorities. What we seek to do in HB 366 is merely to ensure that state law is consistent with the assurances already given by the Governor, so that we can more effectively perform our advocacy responsibilities. HB 366 does not broaden MAP's authority in any way.

Our primary concern is that our authority to access records, persons and facilities be clear in state law. Currently, our staff sometimes face long delays in obtaining records which are needed to effectively represent a client. These delays can cause harm to a client. The clarification contained in HB 366 will help eliminate delay when MAP is asked to advocate on a client's behalf.

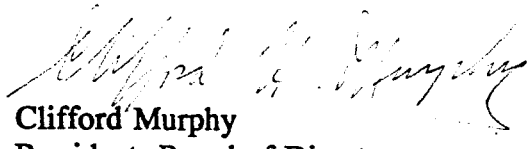
Opposition to Mandatory Reporting Requirement in HB 366 and HB 186

There is one portion of HB 366 to which we cannot lend our support and that is the provision in Section 6 which requires that MAP report all incidents of suspected abuse or neglect uncovered by the agency to the Department of Family Services. We oppose a similar provision in HB 186.

The Department of Family Services and MAP share a common goal: to eliminate abuse and neglect of persons with disabilities. Both agencies have authority and responsibility to investigate incidents of neglect and abuse. Our Board and staff do not believe that requiring MAP staff to report to DFS all incidents it encounters will further the common goal of both agencies. MAP is viewed by some clients or potential clients as a more independent agency than DFS; some of our referrals are from persons who perceive (whether rightly or wrongly) that DFS is not independent from servicing agencies and therefore not likely to provide the remedy they seek. Such distrust, whether or not justified, will carry over to MAP if MAP has to report all cases of neglect or abuse to DFS. The result will be that fewer incidents of neglect or abuse will be uncovered.

In conclusion, I urge you to support HB 366. However, I respectfully request that you attach an amendment to delete the mandatory reporting provision. The common goal of DFS and MAP will be furthered by that elimination. Thank you for your time.

Sincerely,



Clifford Murphy
President, Board of Directors

EXHIBIT 12
DATE 2/9/95
HB 349

Mr. Chairman and Committee Members:

For the record, my name is Paula Crumb. For the past two (2) years I have worked as an Abuse Prevention Specialist on a Developmental Disabilities Planning and Advisory Council funded Project. The goal of this project was to reduce the incidents of abuse, neglect and exploitation of persons with developmental disabilities in Montana. I am testifying today because I am a strong advocate for people with developmental disabilities. In my research I found that on a national level it is estimated that between 90 and 100% of persons with developmental disabilities have experienced abuse at some point in their lives.

Throughout the life of this project, I worked in conjunction with the abuse prevention task force. This body is made up of members from the Developmental Disabilities Division (DDD), the Department of Family Services(DFS), the Montana Advocacy Program (MAP), the Department of Justice,(DOJ) parents of persons with developmental disabilities, and providers of community-based services to people with developmental disabilities. The task force established the goals of the project, set the direction for research and fixed on project outcomes.

Major outcomes of the project included: (1) a requirement that all contracted provider organizations conduct a thorough screening and background check, including a statewide check through the DOJ, on all prospective employees; (2) the writing and statewide distribution of a comprehensive handbook covering best practices on screening and hiring good people to work in service provider agencies; (3) the production and statewide distribution of a video, brochures and posters that are used to train newly hired staff and remind veteran staff how to prevent, recognize and report abuse when and if it occurs; and (4) the identification of legislation that would be pursued by the DFS during 1995 session of the legislature. This includes H.B. 366. These changes will benefit persons with developmental disabilities as well as the agencies providing support and assistance to these individuals.

I support this legislation. In particular sections 52-3-813 and section 52-3-814. Section 52-3-814 allowing immunity from liability when information is exchanged in good faith. With the ever present danger of costly litigation this section is vital to stimulate an open exchange of information. This immunity assists the employer to feel comfortable about using information given when making a hiring decision and ultimately helps to protect people with developmental disabilities. Section 52-3-813 allowing the department to give information for the purpose of background screening for prospective employees or volunteers. Currently, there is access to statewide conviction information, but many individuals who have abused and are substantiated by the department are not charged with a crime by the county attorney. Having access to the department's information is another way for providers to gain information about a prospective employee and assure that

people with developmental disabilities are free from abuse. My only concern with this section is that the appeal process available is an administrative review through the same department that makes the case determination. If we are denying employment or taking other personnel action based upon the department's decisions, I believe it is necessary to build in due process procedures up front by providing for a fair hearing process that allows substantiated individuals to appeal decisions before an impartial body.

EXHIBIT 13
DATE 2/9/95
HB 366

MONTANA ADVOCACY PROGRAM, Inc.
316 North Park, Room 211
P.O. Box 1680
Helena, Montana 59624

(406)444-3889
1-800-245-4743
(VOICE - TDD)
Fax #: (406)444-0261

February 9, 1995

Bob Clark, Chairperson
House Judiciary Committee
State Capitol
Helena, Montana

Re: HB 366 and HB 186

For the record, my name is Mary Gallagher and I am the acting Executive Director of the Montana Advocacy Program. I would like to submit the following testimony in support of HB 366, but in opposition to those provisions in HB 366 and HB 186 which mandate the reporting of incidents of abuse and neglect to the Department of Family Services.

Opposition to mandatory reporting requirement in HB 366 and HB 186

I want to expand upon the testimony of our Board President, Cliff Murphy, and explain further why MAP is opposed to the mandatory reporting requirement. First, let me explain more about the protection and advocacy system programs. Basically, the programs have two duties: (1) to independently investigate incidents of abuse or neglect involving persons with disabilities; and (2) to pursue legal and other appropriate remedies on behalf of persons with disabilities to ensure enforcement of their rights. We believe the reporting requirement would improperly interfere with these advocacy duties and, in turn, negatively impact our client.

1. The reality is that MAP refers most complaints of abuse and neglect to DFS for investigation. However, there are times when DFS is perceived as being biased. This is especially true in rural areas where there may be only one DFS social worker; the DFS worker and manager of the facility being investigated are often friends. One advocate at MAP has received at least six calls in the past year from people who called our agency primarily because they did not believe DFS was effective. Another advocate received a referral when DFS declined to investigate because the only witness to the incident was developmentally disabled and the DFS worker believed, therefore, that the witness was not credible. Before attempting to conduct our own investigation, the advocate approached DFS administration and the case was re-opened for an investigation. So please do not think that MAP is refusing to report to DFS and putting clients at risk. MAP does report most incidents to DFS, but there are times when MAP is sought out because MAP is viewed as more independent. At those times, MAP must retain the discretion to conduct an independent investigation without involving DFS.

2. When conducting an investigation, MAP must be able to control the release of information in a strategic manner: We must be able to ensure that the release of information does not

compromise the integrity of the investigation, expose vulnerable persons to retaliation, or interfere with the potential legal remedies.

3. The proposed reporting requirement would, in most cases, violate MAP's obligation under federal law to maintain confidentiality. MAP staff would be at risk of violating confidentiality provisions of federal law whenever they reported an incident of abuse or neglect to DFS, and at risk of violating the state reporting requirements whenever they decided not to report an incident of abuse or neglect. I do not believe our employees should be put in that position whenever they try to represent an individual.

4. The clause which allows MAP to refrain from disclosing information if it "would violate provisions of federal or state law" is of little comfort or direction. It would be a violation of federal law to compel disclosure in any circumstance where MAP exercises the discretion, in the interest of the client, to refrain from reporting. This would mean that the mandatory reporting requirement would only apply to those situations in which MAP chooses to report. Yet those reports which are made voluntarily would be made with or without this statutory requirement.

5. There is a real risk that a statutory reporting requirement could be used by facilities who are being investigated to hinder an investigation initiated by MAP. The facility could seek criminal prosecution of MAP for not first reporting to DFS.

6. As currently drafted, MAP would be required to disclose information to DFS even when MAP is investigating a DFS facility. This would not only seriously undermine the investigation; it is a clear violation of federal law. A P&A cannot be required to disclose to the facility being investigated the substance of a report of abuse or neglect. [See February 8, 1994 opinion letter issued by the Administration on Developmental Disabilities (within the Department of Health and Human Services), which administers the DD Act.]

7. This requirement will cause more confusion in the field about MAP's role and MAP's authority to conduct investigations. MAP already faces resistance, due in part to the lack of clarity in state law about MAP's duties and authorities. There would be more confusion about how MAP could be an agency with separate investigative authority, yet be required to report to DFS.

<u>Support of HB 366</u>

We urge your support of the provisions of HB 366 which clarify in state law the responsibilities and authorities of the state protection and advocacy system.

1. The portions of this bill clarifying MAP's responsibilities have two components. There are two sections, Sections 11 and 12, which recognize that the PADD and PAIR programs are designated protection and advocacy systems in the State of Montana and which incorporate federal provisions describing MAP's duties and authorities into state law. A section very similar to these was passed by the Montana legislature two sessions ago with respect to the Protection and Advocacy for Individuals with Mental Illness (PAIMI) program. Second, this bill amends those sections in state law which restrict access to records to include the PADD, PAIR and

EXHIBIT 13
DATE 2-9-95
HB 366

PAIMI in the list of identified entities with access authority.

2. Our primary concern is that our authority to have access to persons, records and facilities be clearly stated in state law. Currently, our staff sometimes face long delays in obtaining records which are needed to effectively represent a client. These delays can cause harm to a client, especially if we are prevented from having the access we need to conduct an investigation of abuse or neglect. This happens because state law provisions on confidentiality which list those persons or entities who are authorized to gain access to records do not currently list the P&A system. Yet, most providers rely upon state law when deciding whether to allow access.

As Cliff Murphy testified, HB 366 does not broaden MAP's authority in any way; it simply clarifies the law to eliminate the conflict between state law and the assurances given by the Governor about MAP's authority when Montana accepted federal funds.

In closing, I urge you amend HB 366 and HB 186 to delete the requirement that MAP report incidents of abuse and neglect to DFS and then pass HB 366. Thank you for your time.

Sincerely,

Mary Gallagher

Mary Gallagher
Acting Director

EXHIBIT 14
DATE 2/9/95
HB 366

DEPARTMENT OF FAMILY SERVICES

MARC RACICOT, GOVERNOR

(406) 444-5900
FAX (406) 444-5956

STATE OF MONTANA

HANK HUDSON, DIRECTOR

PO BOX 8005
HELENA, MONTANA 59604-8005

February 9, 1995

DEPARTMENT OF FAMILY SERVICES TESTIMONY IN SUPPORT OF HB 366

The Department of Family Services urges your support of HB 366. The bill will clean up language in the statutes related to adult protective services, such as changing references to "developmentally disabled" people to "persons with developmental disabilities." It also consolidates redundant laws and repeals unnecessary laws.

The bill expands the mandatory reporting law by including advocates and guardians as people who must report suspected abuse or neglect of the elderly and persons with developmental disabilities. The release of confidential information is expanded to include a broader range of people who serve the client population, especially providers of services to the elderly and persons with developmental disabilities. For example, if a nursing home operator asked for information regarding an applicant who would be providing direct, unsupervised care to an elderly person, the agency could inform the provider whether there was protective services information indicating that the person posed a risk to clients.

Along with authorizing the release of information to providers, the bill provides limited immunity to persons giving or receiving such information.

Other provisions of the bill deal with the advocacy and protection program in Montana and will be addressed by staff from that program.

Proposed Amendment to HB 366

1. Page 9, line 17.
Following:"systems"
Strike: "authorized under the provisions"
Insert: "pursuant to the authorization"

2. Page 14, line 9.
Strike: "ischarge"
Insert: "discharge"

EXHIBIT 15
DATE 2/9/95
HB 366

MONTANA DEPARTMENT OF FAMILY SERVICES

ADULT PROTECTIVE SERVICES

PROGRAM DESCRIPTION:

Protective services are provided by DFS community social workers to persons age 60 and older and to mentally or physically disabled adults who are at risk of physical or mental harm due to abuse, sexual abuse, neglect, or exploitation. DFS social workers investigate any referrals of alleged abuse, sexual abuse, neglect, or exploitation.. If the investigation indicates the alleged victim has been or is being abused, sexually abused, neglected, or exploited the social worker develops a plan of services to eliminate or reduce the risk to the aged or disabled victim.

GOALS:

- Provide each client with a choice in selecting or refusing services insofar as he/she is able.
- Provide the necessary services and supports to allow the client to do as much for him or herself as he or she is able.
- Provide the least restrictive services to allow the client to function at the highest independent level possible.
- Protective services will only be provided until the risk is reduced or removed or until the client refuses to accept services.

SERVICES PROVIDED:

DFS community social workers provide or arrange for most of the protective services that are provided to victims. DFS home attendants and human service aides also may provide protective services in case specific situations. In rural areas the local DFS social worker is not only responsible for adult protective services but also must provide child protective services. Adult protective services that the DFS social worker can provide or arrange for can include:

1. Investigation and assessment of referrals.
2. Utilization of family and community resources.
3. Strengthening current living situations.

4. Removal from unsafe situations.

5. Development and protection of financial resources.

6. Legal intervention. (could include court ordered investigations, arranging for restraining orders, or arranging or obtaining full or limited guardianships)

7. Public awareness activities as time permits to assure that victims of abuse, neglect, or exploitation are identified and provided services.

BUDGET AND FUNDING:

Please refer to the department's overall budget. The department does not have a separate budget for adult protective services since most of the field staff that provide these services are also responsible for providing protective services to children.

PERFORMANCE INDICATORS:

1. DFS staff completed investigations of 694 cases of adult abuse, neglect or exploitation in FY 87. In FY 94 DFS staff completed 1480 investigations. The number of completed APS investigations more than doubled in the past seven years.

   Based on historical data, it is projected that DFS adult protective services workers will investigate 1628 referrals in FY96 and 1791 referrals in FY97.

2. DFS staff provided extensive adult protective services to 317 clients in FY 87 and to 503 clients in FY 94.

   Based on historical data, it is projected that DFS staff will provide extensive adult protective services to 553 clients in FY 96 and to 608 clients in FY 97.

   It is projected that DFS staff will provide brief adult protective services to an additional 359 clients in FY 96 and to 395 clients in FY 97. (Brief services could include identifying services other than adult protective services, referring clients to those services, assisting clients to access those services, and follow up.)

3. DFS will continue to contract with St. Vincent's Hospital in Billings to operate a 24-hour hot-line. The hot-line will process 216 calls in FY 96 and 238 calls in FY 97.

EXHIBIT 16
DATE 2/7/95
HB 366

HB 366
AN ACT GENERALLY REVISING THE LAWS RELATING TO ADULT PROTECTIVE SERVICES;....EXPANDING THE LIST OF PERSONS TO WHOM CERTAIN CONFIDENTIAL INFORMATION MAY BE RELEASED;...GRANTING LIMITED IMMUNITY TO PERSONS WHO PROVIDE OR USE BACKGROUND OR EMPLOYMENT SCREENING INFORMATION REGARDING AN EMPLOYEE'S OR VOLUNTEER'S HISTORY OF ABUSE...

February 8, 1995

I am Judith H. Carlson, citizen, testifying in favor of HB 366. As some of you know, I have been involved in human services in Montana for many years, most recently as a lobbyist for several organizations and as a member of an Abuse Prevention Task Force made up of providers of services to persons with developmental disabilities.

One problem which has come up from time to time over the years has been abuse by staff of residents or users of services. More than once, the same person will be abusive in one agency, be fired, and then hired by another similar agency. Because of the laws regarding fair treatment of personnel, it is not possible for one agency to tell another agency that the applicant was fired because of abuse.

Our Task Force considered many ways of preventing abuse in the first place. Training has been beefed up and increased through use of written and video materials. This is a major method of prevention of abuse.

But one area which kept coming up was the one where abusive persons can keep making the rounds of human service agencies. If they are never actually convicted of a crime, there is no record.

Certainly we are concerned about protection of the rights of employees. We do not want to be involved in spreading unfounded rumors. But there must be a first consideration for the safety of the individuals under the care of the state. The parts of this bill which will help considerably with this are : 1) the new section specifying that information can be shared with an employer who is screening applicants, and 2) the new section providing immunity from civil and criminal liability for a person who provides information about an employees.

My hat is off to Representative Betty Lou Kasten for sponsoring this needed piece of legislation.

Judith H. Carlson
408 Washington Drive
Helena, MT 59601

EXHIBIT 17
DATE 2/9/95
HB 366

Jack E. Sands
ATTORNEY AT LAW

THE GRAND
100 NORTH 27TH STREET
BILLINGS, MONTANA 59101
406/245-2591

February 6, 1995

The Honorable Bob Clark
Chairman
House Judiciary Committee
Capitol Station
Helena, MT 59620

RE: Proposed amendment to HB 366 and HB 186

Dear Chairman Clark and Members of the Committee:

I am writing as a private Montanan and one of the ten volunteer members of the Board of Directors of the Montana Advocacy Program, Inc. MAP's Board of Directors opposes those provisions of HB 366 and HB 186 which require that MAP report all incidents of suspected abuse or neglect to the Department of Family Services, and respectfully requests that those provisions be amended out of the two bills.

Before explaining why, it might be helpful to the Committee to understand MAP's unique role in our State. MAP is federally funded but is governed by a Board of private Montanans. The federal statutes and regulations governing the programs MAP administers contain reporting and administrative guidelines, but its Board of Directors establishes MAP's priorities, goals, and objectives.

MAP's job, essentially, is to be a law firm for some of Montana's most disadvantaged-- the developmentally disabled, mentally ill, brain-injured, and others who are disabled through no fault of their own. MAP's mandate is to regard these Montanan's as our legal clients-- to serve their interests, to be guided by their commands, and to owe loyalty to no others, particularly to State or federal government agencies, to the institutions in which our clients are sometimes confined, or to those who provide services to them. MAP's role is to make the laws work for our clients, from their perspective. Thus MAP is directed by Montanans and serves Montanans.

With this background in mind, let me outline the reasons why we request that the mandatory reporting provisions of HB 366 and HB 186 not apply to MAP:

First, they interfere with MAP's role to advocate for the interests of our clients. Our clients will not trust us if they cannot confide in us.

Second, they would often violate the attorney- client privilege.

Third, they violate federal law. Those laws require MAP to maintain client confidentiality. The specific legal references are contained in the attached letter from the National Association of Protection and Advocacy Systems and can be explained more fully by MAP's attorney, Andree Larocc.

Fourth, the qualifier allowing MAP to avoid mandatory disclosure if doing so would "violate provisions of federal or state law" makes no sense. The law is supposed to provide direction to us. As a former navigator of merchant ships, I can tell you that I never read a nautical chart that said: "Go west unless going in that direction would be wrong." It is your obligation as lawmakers to determine what the law is, what our direction should be. It is neither good public policy nor fair to require such a determination on the spur of the moment as each individual case arises, which seems to be implied by the language.

Fifth, these provisions interfere with MAP's independence, and we can only be effective if we are independent. A case that MAP investigates may be abuse or neglect by a DFS employee or may be a case where DFS has refused to act. It might not be in our client's interest to prematurely warn DFS of MAP's strategy or even its involvement.

In the overwhelming number of cases, MAP has and will continue to report to and cooperate with DFS. But for the reasons outlined above, we firmly believe that the provisions requiring MAP to report suspected abuse and neglect to DFS should be removed from the two bills.

Thank you for providing MAP with the opportunity to address our concerns to you. I regret that previous commitments made it impossible for me to express these views personally. If you should have questions that are not adequately addressed by Andree, she or I would be pleased to supplement these remarks in any manner desired.

Sincerely,

Jack Sands

Jack Sands
Member of the Board of Directors
Montana Advocacy Program, Inc.

JS/1

EXHIBIT 18
DATE 2/9/95
HB 366

NAPAS National Association of Protection & Advocacy Systems

February 8, 1995

Bob Clark, Chairman
House Judiciary Committee
State Capitol
Helena, Montana

Dear Chairman Clark and Members of the Committee:

The National Association of Protection and Advocacy Systems (NAPAS) wishes to submit this letter to you and the House Judiciary Committee as testimony on HB 366. NAPAS is a voluntary membership organization for the nationwide system of protection and advocacy system agencies (P & As). P & As were established under a number of federal statutes (which, as is discussed below, would be impacted by HB 366) to provide legal representation and related advocacy services on behalf of all persons with disabilities. NAPAS is authorized by the federal agencies which administer these statutes to provide P & As with standards on the implementation of these requirements, as well as related training and technical assistance.

We understand that the Montana Department of Family Services (DFS) is proposing to require the Montana Advocacy Program (MAP) -- the designated P & A for the State of Montana -- to report all incidents of suspected abuse or neglect uncovered by the agency to the DFS, "unless disclosure would violate provisions of federal or state law."

We conclude that such a mandatory reporting requirement would conflict with the confidentiality obligations imposed on MAP by the statutes and regulations governing the P & A system; in addition, it would generally interfere with MAP's authority under these laws to investigate and take corrective action with regard to incidents of abuse and neglect. Accordingly, we urge the Legislature not to pass the reporting requirement.

The specific statutory programs that would be affected by this legislation are the following: the Developmental Disabilities Assistance and Bill of Rights (DD) Act (42 U.S.C. 6000 et seq.), the Protection and Advocacy for Individuals with Mental Illness (PAIMI) Act (42 U.S.C. 10801 et seq.), and the Protection and Advocacy for Individual Rights (PAIR) Program under the Rehabilitation Act (29 U.S.C. 794e) (Detailed information describing these statutory programs is contained in an attachment to this letter.)

The three statutory programs (which, individually, serve distinct populations of persons with disabilities), all generally require P & As to strictly maintain the confidentiality of all personal information about persons served by the P & A (including, but not limited to, information contained in client records).[1] This obligation extends to information provided to the P & A concerning persons who may have been subject to abuse or neglect. While there are some very narrow specific exceptions to this confidentiality obligation (e.g., information may be released with the written consent of a client or his or her legal representative), it is clear that the proposed mandatory reporting requirement would, in most cases, violate the obligation.

Further, insofar as the reporting requirement would compel the disclosure of information about an individual communicated to an attorney in confidence, it would lead to violations of the attorney-client privilege.

Moreover, the reporting requirement would improperly interfere with the P & A's primary advocacy duties under the P & A statutes. Under all there of these programs, MAP has two related obligations -- to (1) independently investigate incidents of abuse or neglect involving persons with disabilities, and other violations of their rights; and (2) pursue legal and other appropriate remedies on behalf of persons with disabilities to ensure the enforcement of their constitutional and statutory rights.

The leading cases interpreting the P & A statutes have held that P & A agencies must have unrestricted discretion to independently carry out these mandates. Mississippi Protection and Advocacy System, Inc. v. Cotten, No. J87-0503(L) (S.D. Miss. August 7, 1989), aff'd, 929 F2d 1054 (5th Cir. 1989); Robbins v. Budke, 739 F.Supp. 1479 (D. N.M. 1990).[2] All P & As, including MAP, must have unrestricted discretion to determine, in the interest of a client, whether to conduct a particular investigation independently, and to refrain from making a referral to an outside agency. P & As must be able to control the release of information in a strategic manner: The agency must be able to ensure that the release of information does not compromise the integrity of the investigation, expose vulnerable persons to retaliation, or interfere with

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[1] These confidentiality requirements are mandated by the statutes themselves and by their implementing regulations. See 45 CFR 1386.21 (DD Act), 34 CFR 381.34 (PAIR Program), 59 Federal Register 64367, December 14, 1994 (proposed regulations implementing the PAIMI Program).

[2] Federal funding is received by Montana to provide protection and advocacy services for persons with disabilities on condition that the P & A has an effective system implementing the federal mandates discussed above. The court in the Cotten case held that "the state cannot satisfy the requirements of the [DD Act] by establishing a protection and advocacy system which has this authority in theory, but then taking action which prevents the system from exercising that authority."

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potential legal remedies.[3] The mandatory reporting requirement would interfere with all of these authorities.

It might be argued that the proposed legislation would not require MAP to disclose information in a manner which interferes with these federal mandates, inasmuch as the proposal would permit the P & A to refrain from reporting where to do so "would violate provisions of federal or state law." However, as discussed above, in many cases such reporting would clearly violate federal law. Therefore, this exception essentially swallows the rule -- and there is no need establish a statutory reporting requirement.

Moreover, the reporting requirement would place MAP in the untenable position of risking violation of federal confidentiality requirements every time it reported an incident of abuse or neglect to DFS. Conversely, MAP potentially would be subject to prosecution whenever it determined that reporting to DFS would be contrary to its federal obligations. In either case, the burdens placed on MAP would severely undermine its ability to carry out its obligations under the P & A statutes.

Thank you very much for considering our concerns. If you have any questions concerning this matter, please do not hesitate to contact me or Gary Gross of my staff.

Sincerely,

Curtis L. Decker/gg

Curtis L. Decker
Executive Director

Attachment

cc: Administration on Developmental Disabilities, HHS
Center for Mental Health Services, HHS
Rehabilitative Services Administration,
Department of Education

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[3] This principle was clarified in a February 8, 1994 opinion letter issued by the Administration on Developmental Disabilities (within the Department of Health and Human Services), which administers the DD Act. That letter states that a P & A cannot be required to disclose to a third party the substance of a report of an incident of abuse or neglect or the basis of the P & A's belief that such an incident has occurred. The agency concluded that "disclosure of such information would compromise the effectiveness and integrity of the investigation and could expose sources and already vulnerable clients to retaliation."

NAPAS National Association of Protection & Advocacy Syst
900 Second St., NE, Suite 211, Washington, DC 20002 (202) 408-9514
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STATE PROTECTION AND ADVOCACY SYSTEMS

Protection and Advocacy (P & A) Systems were created by Congress and are mandated to provide legal assistance and related advocacy services to people with disabilities. P & A Systems include: Protection & Advocacy for Persons with Developmental Disabilities; Protection & Advocacy for Individuals with Mental Illness; and most recently, Protection & Advocacy for Individual Rights.

P & A's were initially developed to address public outcry related to the abuse and neglect and lack of programming in state institutions for persons with disabilities.

Protection & Advocacy Systems for Persons with Developmental Disabilities (PADD) were originally established by the Developmental Disabilities Assistance and Bill of Rights Act of 1975 (Public Law 94-103), which mandates that each state and territory establish a protection and advocacy system by October 1, 1977 as a condition for receiving its basic state grant allotment under the Act. Agencies established to provide advocacy services must have the ability to pursue legal, administrative, and other appropriate remedies to protect the rights of individuals with developmental disabilities under federal and state law. The Governor in each state designates the P & A System, and provides assurances that the System is independent of any service provider.

Protection & Advocacy Programs for Individuals with Mental Illness (PAIMI) were established in 1986 with the passage of Public Law 99-319. It is modeled after PADD. The program is mandated to protect the rights of persons with mental illness under federal and state law, and to investigate allegations of abuse and neglect of persons residing in residential care or treatment facilities. The agencies designated to serve as the PADD systems in each state and U.S. territory are responsible for implementing the PAIMI program.

The **Protection and Advocacy for Individual Rights (PAIR)** program was authorized by Congress under the Rehabilitation Act of 1978, but no funds were appropriated for this program until fiscal year 1991. Under PAIR, P & A's have authority to pursue legal, administrative and other appropriate remedies for all persons with disabilities who are not elgible for services under the PADD or PAIMI programs. In fiscal year 1994, Congress appropriated $5.5 million, hitting the trigger for formula grant status ($100,000 for states, $50,000 for territories). As a result, each PADD will now receive funds to operate a PAIR.

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P & A Activities

P & A activities may include:

(1) investigating, negotiating or mediating solutions to problems expressed by persons eligible for P & A services;

(2) providing information and technical assistance to individuals, attorneys, governmental agencies, service providers and other advocacy organizations;

(3) providing legal counsel and litigation services to eligible persons and groups (who satisfy the established priorities of the P & A for the provision of services); and

(4) providing education and training for staff, governing boards and advisory councils, volunteers, service delivery professionals, constituency groups, and the community.

In addition, P & A's interact with elected and appointed officials to share information which will assist policy makers in making legislative and administrative changes which benefit persons with disabilities.

HOUSE OF REPRESENTATIVES
VISITORS REGISTER

JUDICIARY COMMITTEE DATE 2-9-95

BILL NO. HB 429 SPONSOR(S) Rep. Molnar

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NAME AND ADDRESS	REPRESENTING	Support	Oppose
Mary Ellerd	MJPOA		✓
Chuck Wells	MT. Newspaper Assn	✓	
Mike Sullivan	Lee Newspapers of Mont	✓	
Rick J. Merl	Jud. Prob. Office		✓

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HOUSE OF REPRESENTATIVES
VISITORS REGISTER

JUDICIARY COMMITTEE DATE 2-9-95

BILL NO. HB 371 SPONSOR(S) Rep. Smith

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NAME AND ADDRESS	REPRESENTING	Support	Oppose
Bruce Seaman	State Fed Refusal DOJ	✓	
Roy C. Brock Jr.	Powell CTY Sheriff's Dept	✓	
Paul L Clark	Dillon Police Dept	✓	

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HOUSE OF REPRESENTATIVES
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JUDICIARY COMMITTEE DATE 2-9-95

BILL NO. HB 186 SPONSOR(S) Rep. Martinez

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NAME AND ADDRESS	REPRESENTING	Support	Oppose
Laurie Kathrik	Christian Coalition of Mt	✓	
Monte Beck	self		✓
Russell B Hill	Mt Trial Lawyers		✓
MARY ALICE COOK	ADV for MTs CHILDREN	✓	
Mary Gallagher	MAP	✓	✓
Andrée Larose	Montana Advocacy Program (MAP)	—	

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HOUSE OF REPRESENTATIVES
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JUDICIARY COMMITTEE DATE 2.9.95

BILL NO. HB 366 SPONSOR(S) Rep. Kasten

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NAME AND ADDRESS	REPRESENTING	Support	Oppose
~~Karen Kastet~~	~~Christian Coalition of MT~~	~~X~~	
Paula Crumb	No Affiliation	✓	
Rhoda Miller	Regional Services/MAIDS	✓	
MARY ALICE COOK	ADV. for MT'S CHILDREN	✓	
Bob Anderson	DCHS	✓	
mary Gallagher	MAP	✓	
Andrie Larson	Montana Advocacy Program	✓	

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