RESERVE

MONTANA ADMINISTRATIVE REGISTER

1979 ISSUE NO. 4
PAGES 174 — 205

THE GREAT SEAL OF THE STATE OF MONTANA
ORO -Y- PLATA

NOTICE: The July 1977 through June 1978 Montana Administrative Registers have been placed on jacketing, a method similar to microfiche. There are 31 jackets 5 3/4" x 4 1/4" each, which take up less than one inch of file space. The jackets can be viewed on a microfiche reader and the size of print is easily read. The charge is $.12 per jacket or $3.72 per set. If the set is to be mailed, please include $.93 postage. Montana statutes require prepayment on all material furnished by this office. Please direct your orders along with a check in the correct amount to the Secretary of State, Room 202, Capitol Building, Helena, Montana, 59601. Allow one to two weeks for delivery.

MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 4

TABLE OF CONTENTS

NOTICE SECTION

NOTE: Please check your Register to determine if all pages have been included.

BEFORE THE DEPARTMENT OF AGRICULTURE
OF THE STATE OF MONTANA

In the matter of the repeal of Rules: 4.10.000, 4.10.010, 4.10.020, 4.10.030, 4.10.040, 4.10.050, 4.10.060, 4.10.070,	NOTICE OF PUBLIC HEARING ON REPEAL OF RULES 4.10.000 THROUGH 4.10.070 AND THE PROPOSED ADOPTION OF RULES I THROUGH VIII
AND	
In the matter of the adoption of new Rules: Rule I, Rule II, Rule III, Rule IV, Rule V, Rule VI, Rule VII, Rule VIII.	

TO: All Interested Persons

1. On the 20th day of March, 1979, at 10:00 A.M., a public hearing will be held in room 225 of the Scott Hart Building, 6th & Roberts, Helena, Montana to consider the repeal of Rules: 4.10.000, 4.10.010, 4.10.020, 4.10.030, 4.10.040, 4.10.050, 4.10.060, 4.10.070, and the adoption of new Rules: Rule I, Rule II, Rule III, Rule IV, Rule V, Rule VII, Rule VIII.

2. The rules proposed to be repealed can be found on pages: 4-64, 4-65, 4-66, 4-67, and 4-68 of the Administrative Rules of Montana.

3. The Rules proposed to be adopted provide as follows:

Rule I FINANCIAL RESPONSIBILITIES. (1) Applicants applying for a commercial pesticide applicator's license shall provide, on forms approved by the department, evidence of financial responsibility, establishing ability of applicant and/or his employees, to respond to and indemnify any person or persons for all damages to their person or property arising out of the use, misuse, or attempted use of application of pesticides, within the financial limits set forth below. Provided however, that this requirement for financial responsibility has no application to, and cannot be subjected to pay for any injury or damage to the person or property of the landowner hiring the pesticide application.

The minimum financial responsibility shall be in the amount of One Thousand Five Hundred Dollars ($1,500.00) for aerial applicators, and Five Hundred Dollars ($500.00) for all other applicators.

(2) The department may require all applicators that experience or cause chemical accidents or occurrences over one or more licensing periods, to increase their financial responsiblility requirement up to and including Ten Thousand Dollars ($10,000.00).

(3) Applicators possessing insurance coverage exceeding

the requirements of this rule and it's subsections, upon documentation approved by the department, shall be considered as meeting the requirements of this section.

(4) Commercial pesticide seed treatment applicators, whether at farm sites or their own business locations, those seed treaters using fumigants, vertebrate pest control applicators using ground applied baits and public utility non-commercial and food manufacturing and processing applicators applying pesticides in or on properties managed by the public utility or food manufacturer or processor are exempt from the financial responsibilities required in rules I through Rule III. Demonstration and Research Pest Control applicators may be exempt from the financial responsibilities required in rules I through Rule III upon appropriate application for exemption approved by the department. The department will evaluate each applicant's situation as shown on the waiver application considering particularly the following factors; actual pesticide applications by the applicant, the use of co-operators, the size of plots, the hazards and drift potential of pesticides utilized. All applicators shall comply with the requirements in rules IV through VIII , inclusive.

(5) An applicator who's financial responsibility requirements had been increased, but who has, for two consecutive spray seasons, operated without any accidents or occurrences of pesticide damage, may make application to the department to be allowed to revert back to the minimum financial responsibility requirements of rule I.

RULE II TYPES AND CONDITIONS OF FINANCIAL RESPONSIBILITY.

(1) In meeting the financial responsibility requirements of rule I, applicant shall have the option to utilize and provide any one or more of the following means: (a) policy of liability insurance; or (b) a surety bond; or (c) by a deposit of cash, or certificate of deposit, or deposit of bonds or other obligations for the payment of which the full faith and credit of the United States or of this state are pledged, and which has the capability of being directly converted to legal tender by this department, and approved by this department. The said deposit shall be into an indemnity trust fund, conditioned to indemnify the people of the state of Montana for all damages to property and/or injury or death to any person or persons as set forth in rule I. After a deposit is made pursuant to (c) above, and after a license has been issued conditioned thereon, the deposit may not be withdrawn except with the prior written consent of the department and any unauthorized withdrawal or attempt to so withdraw may subject all persons involved with the withdrawal or any attempt thereof, to a charge of violating section 80-8-306 (1) MCA.

The insurance policy or surety bond options shall only be approved if issued by an insurance company or bonding

company currently qualified to do businss in the state of Montana, and which provides for chemical damage responsibility for each and every chemical or pesticide the applicator may choose to apply.

The total aggregate liability of each insurer or surety for claims shall be limited to the face amount of the liability policy or surety bond, and not exceeding the limits of each applicant under rule I in the event the face amount of the policy or bond exceeds the required limits, for the current year together with all unresolved or unpaid claims, timely filed, pending from previous calendar years coverage.

(2) The department may accept a liability insurance policy in the proper face amount that contains a deductible clause, in an amount not to exceed Five Hundred Dollars ($500.00) for aerial applicators, and Two Hundred Fifty Dollars ($250.00) for all other applicators. If the licensee has not satisfied the requirements of the deductible amount in any prior damage claim, such deductible clause in a currently submitted policy shall not be accepted by the department to satisfy the licensing requirements unless and until the applicant satisfies the prior damage claim. Insurance policies may have the pollution exclusion clause removed.

(3) The financial responsibility requirement imposed by rule I must be maintained in full force and effect during each entire licensing period, except as provided in rule VIII. In the event of a lapse or termination in the means assuring financial responsibility, the applicator's license(s) shall automatically terminate, co-incidental in time with the lapse or termination of financial responsibility, and the licensee shall immediately cease all applications of pesticides, and without further notice shall immediately return to the department, in person or by certified mail, all licenses issued to him and/or his employees for the current calendar year; any failure to so return shall constitute a violation under rule 4.10.170. In the event a previously licensed applicator whose license(s) was terminated by the provisions of this rule desires to have his license re-issued for the balance of the calendar year, he shall file a new application, accompanied by a new filing fee, and demonstrate to the satisfaction of the department that he once again meets the financial responsibility requirements of rule I, and upon re-approval by the department his license(s) may be re-issued unless some other legal or regulatory cause exists for non-issuance.

RULE III APPROVAL, MODIFICATION, AND CANCELLATION OF FINANCIAL RESPONSIBILITY ELEMENTS.

(1) The department shall ascertain that the means establishing financial responsibility filed by the applicant fully complies with the act, and fully satisfies the rules adopted thereunder, prior to issuance of any license. The information

demonstrating financial responsibility shall be submitted on forms of the type approved by the department. License application approval shall not be granted until a complete copy of the bond, verification of the indemnity trust fund deposit, or a certificate or binder of insurance coverage is filed along with the license application. The licensee shall provide a complete copy of the insurance policy upon written request of the department. In the event the applicator options to utilize a liability insurance policy as the means of establishing financial responsibility, then and in that event, the applicator has the duty and responsibility to ascertain that the policy proposed to be submitted provides chemical damage coverage for every chemical proposed to be applied during the licensing period. In the event applicator's proposed policy of insurance contains excusions against coverage of one or more chemicals applicator proposes to apply, then and in that event the applicator may submit the proposed insurance policy to provide such coverage as it affords but the applicator must, in addition thereto, provide evidence of financial responsibility to indemnify the public against chemical damage arising out of the use, misuse or attempted use of each and every chemical proposed to be used or applied which is excluded from coverage of the proposed liability insurance policy. The amount of additional coverage shall be in the minimum amount required under rule I and the means to be utilized shall be the options provided in rule II (1) (b) or (c).

(2) The department shall be notified by registered mail ten (10) days prior to any proposed modification of the liability insurance policy or surety bond requested by the licensee. Such modification must be approved by the department before the proposed modification can become final. Ten (10) days notice by registered mail to the department is required prior to the surety or insurer cancelling the licensee's surety bond or liability insurance, and prior to settlement of claims made against licensee's bond or insurance. Modification of the indemnity trust fund, for any reason by any party, shall not be completed until the department has approved the proposed modification by written authorization to the licensee and the bank, trust or other financial official or institution.

If the financial responsibility is to be cancelled, the requirements and procedures established in rule VIII shall be followed.

RULE IV JUDGEMENT OF DAMAGES AND/OR INJURY. (1) A judgement rendered in any court of competent jurisdiction, of this state or any other state, or of the United States, against a licensee or certificate holder, upon a cause of action arising out of any pesticide use, misuse or attempted use or application, filed with the department; and a written agreement, mutually agreed upon between the licensee and the individual experiencing property damage or bodily injury, as to the fact of damages and the dollar value thereof, duly notarized and

filed with the department, are for all purposes within these rules, denominated as judgments.

(2) No licensee nor certificate holder shall permit any judgement against him for damages or injury arising out of his pesticide operation to remain unsatisified for a period of more than thirty (30) calendar days.

(3) Individuals experiencing non-crop vegetative damage may, upon mutual agreement with the licensee, reduced to writing, duly notarized, filed with the department, delay the final determination of the dollar amount of the damage, and judgement thereon, for a period of time, not to exceed one year from the date damage is first observed by the damaged party.

(4) Individuals experiencing crop damage may, upon mutual agreement with the licensee, reduced to writing, duly notarized, filed with the department, delay the final determination of the dollar amount of crop damage for a period of time, not to exceed (60) days following the completion of harvest on the crops and fields allegedly damaged, provided that the licensee and the individual experiencing crop damage provide an estimate to the department of the approximate dollar value of the damages, and, if necessary, that the licensee provides evidence of additional financial responsibility to fully indemnify damaged party for the estimated damages and still maintain his minimum required financial responsibility under rule I.

RULE V . INCIDENT REPORTS AND RECORDS. (1) An applicator who through his own actions or omissions, or the actions or omissions of his employees, causes or allows any pesticide to escape onto or to be deposited onto the person, lands, or property of another not the person hiring or contracting for his services, shall be required to file a written report to the department within forty-eight (48) hours of the incident, specifying the location of the incident, the name of the pesticide involved, the type of formulation, the method of application, the name and address of the person for whom the application was being made, and the name and address of the person(s) whose land, person, or property was subjected to the unintentional pesticide application. (In addition, if the pesticide is classified as either Extremely Toxic or Highly Toxic to people or animals the applicator or operator shall immediately cease his application and notify the land-owner or operator whose land, person or property was subjected to unintentional pesticide application and to the department, immediately, by the quickest available means, after applying first-aid or personal decontamination if appropriate.)

(2) A complete record of all settled and pending claims from the preceding licensing period must be filed when reapplying for an applicator's license. The record shall indicate for each and every incident the names of all parties involved, the location of the incident, the manufacturer and the technical name of the pesticide involved, the type of formulation, the method of application, the intended use,

and the target or site, specifying the animals, wildlife, plant and aquatic life, soil, or people subjected to the unintentional pesticide application(s).

(3) For settled claims, report the information required in (2) above, together with the dollar amount of the economic loss and the final settlement agreement between all parties.

Applicators failing to file the foregoing reports, or falsifying them in any fashion, shall be subject to immediate revocation of current licenses and/or shall not be issued a license until the requirements of this section are fully satisfied.

RULE VI REVOCATION OF LICENSE. (1) The department shall revoke the license of any applicator not satisfying the final judgement rendered against or agreed to by him, within thirty (30) calendar days from the date the judgement is filed with the department. The revocation shall remain in effect and no license shall be issued to the applicator unless and until the judgement is satisfied or until applicator files with the department his written direction to his financial responsibility guarantors to respond in full to the damages specified in the judgement.

(2) In the event the financial responsibility guaranteed is not adequate to satisfy the judgement when fully applied thereto, then, and in that event the applicator shall apply such additional monies or assets as may be required to fully satisfy the judgement, and the applicator's license shall not be issued until the judgement has been fully satisfied and the required financial responsibility once again brought up to the amount required of the particular applicator under rule

RULE VII PERSONAL LIABILITY FOR DAMAGES. (1) Nothing in these regulations shall be construed to relieve any person, landowner or applicator, from liability for any damage to the person, lands or property of another, caused by their use of pesticides even though such use conforms to the rules of the department.

RULE VIII LICENSING PERIOD. (1) The licensing period shall be from the date of license issuance through December 31 of that calendar year. An applicator who applies pesticides seasonally may cancel his financial responsibility (in effect, cancelling his license) sixty (60) days after the date of his last application. The sixty (60) day requirement may be waived if his means of providing financial responsibility is such that it provides effective ongoing coverage during the period of time a damage action could be maintained under statute of limitation sections 27-2-204 and/or 27-2-207 MCA.

(2) An applicator who provides an indemnity trust fund as his means of establishing financial responsibility may

cancel his fianacial responsibility sixty (60) days after the date of his last application. Cancellation of an indemnity trust fund may be accomplished by submitting a notarized statement to the department, for it's descretionary approval, declaring that there are no known claims pending or judgement unsatisfied against the applicator. An applicator who provides an indemnity trust fund shall not be allowed to cancel his financial responsibility if a claim is pending or a judgement unsatisfied.

The fact that an applicator obtains a cancellation of his indemnity trust fund in no way is to be construed as absolving an applicator from a suit nor claim of damages filed in a court of competent jurisdiction within the time provided by statute of limitation sections 27-2-204 and/or 27-2-207 MCA.

4. The rule changes are proposed to simplify and clarify the verbage of the rules; to provide for more liberalized and flexible rules establishing financial responsibility.

5. Interested persons may present their data, views or argument either orally or in writting, at the hearing, and persons wishing to submit their data, views or agrument in writing may do so any time up to and including the 28th day of March, 1979.

6. Raymond Brault, Scott Hart Building, 6th & Roberts, Helena, Montana, 59601 has been designated by the Director of the Department of Agriculture to preside over and conduct the hearing.

7. The authority of the agency to make the proposed rule changes is based on : Title 80, Chapter 8, Section 105 M.C.A. (27-234, R.C.M. 1947)

W. Gordon McOmber, Director

Certified to the Secretary of State February 20, 1979.

BEFORE THE BOARD OF HEALTH AND ENVIRONMENTAL SCIENCES
OF THE STATE OF MONTANA

In the matter of the amendment of rule ARM 16-2.14(1)-S14041, a rule establishing procedures for hearings on proposed ambient air quality standards.	)))))	NOTICE OF PUBLIC HEARING FOR AMENDMENT OF A RULE ESTABLISHING PROCEDURES FOR HEARINGS ON PROPOSED AMBIENT AIR QUALITY STANDARDS

TO: All Interested Persons:

1. On or about Friday, March 9, 1979, at 9:00 a.m., or as soon thereafter as practicable, a public hearing before the Board of Health and Environmental Sciences will be held in Rooms 142-143 of the Cogswell Building, Capitol Complex, Helena, Montana, to consider the amendment of rule ARM 16-2.14(1)-S14041.

2. The proposed amendments are to change the dates for prefiled testimony in the present rule, to add a requirement for a summary to accompany written testimony, and to add clarifying language. The text of present rule 16-2.14(1)-S14041 is found in the published notice of proposed adoption at p. 1459 of the 1978 Montana Administrative Register, Issue No. 14, and the notice of adoption found at p. 36 of the 1979 Montana Administrative Register, Issue No. 2.

3. Notice of the proposed amendments, including the text, was given at p.25 of the 1979 Montana Administrative Register, Issue No.2, and is repeated here to ensure adequate public notice, since the notice of adoption of the rule to be amended appeared in the same issue of the Register as the notice of amendment.

4. The Board is proposing to amend this rule in order to give those testifying on the ambient air quality standards an additional two weeks to submit written testimony, because the publication of the draft EIS on those standards has been delayed two weeks, and the testimony will be based in part on the contents of the EIS. In addition, the requirement of a summary was considered an aid to the Board in its deliberations. The addition of the word "testimony" in paragraph 1 is not substantive and is intended only to clarify what "direct" referred to.

5. Interested persons may present their data, views, or arguments orally or in writing either at the hearing or prior to it to the hearing officer, named below.

6. C.W. Leaphart, 1 North Last Chance Gulch, Helena, Montana 59601 (phone: 442-4930) has been designated to preside over and conduct the hearing.

7. The authority of the Board to make the proposed

amendments is based on sections 75-2-111 and 75-2-202, MCA (section 69-3909, R.C.M. 1947).

JOHN W. BARTLETT, Chairman

Certified to the Secretary of State February 20, 1979.

STATE OF MONTANA
DEPARTMENT OF PROFESSIONAL AND OCCUPATIONAL LICENSING
BEFORE THE BOARD OF COSMETOLOGISTS

IN THE MATTER of the Proposed) Amendment of ARM 40-3.30(8)-) S30095, sub-sections (1) (a)) and (2) Manager Operator)

NOTICE OF PROPOSED AMENDMENT OF ARM 40-3.30(8)-S30095 (1) (a) and (2) MANAGER OPERATOR

NO PUBLIC HEARING CONTEMPLATED

To: All Interested Persons:

1. On March 30, 1979, the Board of Cosmetologists proposes to amend ARM 40-3.30(8)-S30095, sub-sections (1) (a) and (2) concerning manager operators.

2. The rule as proposed will amend sub-section (1)(a) and delete sub-section (2) of the above stated rule and will read as follows: (new matter underlined, deleted matter interlined)

"(1)..(a) The affidavit must ~~state-that-the-applicant has-worked~~ be completed by a manager operator and notarized, stating that the applicant has worked for one (1) year in the State of Montana under ~~the~~ their direct supervision ~~of-a-manager-operator~~ in a salon.

~~(2)--Any-operator-found-in-violation-will-not-be-granted-working-experience-prior-to-date-of-violation.~~"

3. The Board is proposing amendment of the above rule to implement section 37-31-302 (3) MCA (66-801 R.C.M. 1947) and to clearly define the requirement for applying for a manager operator license.

4. Interested parties may submit their data, views or arguments concerning the proposed amendment in writing to the Board of Cosmetologists, Lalonde Building, Helena, Montana 59601 no later than March 28, 1979.

5. If a person who is directly affected by the proposed amendment wishes to express his data, views or arguments orally or in writing at a public hearing, he must make written request for a hearing and submit this request along with any written comments he has to the Board of Cosmetologists, Lalonde Building, Helena, Montana 59601 no later than March 28, 1979.

6. If the Board receives requests for a public hearing on the proposed amendment from 10% or 25 or more of the persons directly affected by the proposed amendment, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register.

7. The authority of the Board to make the proposed amendment is based on section 37-31-203 MCA [66-806, (1) R.C.M. 1947]. The proposed amendment implements section 37-31-302 (3) MCA (66-801 R.C.M. 1947).

BOARD OF COSMETOLOGISTS
JUNE BAKER, PRESIDENT

BY: 
ED CARNEY, DIRECTOR
DEPARTMENT OF PROFESSIONAL
AND OCCUPATIONAL LICENSING

Certified to the Secretary of State, February 20, 1979.

MAR Notice No. 40-3-30-29

4-2/28/79

STATE OF MONTANA
DEPARTMENT OF PROFESSIONAL AND OCCUPATIONAL LICENSING
BEFORE THE BOARD OF OPTOMETRISTS

IN THE MATTER of the Proposed) Adoption of a new rule) implementing 37-10-304 MCA) Diagnostic drugs)	NOTICE OF PROPOSED ADOPTION OF A NEW RULE CONCERNING DIAGNOSTIC DRUGS NO PUBLIC HEARING CONTEMPLATED

To: All Interested Persons:

1. On March 30, 1979 the Board of Optometrists proposes to adopt a new rule concerning diagnostic drugs.

2. The rule as proposed will read as follows:

"(1) An approved course, as referred to in section 37-10-304 MCA shall include diagnostic pharmacological agents course offered by the University of California.

(2) That a certificate of competency for the use of topical ophthalmological diagnostic agents be issued to those optometrists who have taken the course and pass the required examination.

(a) The test for competency is to be given by the staff conducting the course.

(b) That a passing score on the test will be such score determined as passing by the teaching staff.

(3) That all new optometrists applying for licensure in this state shall have satisfied the Board of Optometrists that their studies in ocular pharmocological agents are equivalent to the course offered by the University of California. On the recommendation of the Board of Optometrists, these individuals will be granted a certificate by the Board of Medical Examiners.

(4) All licensees shall complete 12 hours of continuing education in ocular pharmocology and pathology within a 2 year period following licensure or certification. Said requirement shall continue for an additional 2 year period.

(5) Upon licensure or certification the permissible drugs and their concentrations are as follows:

(a) Mydriatics	
(i) Phenylephrine Hydrochloride	2.5%
(ii) Hydroxyamphetamine Hydrobromide	1.0%
(b) Cycloplegics	
(i) Tropicamide	1.0%
(ii) Cyclopentolate	1.0%
(iii) Homatropine Hydrobromide	.5%
(iv) Atropine Sulfate	.5%
(c) Topical Anesthetics	
(i) Proparacaine Hydrochloride	.5%
(ii) Benoxinate Hydrochloride	.4%
(iii) Piperocaine Hydrochloride	2.0%

(d) Miotic, only in the event of an emergency and after consultations with physician

(i) Pilocarpine Hydrochloride 1.0% "

3. The reasons for the proposed rule are as follows:

a. Section 37-10-304 MCA mandates the Board of Optometrists, upon the prescription of the Board of Medical Examiners to approve, adopt and implement rules providing for diagnostic drug use certification. The proposed rules are designed to implement that mandate.

b. The Boards have determined that the University of California course meets the requirements of sub-section (3) to section 37-10-304 MCA and that it's of a quality sufficient to accomplish the educational and certification goals of the statute.

c. The continuing education requirement is imposed to insure continuing competency in the same manner as imposed generally on optometrists under section 37-10-308 MCA.

d. The permissible drugs and their concentrations have been determined and designated through recognition of the types and amounts as will adequately fulfill the needs for diagnostic pharmocology within the frame work of the training.

4. Interested parties may submit their data, views or arguments concerning the proposed adoption in writing to the Board of Optometrists, Lalonde Building, Helena, Montana 59601 no later than March 28, 1979.

5. If a person who is directly affected by the proposed adoption wishes to express his data, views or arguments orally or in writing at a public hearing, he must make written request for a hearing and submit this request along with any written comments he has to the Board of Optometrists, Lalonde Building, Helena, Montana 59601 no later than March 28, 1979.

6. If the Board receives requests for a public hearing on the proposed adoption from 10% or more of the persons who are directly affected by the proposed adoption, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register.

7. The authority of the Board to make the proposed adoption is based on section 37-10-202 MCA (66-1303 R.C.M. 1947) and implements section 37-10-304 MCA (66-1301.2 and 66-1305.1 R.C.M. 1947).

BOARD OF OPTOMETRISTS
CHRIS E. BERG, O.D., PRESIDENT

BY: 
ED CARNEY, DIRECTOR
DEPARTMENT OF PROFESSIONAL
AND OCCUPATIONAL LICENSING

Certified to the Secretary of State, February 20, 1979.

BEFORE THE DEPARTMENT OF SOCIAL
AND REHABILITATION SERVICES OF THE
STATE OF MONTANA

In the matter of adoption of rule pertaining to contested cases and appeals to the Board of Social and Rehabilitation Appeals and the Repeal of Rules ARM 46-2.2(2)-P210 through 46-2.2(2)-P2070 pertaining to contested cases and appeals to the Board of Social and Rehabilitation Appeals.	)))))))))	NOTICE OF PUBLIC HEARING FOR ADOPTION OF RULES PERTAINING TO CONTESTED CASES AND APPEALS TO THE BOARD OF SOCIAL AND REHABILITATION APPEALS AND REPEAL OF RULES ARM 46-2.2(2)-P210 THROUGH 46-2.2(2)-P2070.

TO: All Interested Persons:

1. On March 21, 1979 at 9:00 a.m., a public hearing will be held in the Auditorium of the State Department of Social and Rehabilitation Services, 111 Sanders Street, Helena, Montana to consider the adoption of Rules pertaining to contested cases and appeals to the Board of Social and Rehabilitation Appeals, and Repeal of Rules ARM 46-2.2(2)-P210 through 46-2.2(2)-P2070 pertaining to contested cases and appeals to the Board of Social and Rehabilitation Appeals.

2. The proposed rules succeed and replace sections 46-2.2(2)-P210 through 46-2.2(2)-P2070 currently found in the Administrative Rules of Montana.

3. The Rules proposed to be repealed can be found on pages 46-16 through 46-251 of the Administrative Rules of Montana.

4. The proposed rules provide as follows:

RULE I DEFINITIONS For purposes of this chapter, unless the context requires otherwise, the following definitions apply:

(1) "Adverse Action" means:

(a) a failure of the Department to provide a claimant an opportunity to make application or reapplication for benefits;

(b) a failure of the Department to act promptly on a claimant's application for benefits;

(c) an action by the Department denying, suspending, reducing or terminating benefits of a claimant; or

(d) an action by the Department establishing conditions on the manner or form of benefits, including restrictive or protective payments, or establishing conditions for the receipt of benefits, including a work requirement.

(2) "Authorized Representative" means legal counsel, relative, friend or other spokesman authorized by the claimant

in writing to represent the claimant, but it does not include an employee of the Department;

(3) "Benefit" means:

(a) Financial assistance provided for in Title 53, Chapter 4, MCA (Title 71, Chapter 5, R.C.M. 1947) (Aid to Dependent Children);

(b) Financial assistance provided for in Title 53, Chapter 3, MCA (Title 71, Chapter 3, R.C.M. 1947) (General Relief Assistance);

(c) Social Services provided for under Title XX of the United States Social Security Act;

(d) Medical assistance provided for in Title 53, Chapter 6, MCA (Title 71, Chapter 15, R.C.M. 1947) (Medicaid);

(e) Medical assistance provided for in Sections 53-3-103 and 53-3-105, MCA (Section 71-308, R.C.M. 1947) (County Medical Assistance);

(f) Vocational rehabilitation services provided for in Title 53, Chapter 7, MCA (Title 71, Chapter 21, R.C.M. 1947);

(g) Services to the blind provided for in Title 53, Chapter 7, Part 3, MCA, (Title 71, Chapter 14, R.C.M. 1947); and

(h) Food stamp allotments provided for in 6 CFR Parts 271-274, (Food Stamps).

(4) "Board" means the Board of Social and Rehabilitation Appeals provided for in Section 2-15-2203, MCA (Section 82A-1906, R.C.M. 1947).

(5) "CFR" means the United States Code of Federal Regulations.

(6) "Claimant" means an applicant for or recipient of benefits from the Department, whether an individual or household, and includes the claimant's authorized representative.

(7) "Department" means the Department of Social and Rehabilitation Services provided for in Section 2-15-2201 MCA, (Section 82A-1901, R.C.M. 1947).

(8) "He" and other words used in the masculine gender include the feminine and the neuter.

(9) "Hearing Officer" means an individual hired or appointed by the Department to conduct a hearing under the authority of the Montana Administrative Procedure Act and this chapter.

(10) "Local Office" means a county welfare department, a regional office, a bureau if there is no regional office, or a division if there is neither a regional office nor a bureau.

(11) "Local Supervisor" means a county welfare director or his designee, a regional supervisor, a bureau chief if their is no regional supervisor, or a division administrator if there is neither a regional supervisor nor bureau chief.

RULE II OPPORTUNITY FOR HEARING A claimant who is aggrieved by an adverse action of the Department affecting

benefits provided by or through the Department shall be afforded the opportunity for a hearing before the board after timely and adequate notice as provided in this chapter.

(1) A request for a hearing is any clear expression, oral or written, by the claimant or an authorized representative to present his case to a higher authority.

(2) The freedom to request a hearing shall not be interfered with in any way. The local office shall assist a claimant who needs help in requesting a hearing.

(3) The claimant shall have a reasonable time from an adverse action, not to exceed 90 days, in which to request a hearing.

(4) Cases in which the sole issue is one of state or federal policy may be consolidated for a single group hearing. However, each claimant shall be permitted to present his own case.

RULE III NOTICE UPON APPLICATION At the time of application a claimant shall be informed in writing of:

(1) The claimant's right to a hearing;

(2) How a hearing may be obtained;

(3) The right to representation by legal counsel, relative, friend or other spokesman; and

(4) The availability of free legal representation.

RULE IV NOTICE UPON ADVERSE ACTION Upon an adverse action the claimant shall be provided adequate and timely notice.

(1) If the adverse action proposed by the Department is the denial of benefits to a claimant, notice is timely if it is transmitted or mailed within one (1) day following the end of the period allowed for the processing of applications under the rules of the applicable program.

(2) If the adverse action proposed by the Department is the suspension, reduction or termination of benefits of the claimant, notice is timely if it is mailed at least ten (10) days prior to the time the proposed adverse action is to become effective.

(3) Adequate notice need not be provided prior to the date of adverse action but may be mailed at the time the adverse action is taken in the following instances:

(a) The Department has factual information of death of claimant or payee (and no relative is available to serve as payee) or of all members of the household if claimant is a household for purposes of the food stamp program;

(b) Claimant provides a signed written statement requesting termination or reduction of benefits;

(c) When the fact that claimant has been accepted for benefits in another jurisdiction has been established, except that for purposes of the food stamp program the Department need only establish that claimant has moved from the project

area;

(d) When claimant was notified in writing that benefits would automatically terminate at the time that the grant for or the certification of benefits was made, including a special allowance for a specific period, benefits received to restore lost benefits, and benefits provided pending approval of benefits under another program;

(e) In the case of benefits received under the food stamp program:

(i) The claimant's allotment varies from month to month within the certification period to account for anticipated change and the claimant was so notified at the time of certification;

(ii) Claimant or member of claimant household is subject to a lockout or strike and signs a waiver of notice of adverse action to allow the Department to reduce or terminate benefits when the claimant or member of claimant household receives income from employment again.

(iii) A member of claimant household is disqualified for fraud, or the benefits of the claimant household are reduced or terminated to reflect the disqualification of the member as provided for in 6 CFR § 273.16; and

(iv) The Department initiates a mass change as described in 6 CFR §273.12(e).

(f) In the case of benefits received under all programs except the food stamp program:

(i) The claimant enters an institution and further benefits do not qualify for federal financial participation;

(ii) Claimant is placed in skilled or intermediate nursing care or long-term hospitalization;

(iii) Claimant's whereabouts are unknown and mail is returned with no forwarding address;

(iv) Claimant is a child receiving benefits under the Aid to Dependent Children Program and is removed from his home by judicial determination or is voluntarily placed in foster care by legal guardian;

(v) A change in claimants medical care is prescribed by his physician; and

(vi) Claimant has provided information which requires termination or reduction of assistance and has indicated in writing that he understands the consequences of providing the information.

(4) In the case of probable fraud in all programs except the food stamp program notice is timely if mailed at least five (5) days prior to the effective date of the adverse action.

(5) Notice is adequate if it includes:

(a) A statement of the proposed adverse action;

(b) the reason for the proposed adverse action;

(c) the specific regulations supporting the proposed adverse action;

(d) an explanation of the claimant's right to a hearing;
(e) how to obtain a hearing;
(f) a telephone number to call for additional information;
(g) the right to be represented by legal counsel, friend, relative or other spokesman;
(h) the availability of free legal assistance; and
(i) whether or not benefits are to be continued and the liability of the claimant for benefits received pending hearing if the hearing decision is adverse.

RULE V DENIAL OR DISMISSAL OF HEARING A hearing need not be granted or may be dismissed when:
(1) the request for a hearing is withdrawn by the claimant or his representative;
(2) the claimant or his representative without good cause fails to appear at the hearing;
(3) the request is not received within the specified time;
(4) either federal or state law requires automatic benefit changes for a class of claimants unless the issue is incorrect benefit adjustments; or
(5) the Department does not have jurisdiction over the subject matter or the appeal procedure.

RULE VI CONTINUATION OF BENEFITS (1) If a claimant requests a hearing within the period between the date of the notice and the date of the adverse action and the claimant is receiving benefits at that time, at the request of the claimant benefits shall be continued until after a final hearing decision is rendered, except as provided in paragraph (4) of this section.
(2) If the claimant establishes that his failure to request a hearing within the notice period was for good cause the Department shall reinstate the benefits to their prior level pending the hearing decision.
(3) In any case where action is taken without timely notice and the applicant requests a hearing within 10 days of the mailing of the notice of the action, at the request of the claimant benefits shall be reinstated and continued until a hearing decision is rendered, unless the action resulted solely from an application of or change in state or federal law or policy.
(4) Once continued or reinstated, benefits may not be reduced or terminated prior to a final hearing decision unless:
(a) the certification or grant period expires. Although the claimant may reapply and may be determined eligible for benefits.
(b) a change affecting claimant's benefits occurs while the hearing is pending and a hearing is not requested after

notice of adverse action resulting from the change;

(c) the hearing officer makes a preliminary determination, in writing and at the hearing, that the sole issue is one of state or federal law or policy and no issue of improper benefit calculation, or misapplication or misinterpretation of state or federal law or policy exists; or

(d) A mass change affecting claimants eligibility or benefit level occurs while the hearing decision is pending.

(5) Benefits paid to a claimant pending a hearing decision are subject to recovery by the Department if the adverse action is sustained.

RULE VII HEARING OFFICER, POWERS AND DUTIES A hearing shall be conducted by an impartial individual apppointed or hired by the Department as hearing officer who has had no direct involvement in the initial determination of the adverse action.

(1) The hearing officer may:

(a) require the furnishing of such information, the attendance of witnesses, depositions upon oral examination or written questions, written interrogatories, and the production of such books, records, papers, documents, and other objects as may be necessary and proper for purposes of the hearing. For this purpose, the hearing officer may, and upon request of any party to a hearing, shall issue subpoenas for witnesses or subpoenas duces tecum;

(b) order the Department, or where appropriate the local office, to pay witness fees, mileage and other actual and necessary expenses, as provided under the Rules of Civil Procedure for district courts of the State of Montana, of a witness subpoenaed at the request of a claimant if, in the judgement of the hearing officer, the testimony of that witness is essential to the claimant's case;

(c) disqualify himself at any time on the filing of a timely and sufficient affidavit of personal bias or other disqualification;

(d) direct the parties to appear and confer in a pre-hearing conference to consider definition and simplification of the issues by consent of the parties;

(e) order, where relevant and useful, an independent medical assessment or professional evaluation from a source mutually satisfactory to the claimant and the Department, the cost of which shall be borne by the Department.

(f) allow, for good cause shown, a third party to represent a claimant as an authorized representative in those instances where written authorization of the claimant is not obtainable;

(g) grant a continuance not to exceed thirty (30) days at the request of a claimant for good cause shown, or at the request of the Department or another party for good cause shown if the claimant agrees to such continuance in writing;

and

(h) take judicial notice of state and federal laws and regulations and facts within the general knowledge of the public.

(2) A hearing officer shall:

(a) administer oaths and affirmations:

(b) ensure that all relevant issues are considered;

(c) request, receive and make part of the record all evidence determined necessary to decide the relevant issues;

(d) regulate the conduct of the hearing consistent with due process to ensure an orderly hearing;

(e) prepare a proposal for decision consisting of proposed findings of fact, conclusions of law and a recommended order deciding the case based on the evidence and the testimony contained in the hearing record.

RULE VIII ADMINISTRATIVE REVIEW

(1) Upon the request for a hearing by a claimant the Department shall conduct an administrative review with the purpose of resolving the case and avoiding an unnecessary hearing.

(2) An administrative review includes:

(a) at the claimant's discretion, an informal conference with the Department's local supervisor;

(b) a review of relevant facts, regulations and circumstances involved in the adverse action by the Department's local supervisor and the preparation of an administrative review report for submission to the state office within seven (7) days of the request for hearing; and

(c) a review of the administrative review report by the appropriate division administrator of the Department or his designee within fifteen (15) days of the request for hearing.

(3) An adverse action may be reversed or modified by the Department's local supervisor or the appropriate division administrator or his designee at any time during the administrative review, in which case a hearing will not be held unless the claimant is aggrieved by the modified adverse action and requests that the hearing be held.

(4) If the adverse action is modified or reversed by the division administrator and the benefits which are the subject of the adverse action include county funds, a county welfare department may request the hearing officer to hold the hearing if it disagrees with the action of the division administrator.

RULE IX HEARING PROCEDURE (1) The hearing shall be conducted at a reasonable time and date and shall be held in the county seat of the county of the claimant's residence, unless the parties to the hearing agree to a different location or, in the case of an appeal of an adverse action by a county welfare department which is not the county of claimant's residence, the hearing may be held in the county

whose adverse action is being appealed at that county's option, if that county agrees to pay all the actual and necessary expenses incurred by the claimant and necessary witnesses to attend the hearing.

(2) Timely and adequate notice of hearing.

(a) The Department shall notify the claimant or his authorized representative by registered mail at least ten (10) days in advance of the time and place of the hearing. The claimant may waive in writing the right to ten (10) days notice.

(b) The notice of hearing shall include:

(i) the name, address and telephone number of the person to notify in the event that it is not possible for claimant to attend the hearing;

(ii) notification that the hearing request will be dismissed if the claimant or his authorized representative fails to appear at the hearing without good cause;

(iii) the Department's hearing procedures and any other information that would contribute to claimant's understanding of the proceedings and effective presentation at the hearing; and

(iv) an explanation of claimant's rights as enumerated in subparagraph 3 of this section.

(3) The claimant shall have adequate opportunity:

(a) to examine the contents of his case file, except for those portions which the claimant is precluded from examining by federal regulation or directive of a medical professional, and all documents and records to be used by the Department at the hearing at a reasonable time prior to the hearing as well as during the hearing. Portions of the case file, documents and records that the claimant is not allowed to examine are not admissible as evidence at the hearing;

(b) at his option, to present his case himself or with the aid of an authorized representative;

(c) to bring witnesses;

(d) to establish all pertinent facts and circumstances;

(e) to advance arguments without undue interference; and

(f) to question or refute any testimony or evidence, including opportunities to confront and cross-examine adverse witnesses.

RULE X PROPOSAL FOR DECISION BY HEARING OFFICER (1) The hearing officer shall make a proposal for decision within

(a) thirty (30) days of the request for a hearing if the benefits which are the subject of the hearing request are provided under the Food Stamp Program; or

(b) forty-five (45) days of the request for a hearing if the benefits which are the subject of the hearing request are provided under a program other than the Food Stamp Program.

(2) The proposal for decision shall:

(a) be based on the facts and evidence produced at the

hearing as applied to pertinent state and federal law and policy; and

(b) consist of proposed findings of fact, proposed conclusions of law and a recommended order.

(2) The proposal for decision, the verbatim transcript, if requested by a party, together with all exhibits, papers and requests filed in the proceeding shall constitute the exclusive record. The record shall be available to the claimant for inspection and copying at a place accessible to him at a reasonable time.

RULE XI BOARD REVIEW OF PROPOSAL FOR DECISION (1) A copy of the proposal for decision shall be mailed to the claimant, the local office and all other parties.

(a) If the proposal for decision is adverse to the claimant, an opportunity shall be afforded to him to file exceptions and present briefs and oral argument to the board by the filing of a request for such opportunity with the Department's local office within ten (10) days of the mailing of the proposal for decision.

(b) If a county welfare director or a division administrator disagrees with a proposal for decision, he may, within ten (10) days of its mailing, request an opportunity to file exceptions and briefs with the Board but may not present oral argument.

(c) A board of county commissioners, if it disagrees with a proposal for decision and if it was an original party in the appeal by virtue of the involvement of county funds in the benefits, may request, within ten (10) days of the mailing of the proposal for decision, an opportunity to file exceptions, present briefs and oral argument to the board.

(2) If a request for an opportunity to file exceptions and present briefs and oral argument to the board is not filed within ten (10) days of the date of mailing of the proposal for decision, the proposal for decision shall become final without further action by the board, unless a party can show that the failure to request an opportunity to file exceptions and present briefs or oral argument was for good cause.

(3) If a request is filed within the specified time period, the board shall consider the proposal for decision, the exceptions filed, briefs or oral argument presented and the record of the hearing, and shall:

(a) notify the claimant, the local office and any other party of the board's decision:

(i) within sixty (60) days from the date of the request for hearing in an appeal involving benefits received under the food stamp program; or

(ii) within ninety (90) days from the date of the request for hearing in an appeal involving benefits under a program other than the food stamp program.

(b) notify the claimant or other party of his right to

judicial review.

RULE XII JUDICIAL REVIEW (1) A party to an appeal who is aggrieved by a final decision may seek judicial review of that decision by filing a petition in district court within 30 days after receipt of notice of the final decision as provided in Section 2-4-702 MCA, (Section 82-4216, R.C.M. 1947).

(2) A final decision is binding on the Department and its units, including a County Welfare Department, and the Department or a subunit of the Department, including a County Welfare Department, may not seek judicial review of a final decision.

(3) A board of county commissioners may seek judicial review of a final decision if it was a party to the original hearing by virtue of the involvement of county funds in the benefits which were the subject of the hearing.

RULE XIII IMPLEMENTATION OF HEARING DECISIONS (1) When a hearing decision is favorable to a claimant, the Department shall promptly take the action necessary to restore lost benefits under the rules of the applicable program.

(2) When a hearing decision is adverse to a claimant and a claimant has received continued benefits pending a hearing decision, the Department shall promptly take the appropriate action to recover the value of the benefits continued pending hearing, unless the claimant seeks judicial review, in which case the Department's action to recover benefits shall be suspended pending the outcome of judicial review.

RULE XIV AVAILABILITY OF HEARING RECORDS All hearing decisions and records shall be available to the public for inspection and copying, except that the names and addresses and any other identifying information of claimants shall be kept confidential.

5. The purpose of the proposed rules is to clarify and update the substance and procedures in contested cases and appeals to the Board of Social and Rehabilitation Appeals. New rules will succeed and replace those rules which are proposed to be repealed.

6. Interested persons may present their data, views, or arguments, either orally or in writing, at the hearing.

7. The Office of Legal Affairs, Department of SRS, 111 Sanders, Helena, Montana has been designated to preside over and conduct the hearing.

8. The authority of the agency to make the proposed rule is based on Sections 53-2-201, MCA (Section 71-210(1)(3), R.C.M. 1947) 53-2-606, MCA (Section 71-223, R.C.M. 1947),

53-4-212, MCA (Section 71-503, R.C.M. 1947), 53-6-113, MCA (Section 71-1511(6), R.C.M. 1947) and 53-7-102, MCA (Section 71-2102, R.C.M. 1947).

Keith P. Colbo
Director, Social and Rehabilitation Services

Certified to the Secretary of State February 20, 1979.

BEFORE THE BOARD OF PUBLIC EDUCATION
OF THE STATE OF MONTANA

In the matter of the amendment of Rule 48-2.6(2)-S6000 regarding administrative assistants	NOTICE OF PROPOSED AMENDMENT OF ARM RULE 48-2.6(2)-S6000 regarding administrative assistants. NO PUBLIC HEARING COMTEMPLATED.

TO: All interested persons

1. On April 10, 1979, the Board of Public Education proposes to amend ARM Rule 48-2.6(2)-S6000, Principal.

2. The rule as proposed to be amended provides as follows:

(1) Remains the same.

(2) (a-c) Remain the same.

(d) In any school district where the combined elementary and secondary enrollment exceeds 150 but is less than 300, the superintendent may serve as half-time elementary or high school principal. The district must employ a half-time elementary or high school principal for the other unit in the district. The superintendent shall devote half-time as principal of the assigned school. Or, in any school district where the combined elementary and secondary enrollment exceeds 150 but is less than 300, and where the superintendent serves as both elementary and secondary principal, the district must employ a half-time administrative assistant. The administrative assistant shall be defined as a person who holds a Bachelor's degree and presents evidence of working toward the Administrators Certificate on a planned program to be completed within 5 years of first assignment. The administrative assistant shall not supervise or evaluate staff or curriculum.

(e-k) Remain the same.

3. The rule is proposed to be amended in order to replace a section that was mistakenly deleted.

4. Interested parties may submit their data, views or arguments concerning the proposed amendment in writing to Harriett C. Meloy, Chairwoman of the Board of Public Education, 33 South Last Chance Gulch, Helena, Montana 59601, at any time prior to March 27, 1979.

5. If a person who is directly affected by the proposed amendment wishes to express his data, views and arguments orally or in writing at a public hearing, he must make written request for a hearing and submit this request along with any written comments he has to Harriett C. Meloy, Chairwoman of the Board of Public Education, 33 South Last Chance Gulch, Helena, Montana 59601, no later than March 13, 1979.

6. If the agency receives requests for a public hearing on the proposed amendment from more than 10 percent or 25 or more persons who are directly affected by the proposed amendments, or from the Administrative Code Committee of the legislature, a hearing will be held at a later date. Notice of hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be 135 persons, based on approximately 1,350 active administrative certificates in Montana.

7. The authority of the agency to make the proposed amendments is based on sections 20-7-101 and 20-4-403, MCA (75-7501, 75-6114, R.C.M. 1947).

Harriett C. Meloy, Chairperson
Board of Public Education

By _____
Assistant to the Board

Certified to the Secretary of State February 20, 1979.

DEPARTMENT OF PROFESSIONAL AND OCCUPATIONAL LICENSING
BEFORE THE BOARD OF MEDICAL EXAMINERS

In the Matter of the Proposed) Amendment of ARM 40-3.54(18)-) S54100, sub-section (4)(d)) concerning Emergency Medical) Technician Examination Fees)	NOTICE OF AMENDMENT OF ARM 40-3.54(18)-S54100, (4)(d) EMERGENCY MEDICAL TECHNICIAN BASIC

TO: All Interested Persons:

1. On January 11, 1979, the Board of Medical Examiners published a notice of a proposed amendment to ARM 40-3.54(18)-S54100, sub-section (4)(d) concerning examination fees for emergency medical technicians at page 1, 1979 Montana Administrative Register, issue number 1.

2. The Board has amended the rule exactly as proposed.

3. No comments or testimony were received. The Board amended the rule to provide notice of the cost of examination and application processing to the public and to further clarify the Attorney General's opinion #174.

BEFORE THE BOARD OF PHARMACISTS

In the Matter of the Proposed) Amendment of ARM 40-3.78(6)-) S78030 Statutory Rules and) Regulations - Dangerous Drugs) Sub-section (5))	NOTICE OF AMENDMENT OF ARM 40-3.78(6)-S78030 (5) STATUTORY RULES AND REGULATIONS - DANGEROUS DRUGS

TO: All Interested Persons:

1. On November 17, 1978 the Board of Pharmacists published a notice of a proposed amendment to ARM 40-3.78(6)-S78030, sub-section (5) relating to dangerous drugs at page 1524-1525 of the 1978 Montana Administrative Register, issue number 15.

2. On December 29, 1978 the Board amended the rule as proposed with the exception of any material, compound, mixture or preparation which contains any quantity of pentazocine, including its salts, as it had not been federally controlled at that time. The Board is now adopting that portion as it has been controlled by the federal government as of February 9, 1979.

3. No comments or testimony were received. The Board amended the rule because such additional drugs have been controlled by the Federal Government since the last changes to the Board rules and pursuant to its instructions in Section 50-32-103 MCA (54-302 R.C.M. 1947). The Board is likewise controlling the drugs by this amendment.

DEPARTMENT OF PROFESSIONAL AND OCCUPATIONAL LICENSING
BEFORE THE BOARD OF REAL ESTATE

In the matter of the proposed) Amendment of ARM 40-3.98(6)-) S98040 concerning renewal -) inactive list - register)	NOTICE OF AMENDMENT OF ARM 40-3.98(6)-S98040 RENEWAL - INACTIVE LIST - REGISTER

To: All Interested Persons:

1. On January 11, 1979, the Board of Real Estate published a notice to amend ARM 40-3.98(6)-S98040 by adding a new subsection (3) concerning out-of-state persons applying for salesman licenses at pages 2 & 3, 1979 Montana Administrative Register, issue number 1.

2. The Board has amended the rule exactly as proposed.

3. No comments or testimony were received. The Board is amending the rule because if a real estate salesperson were allowed to operate independently from his broker in another state, the sponsoring broker may not be aware of that license's real estate related activities, yet the broker is responsible for those actions. The public would have no assurance that the real estate transaction they may become involved in through the non-resident licensee would be proper as the supervising broker would not be in a position to properly supervise the transaction. In fact the supervising broker may not be aware of the transaction at all. The supervising broker must have all salesmen he has responsibility for operating from the general vicinity of his agency to give proper supervision to these salesmen in the public interest.

ED CARNEY, DIRECTOR
DEPARTMENT OF PROFESSIONAL
AND OCCUPATIONAL LICENSING

Certified to the Secretary of State, February 20, 1979.

VOLUME NO. 38 OPINION NO. 8

OPEN MEETINGS - Open Meetings Law, right of public observation, mechanical recordings of proceedings.
MONTANA CODE ANNOTATED - Section 2-3-201, et seq.
REVISED CODES OF MONTANA, 1947 - Section 82-3401, et seq.

HELD: A member of the public is authorized to make a mechanical recording of the proceedings and deliberations of an open school board meeting.

13 February 1979

James C. Nelson, Esq.
Glacier County Attorney
Glacier County Courthouse
Cut Bank, Montana 59427

Dear Mr. Nelson:

You have requested my opinion on the following question:

> May a member of the public make a mechanical recording of the proceedings and deliberations of an open school board meeting over the objections of the school board?

The Montana Open Meeting Law, section 2-3-201 et seq., MCA (82-3401 et seq., R.C.M. 1947), does not specifically address the question you raise. Section 2-3-211, MCA (82-3405, R.C.M. 1947),provides that "accredited press representatives" may not be prohibited from recording open meetings. The presiding officer, however, is empowered to assure that this activity "does not interfere with the conduct of the meeting. There is no specific reference in the law to recordings made by any other person.

Section 2-3-201, however, provides:

> The legislature finds and declares that public boards, commissions, councils, and other public agencies in this state exist to aid in the conduct of the peoples' business. It is the intent of this part that actions and deliberations of all public agencies shall be conducted openly. The people of the state do not wish to abdicate their sovereignty to the agencies which serve them.

> Toward these ends, the provisions of the part shall be liberally construed.

It is evident that while some open meetings involve brief, simple issues, others deal with complex and lengthy questions of great public concern. As a meeting increases in length and complexity, so does the difficulty of interested persons of keeping track of what is said and done. This is especially true in situations where public input or comment is solicited, and may also be true when one person is attempting to observe the meetings of several different public bodies. A simple and efficient method for these interested persons to confront these situations is to record the meeting for their own subsequent review, study and analysis.

Therefore, the legislative policy announced in section 2-3-201, MCA, and the mandate for liberal construction, would be furthered by allowing interested members of the public to mechanically record open meetings. The presiding officer of the meeting would still have the power to assure, in accordance with section 2-3-211, MCA, that the recording "does not interfere with the conduct of the meeting."

THEREFORE IT IS MY OPINION:

> A member of the public is authorized to make a mechanical recording of the proceedings and deliberations of an open school board meeting.

Very truly yours,

MIKE GREELY
Attorney General

MG/ABC/br

VOLUME NO. 38 OPINION NO. 9

MEDICAL PRACTITIONERS - Examination and diagnosis of physical handicaps and impairments by physical therapists; PHYSICALLY HANDICAPPED - Examination and diagnosis of physical handicaps and impairments by physical therapists; PHYSICAL THERAPISTS - Examination and diagnosis of physical handicaps and impairments by physical therapists.
MONTANA CODE ANNOTATED - Sections 37-3-102(a), 37-11-101(1), and 37-11-321(9);
REVISED CODES OF MONTANA, 1947 - Sections 66-1012(a), 66-2501, 66-2509.

HELD: A physical therapist may not act as a consultant in evaluating and diagnosing physical handicaps of any person unless acting at the request and direction of a licensed physician.

16 February 1979

Ed Carney, Administrator
Department of Professional and
Occupational Licensing
42 1/2 North Last Chance Gulch
LaLonde Building
Helena, Montana 59601

Dear Mr. Carney:

You have requested my opinion concerning the following question:

> May physical therapists act as independent consultants in evaluating physical handicaps of school children when requested to do so by school districts or educators?

Your request specifically relates to the permissibility of a physical therapist giving evaluations and consultations while working independently of a licensed physician.

Physical therapists are subject to the Physical Therapists Practice Act which defines the practice of physical therapy and requires a license for such practice. Title 37, chapter 11, MCA (§66-2501, et seq., R.C.M. 1947). Subsection 9 of section 37-11-321, MCA (§66-2509, R.C.M. 1947), provides that the Montana State Board of Medical Examiners may refuse to license as a physical therapist anyone who,

> (9) has undertaken to practice physical therapy independent of prescription from a person who holds an unlimited license to practice medicine and surgery in Montana and other states and territories. (Emphasis added.)

Since the Act permits the board to deny a license to any person practicing physical therapy independent of the prescription of a licensed physician, it follows that the practice of physical therapy independent of such prescription is prohibited. This limitation must be read in conjunction with the definition of physical therapy. Section 37-11-101(1), MCA (§66-2501(1), R.C.M.), provides in relevant part:

> (1) "Physical therapy" means the treatment of a bodily or mental condition of a person by the use of the physical, chemical, and other properties of heat, light, water, electricity, massage, and therapeutic exercise including physical rehabilitation procedures. (Emphasis added.)

This section refers only to treatment. It makes no mention of diagnosis or evaluation of conditions for which treatment might be appropriate and there is no provision of the Act which authorizes physical therapists to independently conduct physical examinations and give advice or consultations concerning treatment.

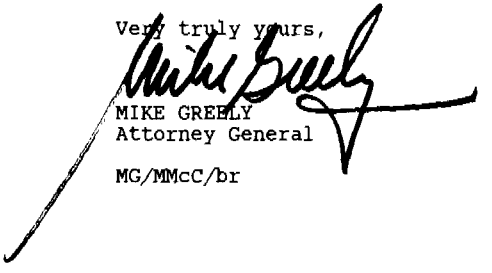
In requiring a physician's prescription as a prerequisite to physical therapy and defining physical therapy as "treatment", the Physical Therapists Act contemplates that the examination and diagnosis of physical handicaps be done by licensed physicians. Such diagnosis of physical ailments and handicaps, as well as prescriptions for treatment, are expressly contemplated as part of the practice of medicine. See section 37-3-102(a), MCA (§66-1012(a), R.C.M. 1947).

This opinion should not be construed as prohibiting a physician from requesting the assistance and advice of a physical therapist in examining and diagnosing physical handicaps or prescribing a course of treatment. However, a physical therapist may not examine, evaluate and diagnose physical disabilities independent of the direction of a physician.

THEREFORE, IT IS MY OPINION:

A physical therapist may not act as a consultant in evaluating and diagnosing physical handicaps of any person unless acting at the request and direction of a licensed physician.

Very truly yours,



MIKE GREELY
Attorney General

MG/MMcC/br