

# MONTANA ADMINISTRATIVE REGISTER



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MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 5

The Montana Administrative Register (MAR), a twice-monthly publication, has three sections. The notice section contains state agencies' proposed new, amended or repealed rules, the rationale for the change, date and address of public hearing, and where written comments may be submitted. The rule section indicates that the proposed rule action is adopted and lists any changes made since the proposed stage. The interpretation section contains the attorney general's opinions and state declaratory rulings. Special notices and tables are inserted at the back of each register.

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BEFORE THE OFFICE OF THE WORKERS' COMPENSATION JUDGE
OF THE STATE OF MONTANA

| | | |
|---|---|---|
| In the matter of the amendment of procedural rules. | ) ) ) ) | NOTICE OF PROPOSED AMENDMENT OF RULES ARM 2.52.343 AND ARM 2.52.344 NO PUBLIC HEARING CONTEMPLATED |

TO: All Interested Persons

1. On April 25, 1986, the Office of the Workers' Compensation Judge proposes to amend, the procedural rules of the Court.

2. The proposed rules to be amended provide as follows:

2.52.343 ATTORNEY FEES (1) No Change.

(a) On the date designated for submission of proposed findings of fact and conclusions of law, claimant's attorney shall submit a verified copy of his attorney fee agreement with the claimant, documentation regarding the time spent by the attorney in representing the claimant, and the attorney's claim concerning his customary and current hourly fee. ~~If the fee is based upon an hourly rate, claimant's attorney shall also submit documentation of the number of hours he has spent on claimant's behalf.~~

~~(b) In arriving at a reasonable attorney fee for the successful claimant, the Court shall presume that the amount agreed upon between the claimant and his attorney is a reasonable basis for the award except that where the attorney fee agreement amounts to a contingent fee based upon a percentage of the recovery it shall be subject to the following limitations:~~

~~(i) For cases where a petition has been filed, but the dispute over benefits has been resolved prior to trial, 25 percent of the amount of benefits the claimant receives due to the efforts of the attorney.~~

~~(ii) For cases where a dispute over benefits has not been resolved prior to trial, 33 percent of the amount of benefits claimant receives due to the efforts of the attorney.~~

~~(iii) For cases that are appealed to the Montana Supreme Court, 40 percent of the amount of benefits the claimant receives based upon an order of the Supreme Court.~~

(b e) In its findings of fact and conclusions of law and judgment, the Court shall indicate the basis for and amount of claimant's attorney fees. (AUTH. and IMP. Sect. 2-4-201 MCA)

2.52.344 PETITION FOR NEW TRIAL OR RECONSIDERATION OF ATTORNEY FEE AWARD (1) No Change.

(2) No change.

(3) If a petition to determine the reasonableness of attorney fees is filed, the party objecting to the award shall have twenty 20 days from the date the judgment is filed within which to file a written petition with the Court requesting a hearing to determine the reasonableness of the Court's award. That petition shall set forth specific facts which the petitioner would prove if granted a hearing and which, if proven, would establish the unreasonableness of the Court's attorney fee award. ~~pursuant to the criteria set forth in Wight v. Hughes Livestock Co., Inc., ----- Mont. -----, 664 P.2d 303, 40 St. Rep. 696 (1983).~~ General allegations to the effect that the award is unreasonable ~~does not meet the criteria set forth in Wight, supra,~~ shall not be sufficient. The Court shall review the petition and determine whether a prima facie basis for reconsideration is established. If not, the petition shall be denied and the original order or judgment issued by the Court shall be considered the final decision of the Court as of the day the request is denied. If so, a hearing shall be set and the petitioner shall be offered an opportunity to present evidence in support of its petition.

(4) No change.

(AUTH. and IMP. Sect. 2-4-102 MCA)

3. The rationale for amending ARM 2.52.343 and 2.52.344 is to set forth the manner in which the Court makes a determination of attorney fees and the procedures to be used in requesting a hearing concerning Attorney fees.

4. Interested parties may submit their data, views or arguments concerning these changes in writing to Clarice V. Beck, Hearing Examiner, Workers' Compensation Court, 5 South Last Chance Gulch, P.O. Box 537, Helena, Montana, 59624-0537 by April 10, 1986.

5. If a person who is directly affected by the proposed amendment wishes to express data, views and arguments orally or in writing at a public hearing, they must make a written request for a hearing and submit this request along with any written comments to Clarice V. Beck, address above, no later than April 10, 1986.

6. If the Court receives requests for a public hearing on the proposed amendment, from 25 persons who are directly affected by the proposed amendment or ten percent of the population of the State of Montana; from the Administrative Code Committee of the legislature; from a governmental subdivision or agency; or from an association having not less than 25 members who will be directly affected, a hearing will be held at a later date. The rule will affect each individual in the state. Notice of Hearing will be published in the Montana Administrative Register.

TIMOTHY W. REARDON
JUDGE

CERTIFIED TO THE SECRETARY OF STATE: February 28, 1986
Date

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE BOARD OF PHARMACY

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| In the matter of the proposed amendment of 8.40.403 concerning examination and 8.40.1003 concerning approved programs | ) ) ) ) | NOTICE OF PROPOSED AMENDMENTS OF 8.40.403 EXAMINATION FOR LICENSURE AS A REGISTERED PHARMACIST and 8.40.1003 APPROVED PROGRAMS |

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons.

1. On April 12, 1986, the Board of Pharmacy proposes to amend the above stated rules.

2. The proposed amendment of 8.40.403 will read as follows: (new matter underlined, deleted matter interlined)(full text of the rule is located on pages 8-1133 through 8-1134, Administrative Rules of Montana)

8.40.403 EXAMINATION FOR LICENSURE AS A REGISTERED PHARMACIST (1), (2) and (5) will remain the same.

~~(3) A general average of not less than 75 in all subjects and not less than 50 in chemistry, mathematics, pharmacology, pharmacy nor less than 75 in practice of pharmacy shall be a passing score for the examination.~~ The Board has selected the National Association of Boards of Pharmacy Standard Examination for Licensure to be administered in Montana for candidates for licensure in pharmacy. A score of 75 shall be a passing score for this standardized examination.

~~(4) The candidate has the option of retaking one or more subjects at the next scheduled testing dates in order to bring his average up to a score of 75 or higher. In any event, the above was not achieved.~~ A candidate who does not attain this score has the option of retaking the examination at the next scheduled testing date.

Auth: 37-7-201, MCA Imp: 37-7-201, MCA

3. The reason for the amendment is the rule needed to be changed because the examination to be administered starting in June 1986 is an integrated exam, i.e., there are not the five subsections that are in the examination presently administered. The new format contains all the subjects listed but are integrated throughout the examination.

4. The proposed amendment of 8.40.1003 will read as follows: (new matter underlined, deleted matter interlined)(full text of the rule is located on page 8-1167 through 8-1168, Administrative Rules of Montana)

8.40.1003 APPROVED PROGRAMS (1) Continuing education programs sponsored by providers that are approved by the American Council ~~of~~ on Pharmaceutical Education (ACPE) will automatically qualify for continuing education credit.

(2) Pharmacists may receive C.E.U. for programs other than those on the ACPE List of providers by applying for prior approval by the ~~Continuing Education Advisory Council. The duties of the Continuing Education Advisory Council shall be to provide a list of ACPE approved continuing education programs (including subject matter, type of program, provider or sponsor, date, location, and C.E.U.), to publish the list periodically, and to determine approval of alternative programs~~ board. The forms and guidelines for applying for approval are available from the board office.

(3) ...

Auth: 37-7-305, MCA Imp: 37-7-304, MCA

5. The reason for the amendment is because the need for the Continuing Education Advisory Council no longer exists. The Council established guidelines and a form to be used for the approval or disapproval of credits for programs that are sponsored by providers not approved by the American Council on Pharmaceutical Education. These guidelines and form are now used by the Executive Director in consultation with the President of the Board of Pharmacy to approve or disapprove programs in this category.

6. Interested persons may submit their data, views or arguments concerning the proposed amendments in writing to the Board of Pharmacy, 1424 9th Avenue, Helena, Montana, 59620-0407, no later than April 10, 1986.

7. If a person who is directly affected by the proposed amendments 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 comments he has to the Board of Pharmacy, 1424 9th Avenue, Helena, Montana, 59620-0407, no later than April 10, 1986.

8. If the board receives requests for a public hearing on the proposed amendments from either 10% or 25, whichever is less, of those persons who are directly affected by the proposed amendments, from the Administrative Code Committee of the legislature, from a governmental agency or subdivision, or from an association having no less than 25 members who will be directly affected, a public hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be 110 based on the 1100 licensees in Montana.

BOARD OF PHARMACY
D. WAYNE BOLLINGER, R.PH.
PRESIDENT

BY: Keith L. Colbo

KEITH L. COLBO, DIRECTOR
DEPARTMENT OF COMMERCE

Certified to the Secretary of State, March 13, 1986

MAR Notice No. 8-40-28

5-3/13/86

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE BOARD OF REALTY REGULATION

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| In the matter of the proposed amendment of 8.58.401 concerning the purpose of the board | ) ) ) | NOTICE OF PROPOSED AMENDMENT OF 8.58.401 PURPOSE OF BOARD |

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons.

1. On April 12, 1986 the Board of Realty Regulation proposes to amend the above-stated rules.

2. The proposed amendment of 8.58.401 will read as follows: (new matter underlined, deleted matter interlined)(full text of the rule is located at page 8-1601, Administrative Rules of Montana)

8.58.401 PURPOSE OF BOARD (1) will remain the same.

(2) In order to fulfill the purpose of this board, this board may revoke, suspend, censure, reprimand or apply any other disciplinary sanctions contemplated by Section 37-51-136, MCA to any real estate licensee for (any) violation of the provisions contained in Chapter 51 of Title 37, Montana Code Annotated and Chapter 58 of the Administrative Rules of Montana.

Auth: 37-51-203, MCA Imp: 37-51-202, MCA

3. The reason for the amendment is because the Board of Realty Regulation is cognizant of numerous violations of (its) rules and regulations which are not severe enough to merit suspension or revocation of license but these violations do necessitate some form of disciplinary action which will better enable the Board to fulfill its purpose of "protecting the public".

4. Interested persons may submit their data, views or arguments concerning the proposed amendments, in writing to the Board of Realty Regulation, 1424 9th Avenue, Helena, Montana, 59620-0407, no later than April 10, 1986.

5. If a person who is directly affected by the proposed amendments, 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 comments he has to the Board of Realty Regulation, 1424 9th Avenue, Helena, Montana, 59620-0407, no later than April 10, 1986.

6. If the board receives requests for a public hearing on the proposed amendments from either 10% or 25, whichever is less, of those persons who are directly affected by the proposed amendments, from the Administrative Code Committee of the legislature, from a governmental agency or subdivision, or from an association having no less than 25 members who will be directly affected, a public hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons

directly affected has been determined to be 510 based on the 5100 licensees in Montana.

BOARD OF REALTY REGULATION
GEORGE PIERCE, CHAIRMAN

BY: Keith L. Colbo
KEITH L. COLBO, DIRECTOR
DEPARTMENT OF COMMERCE

Certified to the Secretary of State, March 13, 1986

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE BOARD OF SOCIAL WORK EXAMINERS
AND PROFESSIONAL COUNSELORS

| | | |
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| In the matter of the proposed adoption of rules pertaining to Continuing Education Re-ments | ) ) ) ) | NOTICE OF PROPOSED ADOPTION OF RULES PER-TAINING TO CONTINUING EDUCATION REQUIREMENTS |

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons.

1. On April 12, 1986 the Board of Social Work Examiners and Professional Counselors proposes to adopt the above stated rules.

2. The proposed rules will read as follows:

I. HOURS, CREDITS, AND CARRY OVER (1) Each licensee of the Board of Social Work Examiners shall earn 20 clock hours of accredited continuing social work education for each year after 1985. Clock hours or contact hours shall be the actual number of hours during which instruction was given.

(2) A maximum of ten clock hours may be given for the first time preparation of a new course, in-service training workshop or seminar which is related to the enhancement of social work practice, values, skills, and knowledge; or a maximum of ten clock hours credit may be given for the preparation by the author or authors of a professional social work paper published for the first time in a recognized professional journal or given for the first time at a statewide or national professional meeting.

(3) If a licensee completed more than 20 hours of continuing education after 1985, excess hours in an amount not to exceed 20 hours may be carried forward to the next year.

(4) Any licensee over the age of 70 may apply for an exemption from the Continuing Social Worker Education requirements of these rules by filing a statement with the Board setting forth good faith reasons why he or she is unable to comply with these rules and an exemption may be granted by the Board.

Auth: Sec. 37-23-103, MCA Imp: Sec. 37-23-205(3), MCA

II. ACCREDITATION AND STANDARDS The following standards shall govern the approval of continuing social work education activities by the Board:

(1) They shall have significant intellectual or practical content, and the primary objective shall be to increase the participant's professional competence as a social worker.

(2) They shall constitute an organized program of learning dealing with matters directly related to the practice of social work, professional responsibility or ethical obligations of social workers.

(3) Providers of continuing social work education shall apply to the Board for accreditation.

(4) Applicants shall demonstrate that the offered course complies with the standards.

Auth: Sec. 37-23-103, MCA Imp: Sec. 38-23-205(3), MCA

III. REPORTING REQUIREMENTS (1) Each licensee shall submit an affidavit on a form approved by the Board attesting to the number of accreditated continuing education hours completed each year. Said affidavit shall be filed as part of licensee's renewal.

(2) Licensees and course providers may inquire in advance of continuing education activity for Board accreditation.

(3) The Board shall appoint a Continuing Education Review Committee which shall assist the Board in approving courses, papers, workshops, and other activities designed to meet continuing education requirements of licensed social workers.

Auth: Sec. 37-23-103, MCA Imp: Sec. 37-23-205(3), MCA

IV. NONCOMPLIANCE (1) In the event that a licensed social worker shall fail to comply with these rules in any respect, the Board shall promptly send a notice of noncompliance. The notice shall specify the nature of the noncompliance and state that unless the noncompliance is corrected or a request for a hearing before the Board is made within 30 days, the statement of noncompliance shall be an instance of unprofessional conduct.

Auth: Sec. 37-23-103, MCA Imp: Sec. 37-23-205(3), MCA

3. Rule I is being proposed in accordance with Section 37-22-304(2) which requires proof of completion of continuing education requirements.

Rule II is being proposed to ensure accreditation and standards are set high enough to be easily attainable and yet not too low in order to ensure maximum protection of the public.

Rule III is proposed because uniform reporting requirements are mandatory to assist the Board in determining whether or not licensee is maintaining a high degree of proficiency.

Rule IV is being proposed because noncompliance must be addressed for the protection of both the board and the licensee in order to guarantee equality to all concerned.

4. Interested persons may submit their data, views or arguments concerning the proposed adoptions in writing to the Board of Social Work Examiners, 1424 9th Avenue, Helena, Montana, 59620-0407, no later than April 10, 1986.

5. If a person who is directly affected by the proposed adoptions 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 comments he has to the Board of Social Work Examiners, 1424 9th Avenue, Helena, Montana, 59620-0407, no later than April 10, 1986

6. If the board receives requests for a public hearing on the proposed adoptions from either 10% or 25, whichever is less, of those persons who are directly affected by the proposed amendments, repeals, and adoptions, from the Administrative Code Committee of the legislature, from a governmental agency or subdivision, or from an association having no less than 25 members who will be directly affected, a public hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be 11 based on the 110 licensees in Montana.

BOARD OF SOCIAL WORK EXAMINERS
AND PROFESSIONAL COUNSELORS
PATRICK KELLY, CHAIRMAN

BY: Keith L. Colbo
KEITH L. COLBO, DIRECTOR
DEPARTMENT OF COMMERCE

Certified to the Secretary of State, March 13, 1986

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE BOARD OF SOCIAL WORK EXAMINERS
AND PROFESSIONAL COUNSELORS

| | | |
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| In the matter of the proposed adoption of rules pertaining to Professional Counselor | ) ) ) ) | NOTICE OF PROPOSED ADOPTION OF RULES PERTAINING TO PROFESSIONAL COUNSELORS |

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons.

1. On April 12, 1986 the Board of Social Work Examiners and Professional Counselors proposes to adopt the above stated rules.

(2) The proposed rules read as follows:

I. LICENSURE REQUIREMENTS (1) A planned graduate program of study that is primarily counseling in nature is one which shows evidence of 66% of the credits within the university accredited by various associations of colleges and secondary schools. This list is available at the board office. Credits are available in the following areas:

(a) Counseling Theory;

(b) Counseling Techniques, and

(c) Supervised Counseling Experience (this practicum must be supervised at the ratio of at least one hour of one-to-one supervision for every 10 hours of experience in the setting) and at least six of the following:

(i) Human growth and development includes studies that provide a broad understanding of the nature and needs of individuals at all developmental levels. Emphasis is placed on psychological, sociological, and physiological approaches. Also included are areas such as human behavior (normal and abnormal), personality theory, and learning theory.

(ii) Social and cultural foundations includes studies of change, ethnic groups, subcultures, changing roles of women, sexism, urban and rural societies, population patterns, cultural mores, use of leisure time, and differing life patterns.

(iii) The helping relationship includes philosophic bases of the helping relationship, consultation theory and/or an emphasis on the development of counselor and client (or consultee) self-awareness and self-understanding.

(iv) Groups includes theory and types of groups, as well as descriptions of group practices, methods dynamics, and facilitative skills. It includes either a supervised practice and/or a group experience.

(v) Life-style and career development includes areas such as vocational-choice theory, relationship between career choice and life-style, sources of occupational and educational information, approaches to career decision-making processes, and career-development exploration techniques.

(vi) Appraisal of the individual includes the development of a framework for understanding the individual, including methods of data gathering and interpretation, individual and group testing, case-study approaches and the study of individual differences. Ethnic, cultural, and sex factors are also considered.

(vii) Research and evalutaion includes areas such as statistics, research design, and development of research and demonstration proposals. It also includes understanding legislation relating to the development of research, program development, and demonstration proposals, as well as the development and evaluation of program objectives.

(viii) Professional orientation includes goals and objectives of professional counseling organizations, codes of ethics, legal consideration, standards of preparation, certification, and licensing and role identity of counselors.

Auth: Sec. 37-23-103, MCA Imp: Sec. 37-23-202, MCA

II APPLICATION PROCEDURE (1) Any person seeking licensure must apply on the board's official forms which may be obtained through the board office.

(2) Completed applications must be accompanied by:

(a) application fee;

(b) all verifications, transcripts, etc. as requested on the application, and

(c) three nomination letters as required by section 37-23-202(1)(d), MCA.

(3) The applicant shall be notified in writing of the results of the evaluation of the application.

Auth: Sec. 37-23-103, MCA Imp: Sec. 37-23-202(1)(d), MCA

III. FEE SCHEDULE

| | | |
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| (1) | Application Fee | $50.00 |
| (2) | Original license fee | 50.00 |
| (3) | Examination fee | 50.00 |
| (4) | Renewal Fee | 75.00 |

Auth: Sec. 37-23-103, MCA Imp: Sec. 37-1-134, 37-23-206, MCA

IV. ETHICAL STANDARDS (1) Violation of any of the following constitutes a breach of professional ethics:

(a) Misrepresent the type or status of license held by the licensee.

(b) Intentionally cause physical or emotional harm to a client.

(c) Commit any dishonest, corrupt, or fraudulent act which is substantially related to the qualifications, functions or duties of a licensee.

(d) Misrepresent or permit the misrepresentation of his or her professional qualifications, affiliations, or purposes.

(e) Have sexual relations with a client, solicit sexual relations with a client, or to commit an act of sexual misconduct or a sexual offense if such act, offense, or solicitation is substantially related to the qualifications, functions, or duties of the licensee.

(f) Perform or hold himself or herself out as able to perform professional services beyond his or her field or fields of competence as established by his or her education, training and/or experience.

(g) Permit a person under his or her supervision or control to perform or permit such person to hold himself or herself out as competent to perform professional services beyond the level of education, training and/or experience of that person.

(h) Fail to maintain the confidentiality, except as otherwise required or permitted by law, of all information that has been received from a counselee during the course of treatment and all information about the counselee which is obtained from tests or other such means.

(i) Prior to the commencement of treatment, fail to disclose to the counselee, or prospective counselee, the fee to be charged for the professional services, or the basis upon which such fee will be computed.

(j) Advertise in a manner which is false or misleading.

Auth: Sec. 37-23-103, MCA Imp: Sec. 37-23-211(1), MCA

3. The reason for the proposed adoption of Rule I is because a specific guideline is required to assist the Board in determining qualifications of prospective applicants in the professional counseling field. It will enhance the decision making process in identifying qualifications needed to closely protect the public.

Rule II is being proposed to set up a uniform application procedure and to guarantee all information required is received. This will enable fair determination of prospective licensee's qualifications.

Rule III is being proposed to implement section 37-1-134, MCA which allows the boards to set fees commensurate with costs of operating expenses. The revenue received from the proposed fees are anticipated to re-pay a start-up loan and cover operating costs.

Rule IV is being proposed to ensure a safeguard for health, safety and welfare of the public.

4. Interested persons may submit their data, views or arguments concerning the proposed adoptions in writing to the Board of Social Workers and Professional Counselors, 1424 9th Avenue, Helena, Montana, 59620-0407, no later than April 10, 1986.

5. If a person who is directly affected by the proposed adoptions 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 comments he has to the Board of Social Workers and Professional Counselors, 1424 9th Avenue, Helena, Montana, 59620-0407, no later than April 10, 1986.

6. If the board receives requests for a public hearing on the proposed adoptions from either 10% or 25, whichever is less, of those persons who are directly affected by the proposed amendments, repeals, and adoptions, from the Administrative Code Committee of the legislature, from a governmental agency or subdivision, or from an association having no less than 25 members who will be directly affected, a public hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be 15 based on the 150 licensees in Montana.

BOARD OF SOCIAL WORK EXAMINERS
AND PROFESSIONAL COUNSELORS
PATRICK KELLY, CHAIRMAN

BY: Keith L. Colbo
KEITH L. COLBO, DIRECTOR
DEPARTMENT OF COMMERCE

Certified to the Secretary of State, March 13, 1986

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE BOARD OF VETERINARY MEDICINE

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| In the matter of the proposed amendments of 8.64.501 concerning applications and 8.64.503 concerning examinations, and the adoption of new rule under sub-chapter 4 disciplinary actions | ) ) ) ) ) | NOTICE OF PROPOSED AMENDMENT OF 8.64.501 APPLICATION REQUIREMENTS AND 8.64.503 EXAMINATION FOR LICENSURE AND NEW RULES UNDER SUB-CHAPTER 4 CONCERNING DISCIPLINARY ACTIONS |

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons.

1. On April 12, 1986, the Board of Veterinary Medicine proposes to amend the above stated rules.

2. The proposed amendment of 8.64.501 will read as follows: (new matter underlined, deleted matter interlined)(full text of the rule is located at page 8-1789, Administrative Rules of Montana)

8.64.501 APPLICATION REQUIREMENTS ~~(1) The examination application form may also be used for application for licensure by reciprocity.~~

~~(2)~~(1) Applicants for licensure by examination shall submit a completed application with the proper fee and supporting documents to the board office no later than 30 days prior to the examination date as set by the board. Supporting documents shall include:

(a)...

~~(3)~~(2) All applicants must have taken the National Board Examination and the Clinical Competency Test within five years prior to the next scheduled examination date as set by the board and have their scores reported to the board office through the Interstate Reporting Service of its equivalent.

~~(a) Applicants must have taken the National Board examination within 5 years prior to the date of the next scheduled examination.~~

~~(b)~~(a) It is the responsibility of each applicant to take the National Board Examination and the Clinical Competency Test wherever and whenever possible. Montana will not administer the National Board Examination or the Clinical Competency Test unless deemed necessary by the board.

~~(4)~~(3) Foreign veterinary school graduates must have completed the requirements of the American Veterinary Medical Association's Education Commission for Foreign Veterinary Graduates (E.C.F.V.G.) before an application will be accepted. ~~The four basic steps for meeting the E.C.F.V.G.'s requirements are:~~

~~(a) graduation from a veterinary college listed by the World Health Organization or from a college recognized by the Ministry of Education of that particular country;~~

~~(b) proof of fluency in English; (i) graduates of U.S. or Canadian English language high schools must furnish proof of high school graduation; or~~

~~(ii) satisfactory completion of the Test of English as a Foreign Language (TOEFL) and the Test of Spoken English (TSE), both administered by the Educational Testing Service of Princeton, New Jersey, must be shown. In the interest of fairness and uniformity, graduates of colleges in all foreign countries, including English speaking countries, are required to take this examination. However, persons who are natives of English speaking countries may petition E.C.F.V.G. for waiver of the TOEFL and TSE requirements. Petitions are considered individually and granted or refused on a case by case basis;~~

~~(c) successful completion of either the E.C.F.V.G. examination or the National Board examination. The E.C.F.V.G. is actually a form of the previously given National Board examination and is printed, distributed, and scored by the Professional Examination Service (PES); and~~

~~(d) completion of a year of evaluated clinical experience at either a college of veterinary medicine in the U.S. or Canada or in a private practice approved by E.C.F.V.G. Approximately six months of the experience received must be with small animals and six months with large animals. Either large or small animal experience or both may be obtained in a mixed practice.~~

~~(i)~~(a) A foreign veterinary medical school graduate may serve the required, but not more than, one year internship (12 months) in this state providing, however, that proof can be shown that the private practice is currently approved by the E.C.F.V.G., and written approval has been obtained from the board of ~~veterinarians~~ veterinary medicine. This internship allows candidates to participate in all phases of the practice of veterinary medicine under direct supervision to the extent permitted by section 37-18-101, MCA et seq.

~~(e)~~(b) For specific information on the requirements of the E.C.F.V.G., contact the American Veterinary Medical Association, E.C.F.V.G., 903 North Meacham Road, Schaumburg, IL 60192.

~~(5)~~(4) An application for examination shall expire two years from the date of the application. An applicant who, for any reason, fails or neglects to take the examination within the two years shall be required to file another application and submit another application for examination fee.

Auth: 37-18-202, MCA Imp: 37-18-202, 302, 303, MCA

3. The reason for the amendment is that the Board is proposing to require the Clinical Competency Test (CCT) commencing with the June 1986 examination, to clean up some of the language in the rules, and to delete the steps for obtaining E.C.F.V.G. certification. The (CCT) measures aspects of a candidate's suitability to enter practice that

are not measured by the National Board Examination (NBE). By requiring both the NBE and the CCT, the Board will obtain information about a candidate's ability which is not obtained by using only one of the tests. The CCT is seen to access a candidate's ability to resolve cases similar to those which might be encountered in actual practice.

Because the steps for obtaining the E.C.F.V.G. certificate are continually changing, the Board considers it unnecessary to include the steps when all of the information can be obtained from the American Veterinary Medical Association.

4. The proposed amendment of 8.64.503 will read as follows: (new matter underlined, deleted matter interlined)(full text of the rule is located at page 8-1790, Administrative Rules of Montana)

8.64.503 EXAMINATION FOR LICENSURE (1) The examination for licensure as a veterinarian shall consist of ~~three~~four parts.

(a) The first part shall consist of the National Board examination pursuant to the requirements set forth in rule ARM 8.64.501 and shall score ~~60~~%30% of the total examination.

(b) The second part shall consist of the Clinical Competency Test purusant to the requirements set forth in ARM 8.64.501 and shall score 30% of the total examination.

~~(b)~~(c) The ~~second~~ third part shall consist of a practical examination as composed and corrected by the board and shall score 20% of the total examination.

~~(c)~~(d) The ~~third~~ fourth part shall consist of an oral examination as composed and corrected by the board and shall score 20% of the total examination.

(2) An applicant must achieve an overall average of 70% or better in order to obtain a license to practice veterinary medicine in this state.

(3) Any applicant who has failed the examination may apply to be re-examined at a subsequent examination and shall pay the proper examination fee. The applicant then must retake the practical and oral portion of the examination as given by the board. The applicant may, if he/she so desires, retake the National Board Examination and/or Clinical Competency Test to bring the average up, or must retake the National Board examination and/or Clinical Competency Test examination if the five year allowance period has expired.

Auth: 37-18-202, MCA Imp: 37-18-303, MCA

5. The reason for the amendment is that the Board is proposing to require the Clinical Competency Test (CCT) effective with the June, 1986 examination. The (CCT) measures aspects of a candidate's suitability to enter practice that are not measured by the National Board Examination (NBE). By requiring both the NBE and the CCT, the Board will obtain

information about a candidate's ability which is not obtained by using only one of the tests. The CCT is seen to access a candidate's ability to resolve cases similar to those which might be encountered in actual practice.

6. The text of the proposed rule is as follows:

I. DISCIPLINARY ACTIONS (1) The board reserves the right to take appropriate disciplinary action provided for in 37-1-136, MCA, against a licensed veterinarian violating any law or rules of the board, and to decide on a case by case basis the type and extent of disciplinary action it deems appropriate applying the following considerations:

(a) The seriousness of the infraction:

(b) The detriment to the health, safety and welfare of the people of Montana; and

(c) past or pending disciplinary actions relating to the licensee.

(2) The board may impose one or more of the following sanctions in appropriate cases:

(a) revocation of a license;

(b) suspension of its judgement of revocation on terms and conditions determined by the board;

(c) suspension of the right to practice for a period not exceeding 1 year;

(d) placing a licensee on probation;

(e) public or private reprimand or censure of a licensee;

(f) limitation or restriction of the scope of the license and the licensee's practice;

(g) deferral of disciplinary proceedings or imposition of disciplinary santions; or

(h) ordering the licensee to successfully complete appropriate professional training.

(3) When a license is revoked or suspended, the licensee must surrender the license to the board.

Auth: 37-1-136, 37-18-202, MCA Imp: 37-1-136, MCA

7. The reason the Board is proposing this rule is to implement Section 37-1-136, MCA which allows the Board to adopt rules specifying grounds for disciplinary action and rules for providing different alternatives for such action.

8. Interested persons may submit their data, views or arguments concerning the proposed amendments and adoptions in writing to the Board of Veterinary Medicine, 1424 9th Avenue, Helena, Montana, 59620-0407, no later than April 10, 1986.

9. If a person who is directly affected by the proposed amendments and adoptions 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 comments he has to the Board of Veterinary

Medicine, 1424 9th Avenue, Helena, Montana, 59620-0407, no later than April 10, 1986.

10. If the board receives requests for a public hearing on the proposed amendments and adoptions from either 10% or 25, whichever is less, of those persons who are directly affected by the proposed amendments and adoptions, from the Administrative Code Committee of the legislature, from a governmental agency or subdivision, or from an association having no less than 25 members who will be directly affected, a public hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be 75 based on the 750 licensees in Montana.

BOARD OF VETERINARY MEDICINE
WILLIAM D. MCFARLAND, D.V.M.
PRESIDENT

BY: Keith L. Colbo
KEITH L. COLBO, DIRECTOR
DEPARTMENT OF COMMERCE

Certified to the Secretary of State, March 13, 1986

STATE OF MONTANA
DEPARTMENT OF COMMERCE
FINANCIAL DIVISION

| | | |
|---|---|---|
| IN THE MATTER OF THE AMEND-MENT of Rule 8.80.301 relating to advertising by consumer loan licensees | ) ) ) ) | NOTICE OF THE PROPOSED AMENDMENT OF RULE 8.80.301 RELATING TO ADVERTISING BY CONSUMER LOAN LICENSEES |

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons.

1. On April 12, 1986 the Department of Commerce proposes to amend the above stated rule.

2. The proposed amendment of 8.80.301 will read as follows: (new matter underlined, deleted matter interlined)(full text of the rule is located on pages 8-2346 through 8-2348, Administrative Rules of Montana)

8.80.301 ADVERTISING ~~(1) Except by use of the following phrase, "licensed by the state of Montana," no licensee shall state or indicate that he is subject to supervision by the department of commerce, state of Montana.~~

~~(2)~~(1) Licensees shall maintain a file of all advertising, (written, printed, radio, television, etc.) for a period of at least twelve months after the last date of its use or until an examination of the licensee has been accomplished by the Montana consumer loan commissioner.

~~(3)~~(a) All advertising copy shall have noted thereon the name or names of all advertising media used and the dates when such advertising appeared.

~~(4)~~(b) The full text of radio or television advertising shall be retained. Licensees shall not solicit loans by telephone excepting with present or former customers.

~~(5) Licensees shall not advertise that loans are made at low rates, nor shall such advertising contain phrases such as "lowest cost," "lowest rates," "no red tape," "less than cost," and "easier to repay," or any other similar terms or phrases indicating that the charges for a loan are small or low.~~

~~(6) Advertisements referring to charges, payment schedules, or costs shall contain a complete statement specifying the total number and size of payments required to pay an obligation of given size. The quoted rate and periodic payments shall include all charges and costs to the borrower. If such quoted rates and charges are not available to all borrowers, then such advertisement shall also state the type and class of applicants eligible, the security and any other conditions under which such rates or charges are available.~~

~~(7) Licensees shall not state or suggest in any advertising, or in any manner, that the licensee will pay and discharge a loan which the prospective borrower has with another licensee.~~

~~(8) Licensees shall not advertise or give any premium, discount, gift or rebate to any borrower or prospective~~

borrower as a consideration for making or renewing a loan, except the adjustment due the borrower for the prepayment of a loan within the maximum legal rate of all charges made, in accordance with the provisions of the Montana Consumer Loan Act.

(9) Licensees shall not use any advertising which states or infers that the licensee will make loans at any specified rate or charge, or for any specified period of time unless in each and all of such cases the licensee grants such privilege to all applicants for loans, or unless such advertisements clearly show the type or class of applicants, the security and any other requirements necessary for applicants to qualify for such terms, rates or charges.

(10) Licensees shall not use so-called blind advertisements as, for example, is an advertisement giving only a telephone number, post office or newspaper box number, or a name other than that of the licensee.

(11) Licensees shall not make any loan at a rate in excess of any advertised rate of charge.

(12) Advertising of loans for the purpose of consolidating outstanding obligations is permitted.

(13) Licensees are permitted to issue instruments purporting to extend credit to a borrower or a prospective borrower (such as "credit cards," "letters of credit," etc.) only when:

(a) the complete text of said instrument has been submitted to the commissioner of consumer loans for examination and the commissioner has notified the licensee in writing that the use of the said form is not disapproved, and

(b) said licensee issues said instrument to an individual specifically named, and

(c) said individual has been a customer as a debtor of said licensee within a period not to exceed two years, and

(d) said licensee expressly covenants with said borrower or prospective borrower to consummate a loan or loans up to a definitely stated or determinable maximum amount at a rate not to exceed the current applicable rate of charge by presentation of the credit card without any credit investigation or consideration of the value of the security, and

(e) said credit instrument is dated accurately as of the date of issue and contains a termination date effective at least within twelve months from the date of issuance by the company, and

(f) said credit instrument is not a facsimile of a check, draft, bond, insurance policy or any other form of commercial paper which would tend to be false, misleading, or deceptive, and

(g) said credit instrument clearly shows that a loan and repayment thereof, together with charges thereon is involved.

(14) Under the provisions of the Montana Consumer Act, the above listed regulations shall be binding upon all licen-

~~sees and enforceable by the department of commerce director through the power of suspension or revocation of licensees.~~

(2) Licensees shall not use any advertising which is false, misleading or deceptive.

(3) Licensees shall not use so-called blind advertisements as, for example, an advertisement giving only a telephone number, post office or newspaper box number or a name other than that of the licensee.

(4) Licensees shall not use any advertising which is inconsistent with the Federal or Montana Comsumer Protection Acts or the regulations promulgated thereunder governing advertising.

AUTH: 32-5-401, MCA Imp: 32-5-401, MCA

3. The rule is being amended at the request of certain members of the industry for the following reasons: The amended rule will remove antiquated rules which tended to stifle the ability of licensees to compete in the marketplace, and the changes will still guarantee the protection of the public interest.

4. Interested persons may submit their data, views or arguments concerning the proposed amendments, in writing to Fred Napier, Commissioner of Financial Institutions, Department of Commerce, 1424 9th Avenue, Helena, Montana, 59620-0407, no later than April 10, 1986.

5. If a person who is directly affected by the proposed amendments, 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 comments he has to Fred Napier, Commissioner of Financial Institutions, Department of Commerce, 1424 9th Avenue, Helena, Montana, 59620-0407, no later than April 10, 1986.

6. If the board receives requests for a public hearing on the proposed amendments from either 10% or 25, whichever is less, of those persons who are directly affected by the proposed amendments, from the Administrative Code Committee of the legislature, from a governmental agency or subdivision, or from an association having no less than 25 members who will be directly affected, a public hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be 3 based on the 26 licensees in Montana.

DEPARTMENT OF COMMERCE

BY: _____
ROBERT J. WOOD, LEGAL COUNSEL
DEPARTMENT OF COMMERCE

Certified to the Secretary of State, March 3, 1986.

5-3/13/86 MAR Notice No. 8-80-7

BEFORE THE MONTANA STATE LIBRARY COMMISSION
OF THE STATE OF MONTANA

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| In the matter of the adoption of rules pertaining to state coal severance tax funding to federations and grant programs and the repeal of ARM 10.102.5101 | NOTICE OF PUBLIC HEARING ON THE PROPOSED REPEAL AND ADOPTION OF RULES PERTAINING TO STATE COAL SEVERANCE TAX FUNDING TO FEDERATIONS AND GRANT PROGRAMS |

TO: All Interested Parties

1. On May 3, 1986 at 1:30 p.m. a public hearing will be held in the Ambush-DryGulch Room of the Outlaw Inn, 1701 Highway 93 South, Kalispell, Montana, to consider the repeal and adoption of proposed rules pertaining to state coal severance tax funding to federations and grant programs.

2. The rule proposed to be repealed can be found on page 10-1269 of the Administrative Rules of Montana.

3. The proposed rules provide as follows:

RULE I ALLOCATION OF FUNDING BETWEEN FEDERATIONS AND GRANT PROGRAMS (1) At its first meeting following receipt by the Library Commission of the estimate of the appropriation to public library federations the commission shall allocate all funds received up to $500,000 to library federations according to the following formulas:

(a) The portion of the appropriation allocated to library federations shall be distributed among the six federations according to the following formula: 50% of the first $250,000 shall be divided equally among the six federations and 50% shall be allocated on the basis of population within the six federations.

(b) Any appropriation in excess of $250,000 shall be divided according to the following formula: 20% of the remainder shall be allocated equally among the six federations, 80% of the remainder shall be allocated among the six federations on the basis of population.

AUTH: 22-1-103, MCA IMP: 22-1-413, MCA

RULE II GRANT PROGRAMS AND APPLICATION PROCEDURE (1) The commission may allocate any funds in excess of $500,000 at its second meeting following receipt of the estimate from the Office of Budget and Program Planning to grant programs.

(a) Applications for grants shall be made in writing to the State Library Commission giving such detail as may be necessary to satisfy the commission.

(b) Applications from library federations must indicate the extent to which the grant is expected to help libraries achieve levels of service or strength as prescribed by the Montana Public Library Standards.

(c) Grant applications from federations, individual libraries and library networks shall be approved by the board of trustees of the library or library network.

(d) The applications shall be submitted to the Library Commission not later than four weeks after the Library Commission

announces the portion of appropriations set aside for grant proposals at its next scheduled meeting. Brief oral presentations in support of proposals are invited and questions may be asked by the commission.

(e) The commission may limit the length of discussion on grant applications.

(f) Any funds not allocated by the Library Commission to grant proposals shall be distributed in accordance with the formula for allocation of the state appropriation to library federations as set forth in Rule I (1)(b).

AUTH: 22-1-103, MCA IMP: 22-1-413, MCA

RULE III PRIORITIZATION OF GRANT APPLICATIONS (1) The commission shall prioritize grant applications by reference to the following unprioritized list of fundable grant program features:

(a) Projects which enable libraries to meet one-time capital investment costs in collection development or automation of libraries.

(b) Programs to provide assistance to local libraries in strengthening personnel.

(c) Proposals which strengthen the ability of local libraries to play their role in community centers.

(d) Pilot projects to enable federations to utilize the resources of all member libraries.

(e) Statewide projects which involve all federations or which enable federations to cooperate in offering services.

(f) Pilot projects to strengthen core services which can be continued through regular federation funding.

(g) Special projects which enable libraries to serve special clients or address areas needing special attention.

(h) Projects that enable local libraries and/or federations to enrich or extend library services.

AUTH: 22-1-103, MCA IMP: 22-1-413, MCA

4. The reason for the repeal of ARM 10.102.5101 is that 22-1-103(9), MCA, gives the Montana State Library Commission the authority to designate federation areas and headquarters by resolution rather than by rules.

5. The reason for the adoption of new Rules I, II, III is to implement sec. 22-1-413, MCA, which makes the Montana State Library Commission responsible for the allocation of state funding to public library federations.

6. Interested parties may submit their data, views or arguments concerning the proposed repeal and adoptions, either orally or in writing at the hearing. Written data, views or arguments may be submitted to Mary Jane West, Administrative Assistant, Montana State Library, 1515 E. 6th Avenue, Helena, Montana 59620, no later than April 16, 1986.

7. Mary Hudspeth has been designated to preside over and conduct the hearing.

Sara Parker
Montana State Librarian

Certified to the Secretary of State March 3, 1986

5-3/13/86 MAR Notice No. 10-102-3

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

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| In the matter of the adoption of a rule requiring notification underground storage tanks and interim prohibitions | NOTICE OF PUBLIC HEARING FOR ADOPTION OF RULES (Underground Storage Tanks) |

To: All Interested Persons

1. On April 3, 1986 at 10:30 a.m. a public hearing will be held in Room C209 of the Cogswell Building, 1400 Broadway, Helena, Montana, to consider the adoption of a rule pertaining to notification requirements for owners and operators of underground storage tanks and to an interim prohibition for installation of such tanks.

2. The proposed rule does not replace or modify any section currently found in the Administrative Rules of Montana.

3. The proposed rules provide as follows:

RULE I DEFINITIONS In this chapter the following terms have the meanings or interpretations indicated below and must be used in conjunction with and supplemental to those definitions contained in section 75-10-403, MCA.

(1) "Operator" means any person in control of, or having responsibility for the daily operation of the underground storage tanks.

(2) "Owner" means either:

(a) in the case of an underground storage tank in use on November 8, 1984 or brought into use after that date, any person who owns an underground storage tank used for the storage, use, or dispensing of regulated substances, or

(b) in the case of any underground storage tank in use before November 8, 1984, but no longer in use on that date, any person who owned such tank immediately before discontinuation of its use.

(3) "Release or leak" means any spilling, leaking, emitting, discharging, escaping, leaching, or disposing from an underground storage tank of the regulated substance into groundwater, surface water, surface soils, or subsurface soils.

(4) "Groundwater" means water below the land surface in a zone of saturation.

(5) "New tank performance standards" shall include but need not be limited to design, construction, installation, release, detection and compatibility standards.

(6) "RCRA" means the federal Resource Conservation and Recovery Act of 1986 as amended, 42 U.S.C. section 6901 et seq. The department does not intend to incorporate by reference the provisions of RCRA.

(7) "CERCLA" means the federal Comprehensive Environmental Response, Compensation and Liability Act of 1980 as amended, 42 U.S.C. section 9601 et seq. The department does not intend to incorporate by reference the provisions of CERCLA.

RULE II NOTIFICATION REQUIREMENTS (1) On or before May 8, 1986, each owner of an underground storage tank currently in use must submit, in the form prescribed in section (9) of this rule, a notice of the existence of such tank to the department.

(2) On or before May 8, 1986, each owner of an underground storage tank taken out of operation after January 1, 1974 (unless the owner knows that such tank has been removed from the ground) must submit, in the form prescribed in section (9) of this rule, a notice of the existence of such tank to the department.

(3) Any owner who brings an underground storage tank into use after May 8, 1986, must, within 30 days of bringing such tank into use, submit, in the form prescribed in section (9) of this rule, a notice of the existence of such tank to the department.

(4) Owners required to submit notices to the department under sections (1) through (3) of this rule must provide the required notice for each underground storage tank they own. Owners may provide notice of several tanks using one notification form, but owners who own tanks located at more than one place of operation must file a separate notification form for each separate place of operation.

(5) Notices required to be submitted under sections (1) through (3) of this rule must provide all of the information indicated on the prescribed form described in section (9) of this rule for each tank for which notice must be given.

(6) Any person who deposits regulated substances from December 9, 1985 through May 9, 1987, in an underground storage tank must make reasonable efforts to notify the owner or operator of such tank of the owner's obligations under sections (1) through (3) of this rule.

(7) Beginning 30 days after the department issues new tank performance standards pursuant to section 75-10-405, MCA, any person who sells a tank intended to be used as an underground storage tank must notify the purchaser of such tank of the owner's notification obligations under sections (1) through (3) of this rule.

(8) Sections (1) through (3) of this rule do not apply to tanks for which notice was given pursuant to section 103(c) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980.

(9) The form which must be used for notice submitted to

the department under this rule is department form, "Notification for Underground Storage Tanks", EPA form 7530-1 (11-85) DHES Revised 2-86.

(10) The department hereby adopts and incorporates by reference the form entitled "Notification for Underground Storage Tanks", EPA form 7530-1 (11-85) DHES Revised 2-86, which form asks for information including but not limited to ownership, location, age, material of construction, capacity, use, and internal and external construction. Copies of this form may be obtained from the Solid Waste Bureau, Department of Health and Environmental Sciences, Cosgwell Building, Capitol Station, Helena, Montana 59620.

RULE III INTERIM PROHIBITION FOR INSTALLATION Beginning from the effective date of this rule and until the effective date of new tank performance standards promulgated under section 75-10-405, MCA, no person may install an underground storage tank for the purpose of storing regulated substances unless such tank (whether of single or double wall construction) has the following characteristics:

(1) will prevent releases due to corrosion or structural failure for the operational life of the tank,

(2) is cathodically protected against corrosion, constructed of noncorrosive material, steel clad with a noncorrosive material, or designed in a manner to prevent the release or threatened release of any stored substance, and

(3) the material used in the construction or lining of the tank is compatible with the substance to be stored.

4. The department is proposing these rules to implement amendments to Section 75-10-405, MCA, passed by the 1985 legislature to adopt requirements for reporting by owners and operators of underground storage tanks. The purpose of these notification requirements is to collect information so that the department can develop an inventory of underground storage tanks including location, age, use size, and type, of such tanks. The interim requirements are intended to prevent leakage until the new performance standards are adopted.

5. Interested persons may present their data, views, or arguments, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted to Robert L. Solomon, Cogswell Building, Capitol Complex, Helena, MT, no later than April 11, 1986.

6. Robert L. Solomon, Cogswell Building, Capitol Complex, Helena, Montana, has been designated to preside over and conduct the hearing.

7. The authority of the department to make the proposed rule is based on section 75-10-405, MCA, and the rule implements section 75-10-405, MCA.

JOHN J. DRYNAN, M.D., Director

Certified to the Secretary of State March 3, 1986.

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

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| In the matter of the amendment of Rules 46.12.204, 46.12.501 and 46.12.502 pertaining to co-payments for licensed clinical social workers' services | ) ) ) ) ) | NOTICE OF PUBLIC HEARING ON THE PROPOSED AMENDMENT OF RULES 46.12.204, 46.12.501 AND 46.12.502 PERTAINING TO CO-PAYMENTS FOR LICENSED CLINICAL SOCIAL WORKERS' SERVICES |

TO: All Interested Persons

1. On April 2, 1986, at 1:00 p.m., a public hearing will be held in the auditorium of the Social and Rehabilitation Services Building, 111 Sanders, Helena, Montana to consider the proposed amendment of Rules 46.12.204, 46.12.501 and 46.12.502 pertaining to co-payments for licensed clinical social workers' services.

2. The rules as proposed to be amended provide as follows:

46.12.204 RECIPIENT REQUIREMENTS, CO-PAYMENTS (1) Each recipient, unless eligible for an exemption, must pay to the provider the following co-payments not to exceed the cost of the service:

Subsections (1)(a) through (1)(q) remain the same.

(r) eyeglasses, $1.00 per service; and

(s) physician's services, $1.00 per service~~.~~; and

(t) licensed clinical social workers' services, $.50 per service.

Subsections (2) through (4) remain the same.

AUTH: Sec. 53-2-201 and 53-6-113 MCA
IMP: Sec. 53-6-141 MCA

46.12.501 SERVICES PROVIDED Subsections (1) through (1)(u) remain the same.

(v) psychological services~~.~~;

(w) licensed clinical social workers' services.

Subsection (2) remains the same.

AUTH: Sec. 53-6-113 MCA
IMP: Sec. 53-6-103 and 53-6-141 MCA

46.12.502 SERVICES NOT PROVIDED BY THE MEDICAID PROGRAM

Subsections (1) through (2)(e) remain the same.

~~(f) psychiatric social work services;~~

(gf) mid-wifery services;

~~(h) social work services;~~

(~~i~~g) physical therapy aide services;

(~~j~~h) physician assistant services;
(~~k~~I) nonphysician surgical assistance services;
(~~l~~j) nutritional services;
(~~m~~k) masseur or masseuse services;
(~~n~~l) dietary supplements;
(~~o~~m) homemaker services; and
(~~p~~n) telephone service in home, remodeling of home, plumbing service, car repair and/or modification of automobile.

Subsections (3) through (3)(d) remain the same.

AUTH: Sec. 53-2-201, 53-6-113 and 53-6-402 MCA
IMP: Sec. 53-2-201, 53-6-103, 53-6-141 and 53-6-402 MCA

3. Licensed clinical social workers' services were added as Medicaid services under optional services effective October 18, 1985. The rules governing co-pay, covered services and excluded services were not updated at the same time. These proposed amendments will bring licensed clinical social workers' services in line with other services by imposing a nominal co-payment on these services as a utilization control/cost containment measure.

4. Interested parties may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to the Office of Legal Affairs, Department of Social and Rehabilitation Services, P.O. Box 4210, Helena, Montana 59604, no later than April 10, 1986.

5. The Office of Legal Affairs, Department of Social and Rehabilitation Services has been designated to preside over and conduct the hearing.

Director, Social and Rehabilitation Services

Certified to the Secretary of State February 28, 1986.

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

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| In the matter of the amendment of Rules 46.12.3002, 46.12.3804 and 46.12.3805 pertaining to eligibility determinations for SSI- and AFDC-medically needy assistance and Rule 46.12.3003 pertaining to mandatory social security number requirements | ) ) ) ) ) ) ) | NOTICE OF PUBLIC HEARING ON THE PROPOSED AMENDMENT OF RULES 46.12.3002, 46.12.3804 AND 46.12.3805 PERTAINING TO ELIGIBILITY DETERMINATIONS FOR SSI- AND AFDC-MEDICALLY NEEDY ASSISTANCE AND RULE 46.12.3003 PERTAINING TO MANDATORY SOCIAL SECURITY NUMBER REQUIREMENTS |

TO: All Interested Persons

1. On April 2, 1986, at 9:30 a.m, a public hearing will be held in Room 107 of the Social and Rehabilitation Services Building, 111 Sanders, Helena, Montana, to consider the proposed amendment of Rules 46.12.3002, 46.12.3804 and 46.12.3805 pertaining to eligibility determinations for SSI- and AFDC-medically needy assistance and Rule 46.12.3003 pertaining to mandatory Social Security number requirements.

2. The rules as proposed to be amended provide as follows:

46.12.3002 DETERMINATION OF ELIGIBILITY Subsections (1) through (4)(a)(i) remain the same.

~~(b)--For prospective coverage, eligibility is granted for the month provided the individual met all eligibility criteria the first moment of the first day of the month, except that:~~

~~(i)--for medically needy individuals, prospective coverage begins when incurred medical expenses are greater than or equal to the required incurment for the prospective period.~~

~~(c)--For retroactive coverage, eligibility is granted beginning the first day of the third month before the month of application provided the individual met all the eligibility conditions during the retroactive period, except that:~~

~~(i)--for medically needy individuals, retroactive coverage begins when incurred medical expenses are greater than or equal to the required incurment for the retroactive period.~~

(b) For coverage of aged, blind and disabled persons whose eligibility is related to the supplemental security income program, eligibility is granted for the month provided the resource eligibility criteria is met the first moment of the first day of that month and all other eligibility criteria are met for that month.

(c) For coverage of parents and children whose eligibility is related to the aid to families with dependent children program, eligibility is granted for the month if all eligibility criteria is met any time during the month.

(d) For coverage of medically needy persons, eligibility begins when incurred remedial and medical expenses equal the required incurrment for the period.

(e) In no case will coverage be granted prior to the first day of the third month preceding the date of application.

AUTH: Sec. 53-6-113 MCA
IMP: Sec. 53-6-132 and 53-6-133 MCA

46.12.3003 REDETERMINATION OF ELIGIBILITY Subsections (1) through (2)(a) remain the same.

(3) In redetermining eligibility, the department will also review case records for the recipient's SSN or, in the case of families, each family member's SSN. If the case record does not contain the SSN's, the department will ~~request but not~~ require them in accordance with ARM 46.12.3001(6).

AUTH: Sec. 53-6-113 MCA
IMP: Sec. 53-6-142 MCA

46.12.3804 INCOME ELIGIBILITY, NON-INSTITUTIONALIZED MEDICALLY NEEDY Subsections (1) through (1)(a)(iii) remain the same.

(b) For groups under non-institutionalized SSI-related individuals and couples, quarterly countable income will be determined using the SSI income requirements set forth in 20 CFR, Part 416, Subpart K, as amended through March 1, 1986, ~~as supported by 20 CFR, Part 416, Subpart J, 20 CFR Part 416, Subpart K~~, which contains the SSI criteria for evaluating income, including the income of financially responsible relatives, ~~and 20 CFR Part 416, Subpart J, contains the SSI criteria for evaluating family relationships~~. The department hereby adopts and incorporates by reference 20 CFR, Part 416, Subparts ~~J and~~ K, as amended through March 1, 1986. A copy of these federal regulations may be obtained from the Department of Social and Rehabilitation Services, Economic Assistance Division, P.O. Box 4210, 111 Sanders, Helena, Montana 59604.

Subsections (1)(b)(i) through (4)(c) remain the same.

AUTH: Sec. 53-2-201, 53-6-113 and 53-6-402 MCA
IMP: Sec. 53-2-201, 53-6-101, 53-6-131 and 53-6-402 MCA

46.12.3805 RESOURCE STANDARDS, NON-INSTITUTIONALIZED MEDICALLY NEEDY (1) ~~For groups under non-institutionalized AFDC related families and children, the AFDC resource standards set forth in ARM 46.10.406 will be used to determine whether the family is eligible with respect to resources.~~ The following table sets forth the resource standards applicable for the medically needy program. To be eligible with respect

to resources, the recipient's resources must not exceed the following resource standards.

| Family Size | 01/01/86 to 12/31/86 | 01/01/87 to 12/31/87 | 01/01/88 to 12/31/88 | 01/01/89 to 12/31/89 |
|---|---|---|---|---|
| 1 | 1,700 | 1,800 | 1,900 | 2,000 |
| 2 | 2,550 | 2,700 | 2,850 | 3,000 |

$100 will be added to the standard for two (2) for each additional family member.

(a) In the case of individuals under 21 who are ineligible for medicaid under ARM 46.12.3401(1)(b)(iii) and ARM 46.12.3401(3), the above cited ~~AFDC~~ resource standards will be used to determine whether the individual in his placement is eligible with respect to resources. Because the individual is not living with his parent, parental resources will be considered only when actually contributed.

(2) For groups under non-institutionalized SSI-related individuals and couples, the SSI resource standards set forth in 20 CFR, Part 416, Subpart L, as amended through March 1, 1986, ~~as supported by 20 CFR, Part 416, Subpart J~~, will be used to determine whether the individual or couple is eligible with respect to resources. 20 CFR Part 416, Subpart L, contains the SSI criteria for evaluating resources, including the resources of financially responsible relatives, ~~and 20 CFR Part 416, Subpart J, contains the SSI criteria for evaluating family relationships~~. The department hereby adopts and incorporates by reference 20 CFR, Part 416, Subparts ~~J and~~ L, as amended through March 1, 1986. A copy of these federal regulations may be obtained from the Department of Social and Rehabilitation Services, Economic Assistance Division, P.O. Box 4210, 111 Sanders, Helena, Montana 59604.

(a) The exemption from the resources requirements relating to financially responsible relatives as described at ARM 46.12.3603(2)(b) applies to individuals applying as medically needy.

(3) Under subsections (1) and (2), countable resources ~~may~~ shall not exceed the applicable standards during ~~the quarterly period~~ any retroactive or prospective month over which income is evaluated.

AUTH: Sec. 53-2-201, 53-6-113 and 53-6-402 MCA
IMP: Sec. 53-2-201, 53-6-101, 53-6-131 and 53-6-402 MCA

3. Additional amendments to ARM 46.12.3002 have been proposed to clarify the eligibility requirements of that section. No substantive changes have resulted from these amendments. ARM 46.12.3804 and 46.12.3805 have been amended

to conform to the Tax Equity and Fiscal Responsibility Act (TEFRA) mandate of one income and resource standard for the non-institutionalized SSI- and AFDC-related medically needy programs. This change will also bring these sections into conformity with applicable federal regulations.

The incorporations by reference to 20 CFR, Part 416, Subparts K and L, have been updated as amended to March 1, 1986. The amendments to 20 CFR, Part 416, Subpart K, generally set forth income requirements for determining eligibility for SSI benefits. The amendments to 20 CFR, Part 416, Subpart L, generally set forth resources and exclusions to be taken into account for determining eligibility for SSI benefits.

ARM 46.12.3001(6) was recently amended to require Social Security numbers as a condition of eligibility. ARM 46.12.3003 should have been amended accordingly at that time but was overlooked. This notice is necessary to correct the resulting inconsistency.

4. Interested parties may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to the Office of Legal Affairs, Department of Social and Rehabilitation Services, P.O. Box 4210, Helena, Montana 59604, no later than April 10, 1986.

5. The Office of Legal Affairs, Department of Social and Rehabilitation Services has been designated to preside over and conduct the hearing.

Director, Social and Rehabilitation Services

Certified to the Secretary of State March 3, 1986.

BEFORE THE DEPARTMENT OF AGRICULTURE
OF THE STATE OF MONTANA

| | | |
|---|---|---|
| In the matter of the amendments regarding Alfalfa Leafcutting Bee Rules 4.12.1205 and 4.12.1207 | ) ) ) ) ) | NOTICE OF ADOPTION OF AMENDMENTS TO Alfalfa Leafcutting Bee Rules 4.12.1205 and 4.12.1207 |

TO: All Interested Persons:

1. On January 16, 1986 the Department of Agriculture published notice of the proposed adoption of amendments of ARM 4.12.1205 and 4.12.1207 regarding the certification of imported alfalfa leafcutting bees on pages 6 and 7 of 1986 Montana Administrative Register issue number 1.

2. The department has adopted the rule as proposed.

3. The department received one comment from Dave Cogley of the Legislative Council requesting amplification of the statement of necessity.

Response: The department has determined that areas in Montana exist where chalkbrood is found in alfalfa leafcutting bees. The alfalfa leafcutting bee growers have demonstrated to the department that it is difficult to import alfalfa leafcutting bees that contain no levels of chalkbrood. It is therefore necessary to loosen the restrictions for importing alfalfa leafcutting bees so as to permit growers to be able to replenish their inventories of bees without undue hardship. The amendment to the rule deleting reference to storing imported bees at Montana State University is necessary to reflect the change in the law that removed the requirement of a bee lab at M.S.U. The department now conducts the laboratory analysis at its Helena office headquarters. Therefore, the previous restriction in the rules must be deleted.

4. No other comments or testimony were received.

Keith Kelly
Director

Certified to the Secretary of State March 3, 1986.

BEFORE THE DEPARTMENT OF AGRICULTURE
STATE OF MONTANA

| | | |
|---|---|---|
| In the matter of adoption of rules pertaining to designation of noxious weeds pursuant to the County Weed Control Act | ) ) ) ) | NOTICE OF ADOPTION OF NEW RULES DESIGNATING NOXIOUS WEEDS PURSUANT TO COUNTY WEED CONTROL ACT RULE I - 4.5.201; RULE II - 4.5.202; RULE III - 4.5.203 |

TO ALL INTERESTED PERSONS:

1. On February 28, 1986 at 10 a.m. the Department of Agriculture held a public hearing in Room 225 of the Agriculture/Livestock Building, Helena, Montana to consider the adoption of the above stated new rules at pages 88 and 89, 1986 Montana Administrative Register, issue number 2.

2. The rules were adopted as proposed.

3. The department received no comments critical of the rules.

Comment: The department did receive two recommendations for additional weeds placed on the list. Mr. William Otten recommended that the department include Common Tansy (Tanacetun vulgare L.) and Westeck proposed the addition of sulfur cinquefoil (Potentilla recta), common toadflax (linaria vulgaris), ox-eye daisy (Chrysanthemum leucanthemum), scot's broom (Cytisus scoparius), houndstongue (Cynoglossum offiunale) and muskthistle (Carduus nutans). Westech further suggested that the following grasses and forbs be included in a category 3 list: Bromus tectorum, Bromus japonicus, Salsola iberica, Kochia scoparia.

Response: The department acknowledges that these plants suggested for inclusion on the weed list possess some of the elements of the weeds listed. They, for various reasons, will not be included on the statewide list. The department determined that common tansy, sulfur cinquefoil, common toadflax, ox-eye daisy and scot's broom are found in limited areas of the state and do not presently pose a threat of rapid spreading throughout the state. The department determined that houndstongue and musk thistle are biennial and as such need to be treated differently. However, including biennials on the list at this time would create the problem of an excessively long list that would create major administrative problems for the counties. The listed grasses and forbs admittedly may create economic harm but were not included on the list due to major feasibility problems with designating them as statewide weeds.

It is for these reasons that the department decided to stay with its original proposed list. The department plans to review and revise this list on a periodic basis so as to keep current the weed list to the ecological condition of the state. The department will carefully scrutinize the weeds suggested above and consider them for inclusion on the list if conditions change. These weeds and others may still be included on the county weed lists and can be handled on the local level.

Comment: Dave Cogley of the Legislative Council expressed that the department needed further clarification of its statement of necessity.

Response: The department finds it necessary to implement these rules so as to meet the legislative statutory mandate. These rules are necessary to implement a consistent and manageable noxious weed program throughout the state. The list establishes the necessary minimum weeds that each local weed district must consider for its weed control programs.

4. The department received letters in support for the rules as proposed from James Freeman, Bill Hardman, William Hiett, Jr., Richard E. Grady and Stuart H. Doggett.

5. No other comments or testimony were received.

By: Keith Kelly
Keith Kelly
Director

Certified to the Secretary of State March 3, 1986

BEFORE THE HIGHWAY COMMISSION
OF THE STATE OF MONTANA

| | | |
|---|---|---|
| In the matter of the adoption of Rules I and II, the amendment of Rules 18.6.202, 18.6.211, 18.6.212, 18.6.213, 18.6.214, 18.6.221, 18.6.231, 18.6.251 and 18.6.271, and the repeal of Rule 18.6.272 concerning the regulation of outdoor advertising. | ) ) ) ) ) ) ) ) ) | NOTICE OF THE ADOPTION OF RULES I AND II, THE AMENDMENT OF RULES 18.6.202, 18.6.211, 18.6.212, 18.6.213, 18.6.214, 18.6.221, 18.6.231, 18.6.251 AND 18.6.271, AND THE REPEAL OF RULE 18.6.272 ON OUTDOOR ADVERTISING |

TO: All Interested Persons:

1. On October 17, 1985, the Highway Commission published notice of the proposed adoption of two new rules, amendment of rules 18.6.202, 18.6.211, 18.6.212, 18.6.213, 18.6.214, 18.6.221, 18.6.231, 18.6.251 and 18.6.271, and the repeal of rule 18.6.272 concerning the regulation of outdoor advertising at page 1482 of the 1985 Montana Administrative Register, issue number 19.

2. The commission has adopted Rule I-18.6.203 UNZONED COMMERCIAL OR INDUSTRIAL AREA as proposed with the following changes:

(1) The permanent buildings or improvements comprising a business used to qualify an area must be located ~~on land immediately adjacent to the primary or interstate highway right-of-way, and the permanent buildings or improvements comprising the business must be located~~ within 660 feet of the right-of-way of an interstate or primary highway.

(2) The business ~~itself~~ must be clearly visible to the traveling public and be easily recognizable as a commercial or industrial activity. Signs, displays or other devices identifying the business may be considered in the determination of visibility. A business located on what is otherwise used as residential property will not qualify an area as an unzoned commercial or industrial area if only a portion of the building so used is visible ~~and if the property appears to be primarily residential from the highway~~.

Subsections (3) and (4) are adopted as proposed.

3. The commission has adopted Rule II-18.6.245 NON COMMERCIAL SIGNS as proposed.

4. The commission has amended Rule 18.6.202 DEFINITIONS as proposed with the following changes to subsections (2) and (4). Subsections (1) and (3) are amended as proposed.

(2) On-Premise Signs: means signs ~~Signs~~ erected on property for the sole purpose of advertising its sale or lease, or ~~for~~ of advertising an activity conducted on the property. To qualify as an on-premise sign, a sign advertising an activity conducted on the property must be located on the land actually used or occupied by the activity. The extent of the property used for the activity includes its buildings, ~~and~~ parking area AND INCORPORATED LANDSCAPED AREAS but does not include vacant land or land used for unrelated activities. Boundaries which in the judgment of the Commission are fabricated solely to circumvent the intent and purpose of this definition shall be disregarded.

(4) Conforming Sign means one which was lawfully erected and which complies with ~~State law and regulations in regard to~~ spacing, zoning, size, ~~and~~ lighting and all other ~~legal~~ requirements UNDER THE OUTDOOR ADVERTISING ACT AND THE OUTDOOR ADVERTISING REGULATIONS.

5. The commission has amended Rules 18.6.211 PERMITS, 18.6.212 PERMIT APPLICATIONS - NEW SIGN SITES, 18.6.213 PERMIT ATTACHMENT, and 18.6.214 RENEWALS as proposed.

6. The commission has amended Rule 18.6.221 NEW SIGN ERECTION as proposed with the following changes in subsection (2):

(2) A permit issued for a new sign will become invalid ~~four three~~ FOUR months after the date it is issued if ~~it has not been~~ the sign has not been erected and the permit has not been affixed to the sign ~~it was intended to cover by the expiration of that period~~.

Subsections (1) and (3) are amended as proposed.

7. The commission has amended Rule 18.6.231 SIGN SPACING by amending portions of subsection (5) as follows:

(a) ~~The double faced sign facings~~ DOUBLE-FACED SIGNS may be positioned side by side on a single structure or stacked vertically on a single structure, and are to be considered as one sign for spacing and permitting purposes.

(c) V-Type signs ARE TWO SIGNS IN THE SHAPE OF THE LETTER V OR A TRIANGLE WHEN VIEWED FROM ABOVE, WITH THEIR FACES ORIENTED IN DIFFERENT DIRECTIONS AND LOCATED NO MORE THAN 15 FEET APART AT THEIR CLOSEST POINTS.

The remainder of the rule is unchanged.

8. The commission has amended Rule 18.6.251 REPAIR OF SIGNS as proposed with the following changes to subsection (1)(e):

(e) In no case ~~will~~ may the repair, maintenance, or re-erection of non-conforming signs (or signs in conforming areas which do not meet required size, lighting and spacing criteria) result in AN INCREASE IN THE AREA USED TO DISPLAY ADVERTISING COPY OR an increase of height, width, or areas over the height, width or area of the sign when first permitted; also, in no case ~~will~~ may the repair, mainte-

nance or re-erection of a sign result in a substantial upgrading of the type ~~of~~ or value of the sign. (For example, a change from wood to steel structure or a change from unilluminated to illuminated would constitute a substantial upgrading.) ~~No additional facings may be added to non conforming signs.~~ NEW ADVERTISING COPY MAY BE PLACED UPON AN EXISTING FACE SO LONG AS THE AREA USED FOR ADVERTISING DISPLAY IS NOT INCREASED.

The remainder of subsections (1) and (2) are amended as proposed.

9. The commission has amended Rule 18.6.271 as follows:

18.6.271 OUTDOOR ADVERTISING REGULATIONS TO APPLY TO RECENTLY DESIGNATED PRIMARY ROUTES (1) The Montana Highway Commission ~~has removed certain highway routes from the Federal Aid Secondary System and placed them on~~ occasionally designates additional highways as a part of the Federal Aid Primary System. Outdoor advertising signs ~~along the aforementioned routes~~ visible from the primary system are ~~controlled~~ regulated by ~~regulations contained in ARM 18.6.201 through ARM 18.6.263 and the statutory restrictions contained in~~ the Montana Outdoor Advertising Act, Sections 75-15-101 through 75-15-134, MCA, and the regulations of this sub-chapter. Permits for ~~the foregoing~~ signs visible from newly designated primary highways must be secured from the Department pursuant to ARM 18.6.211. Applications for permits must be received by the Department ~~by June 2, 1978~~ within six months of RECEIPT OF NOTICE OF the designation of a highway to the primary system. THE DEPARTMENT WILL NOTIFY THE SIGN OWNERS OR SIGN SITE OWNERS EITHER PERSONALLY OR IN WRITING OF SUCH DESIGNATION.

Subsection (2) has been amended as proposed.

10. The commission has repealed Rule 18.6.272 regarding the outdoor advertising permit application form, which is found on pages 18-144 through 18-147 of the Administrative Rules of Montana.

11. At the public hearing, adverse comments were received from Myhre Advertising Company, which was also speaking for Butte Neon, Hardenburg Outdoor Advertising and Epcon Sign Company; Hall Advertising Company; Town Pump, Inc. and affiliates; and G.F. McInturff, III. The commission has considered all verbal and written comments received. The following is a summary of the comments received and the commission responses.

The opponents objected to subsection (1) of Rule I for the reason that the restriction of unzoned commercial areas to property immediately adjacent to the right-of-way is contrary to the intent of section 75-15-103(14), MCA. In response, both the Department of Highways and Myhre Advertising submitted the alternate language which is adopted by this commission and which omits the requirements

that the property qualifying as unzoned commercial or industrial area be located adjacent to the right-of-way.

The opponents objected to subsection (2) of Rule I because they believed that it is subjective and would be interpreted differently by each agent. Town Pump, Inc. objected on the basis that it felt the result of the rule would be to increase the visibility of businesses to the traveling public, thereby creating a greater eyesore. Both the Department and Myhre Advertising subsequently proposed different language. The commission believes that a clarification of the requirement of visibility of a qualifying business is necessary to aid in the interpretation of section 75-15-103(1)(c) by right-of-way agents. The commission therefore adopts the proposed language with the omission of part of the last sentence referring to the appearance of property as primarily residential and with the adoption of some of the language proposed by Myhre Advertising. The commission agrees that signs, displays, or devices identifying a business may be considered in a determination of visibility. The other characteristics offered by Myhre, those of reasonable public access, inventory on the premises, tools of the trade, or telephone access, are hereby rejected because although they are characteristic of businesses, they do not generally affect the visibility of the business activity from the main traveled way.

Hall Advertising and Mr. McInturff objected to subsection (3) of Rule I with the assertion that the location of a business in a zoned area establishes a commercial area and should not prohibit it from creating an unzoned commercial area outside of the zoned area, especially where the business is located partially outside the zoned area. The commission has adopted the subsection as proposed because the Outdoor Advertising Act distinguishes between zoned and unzoned areas. Section 75-15-111(1)(e), MCA requires that unzoned commercial or industrial areas be determined by the actual land uses. The definition of an unzoned commercial or industrial area in section 75-15-103(14) limits it to an unzoned area which is occupied by one or more industrial or commercial activities. The proposed language of subsection (3) clarifies this requirement and is adopted.

There were no opponents to subsection (4) of Rule I which is merely being moved from Rule 18.6.202.

Hall Advertising was the only opponent to Rule II. Mr. Keeter, its owner, objected on the basis that he believes the rule puts restrictions on First Amendment rights. He does not believe that the commission has the jurisdiction to restrict noncommercial speech. The commission is adopting the rule as proposed. The Outdoor Advertising Act does not specifically address noncommercial speech and therefore has not exempted control of noncommercial speech where it falls within the definition of outdoor

advertising. Because noncommercial speech is entitled to protection under the Act, the rule clarifies that noncommercial messages will be regulated in the same manner as commercial speech. Where the signs are located on the property of the sign owner, they will be considered on premise signs. In all other situations, the signs must comply with the Outdoor Advertising Act if they fall within the jurisdiction of the Act.

Opponents to the amendment of section 18.6.202 objected to the amendment of subsection (2) for the reasons that the proposed restrictions were arbitrary and would not permit the use of landscaped areas in determining the business premises. The commission believes that clarification of the extent of the on-premise area is necessary but has amended the rule to include landscaped areas. The changes include some of the language subsequently proposed by the Department and by Myhre Advertising.

There were no opponents to the proposed amendments of Rules 18.6.211 and 18.6.212 and the rules have been amended as proposed.

Mr. Keeter of Hall Advertising opposed the amendment of Rule 18.6.213 for the reason that the sign owner should be granted time to rectify a problem with a sign before it is termed illegal so long as it is in a legal location. The commission rejects his objection because Rule 18.6.213 clearly requires the sign owner to be responsible for permit attachment. The amendment merely clarifies the existing rule which allows the Department the discretion to cancel a permit for violation of the rule. The sign owner has 30 days to rectify the deficiency and if he fails to do so, the sign will be illegal because it violates the requirement of section 75-15-122(3), MCA, as well as the rule.

There were no opponents to Rule 18.6.214 and it has been amended as proposed.

Both Hall Advertising and Myhre Advertising objected to the amendment of Rule 18.6.221 to reduce the period for erecting signs to three months because weather conditions often interfere with erection of signs. The commission has accepted their objection, and the rule is amended as proposed with the omission of the change to three months.

Both Myhre Advertising and Hall Advertising objected to the amendment of Rule 18.6.231 regarding sign facings and V-type signs. The commission agrees that the rules should be clarified. The commission has therefore amended the rule by adopting the proposed language of Myhre Advertising on double-faced signs and V-type signs. The proposed language to define a facing was rejected because the commission agrees that is it unclear. The provision on V-type signs clarifies their requirements and complies with 23 C.F.R. §750.760(b) which allows the maximum 15-foot space. The commission rejects the language proposed by

Myhre for new subsections (6) and (7)(a) on size and facings because this language merely repeats the statutory requirements under section 75-15-113(1) and (4) and is therefore unnecessary.

Myhre Advertising objected to the amendment of Rule 18.6.251 on facings because it is unclear whether the amended rule would prohibit the changing of advertising copy on nonconforming signs. The commission has amended the rule by adopting language similar to that proposed by Myhre Advertising to clarify that the rule prohibits only an increase in the area used for advertising copy on a nonconforming sign and will not preclude changing the advertising copy.

Myhre Advertising and Town Pump, Inc., objected to the amendment of Rule 18.6.271 for the reason that the amendment does not require notice to be given to sign and site owners along a newly designated primary highway. The commission has amended the rule with the addition of notice requirements.

There was no opposition to the repeal of Rule 18.6.272 which provided a permit application form and it has been repealed as proposed.

12. The authority for the above rule making is section 75-15-121, MCA, and the rules implement sections 75-15-103, 75-15-111, 75-15-113, 75-15-121, and 75-15-122, MCA, as stated in the original notice of public hearing

Ilert Hellebust
Chairman

By: 

Certified to the Secretary of State March 3, 1986.

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

| | | |
|---|---|---|
| In the matter of the amendment of Rule 46.8.102 and the adoption of rules pertaining to the utilization of aversive training procedures in developmental disabilities services | ) | NOTICE OF THE AMENDMENT OF RULE 46.8.102 AND THE ADOPTION OF RULES (I) 46.8.1201, (II) 46.8.1202, (III) 46.8.1203, (IV) 46.8.1204, (V) 46.8.1206, (VI) 46.8.1207, (VII) 46.8.1208, (VIII) 46.8.1210, (IX) 46.8.1211, (X) 46.8.1213, 46.8.1214, (XI) 46.8.1215, (XII) 46.8.1216, (XIII) 46.8.1218, (XIV) 46.8.1219, and (XV) 46.8.1220 PERTAINING TO THE UTILIZATION OF AVERSIVE TRAINING PROCEDURES IN DEVELOPMENTAL DISABILITIES SERVICES |

TO: All Interested Persons

1. On November 14, 1985, the Department of Social and Rehabilitation Services published notice of the proposed amendment of Rule 46.8.102 and adoption of Rules I through XV pertaining to the utilization of aversive training procedures in developmental disabilities services at page 1712 of the 1985 Montana Administrative Register, issue number 21.

2. The Department has amended Rule 46.8.102 as proposed with the following changes:

46.8.102 DEFINITIONS For purposes of this chapter, the following definitions apply:

Subsections (1) through (10) remain as proposed.

(11) ~~"Developmentally disabled person"~~ "PERSON WITH A DEVELOPMENTAL DISABILITY" OR "DEVELOPMENTALLY DISABLED PERSON" means a person who has a developmental disability as defined in SECTION 53-20-202(3) MCA.

Subsections (12) through (25) remain as proposed.

AUTH: Sec. 53-20-204 MCA
IMP: Sec. 53-20-203 and 53-20-205 MCA

3. The Department has adopted Rule 46.8.1214, MEAL DELAY, as follows in response to suggestions received during the comment period:

46.8.1214 MEAL DELAY No meal may be delayed for a period greater than one hour from its scheduled starting time due to the implementation of an individual program plan. In

no instance may a person miss a regularly scheduled meal as a result of the implementation of an individual program plan.

AUTH: Sec. 53-20-204 MCA
IMP: Sec. 53-20-203 and 53-20-205 MCA

4. The Department has adopted Rules 46.8.1206, SYSTEMATIC PROGRAM REVIEW; 46.8.1207, APPROVAL CRITERIA FOR AVERSIVE PROGRAMS; 46.8.1210, AREA PROGRAM REVIEW COMMITTEES; 46.8.1213, RESTRICTION OF ANY CLIENT RIGHTS; 46.8.1216, REIMPOSITION OF DECELERATION PROGRAM; 46.8.1218, APPEAL PROCESS; 46.8.1219, STAFF CERTIFICATION; and 46.8.1220, UNCLASSIFIED PROCEDURES as proposed.

5. The Department has adopted the following rules as proposed with the following changes:

46.8.1201 AVERSIVE PROCEDURES, PURPOSE (1) These rules are adopted to provide a system for the review, approval and implementation of ethical, safe, humane and efficient training procedures for ~~developmentally disabled~~ persons with developmental disabilities in programs funded through the developmental disabilities division of the department of social and rehabilitation services. It is not the purpose of these rules to advocate the use of aversive procedures. Rather the purpose is to acknowledge that such procedures may be necessary when other less restrictive procedures have failed to significantly modify a person's behavior.

AUTH: Sec. 53-20-204 MCA
IMP: Sec. 53-20-203 and 53-20-205 MCA

46.8.1202 APPLICABILITY (1) A person in a program of developmental disabilities services, funded entirely or in part by the state of Montana, shall be afforded the protections imposed by these rules. Any provider contracting with the department to provide services to ~~developmentally disabled~~ persons with developmental disabilities shall conduct its activities in accordance with these rules.

AUTH: Sec. 53-20-204 MCA
IMP: Sec. 53-20-203 and 53-20-205 MCA

46.8.1203 USE OF AVERSIVE PROCEDURES (1) Aversive procedures may be used in the habilitation of a ~~developmentally disabled~~ person with developmental disabilities in accordance with the provisions of these rules.

(2) Aversive procedures may be designed and implemented only for the benefit of the person and may never be used merely as punishment or for the convenience of the staff or as a substitute for ~~an efficient~~ nonaversive program.

(3) Corporal punishment and verbal or physical abuse are prohibited.

AUTH: Sec. 53-20-204 MCA
IMP: Sec. 53-20-203 and 53-20-205 MCA

46.8.1204 DEFINITIONS FOR AVERSIVE PROCEDURES For purposes of this sub-chapter, the following definitions apply:

(1) "Advocacy/consumer" means a trained advocate or the parent/guardian of a ~~developmentally disabled~~ person with developmental disabilities.

(2) "Antecedent stimulus modification" means arranging the environment in such a way prior to the occurrence of a behavior that the behavior becomes less likely to occur.

Subsections (2) through (7) remain as proposed but will be renumbered (3) through (8).

(9) "Graduated guidance" means systematically providing the minimum degree of physical assistance necessary to ensure that a desired behavior occurs.

Subsections (8) through (8)(e) remain as proposed. Subsection (8) will be renumbered as (10).

(i) the name of the procedure which will be employed ~~to consequate~~ as a consequence for the target behavior;

Subsections (8)(e)(ii) through (8)(f)(v) remain as proposed. Subsection (8) will be renumbered as (10).

(vi) ~~at what point the program will be changed~~ data based criterion for modifying the program if the procedure is not effective;

(vii) graphs of the data;

(viii) ~~at what point the program will be terminated~~ data based criterion for terminating the procedure if it is not effective.

Subsections (9) through (20) remain as proposed but will be renumbered as (11) through (22).

~~(21) "Token system" means a system of increasing appropriate behavior while decreasing inappropriate behavior by contingently applying conditioned generalized reinforcers (e.g., tokens or points). A token system must have at least three (3) components:~~

~~(a) A medium of exchange (the conditioned generalized reinforcer);~~

~~(b) At least one (1) back up reinforcer;~~

~~(c) A specification of the contingencies.~~

(23) "Self-reinforcement" means contingencies established by an individual to control his or her own behavior through the delivery of reinforcement. The reinforcers remain under control of the individual and he or she is free to violate the contingencies at any time.

AUTH: Sec. 53-20-204 MCA
IMP: Sec. 53-20-203 and 53-20-205 MCA

46.8.1208 CLASSIFICATION AND CONDITIONS GOVERNING USE OF PROCEDURES Subsections (1) through (2)(a)(ii) remain as proposed.

(iii) ~~token/point--systems--which--are-not--inclusive-of response-cost-or-educational-fines,~~ self reinforcement.

Subsections (2)(b) through (3)(c)(i) remain as proposed.

(ii) The area manager will respond within five (5) working days to a request ~~in-writing~~ for level II aversive procedures approval.

Subsections (3)(c)(iii) through (4)(c)(i)(B) remain as proposed.

(C) documentation of the failure of less restrictive procedures, including data from previous I.P.P.'s and a brief summary of each procedure that has been employed. In the absence of such documentation, strong justification for the use of aversive procedures must be supplied, as well as an explanation for the lack of documentation;

Subsections (4)(c)(i)(D) and (4)(c)(i)(E) remain as proposed.

AUTH: Sec. 53-20-204 MCA
IMP: Sec. 53-20-203 and 53-20-205 MCA

46.8.1211 DEVELOPMENTAL DISABILITIES PROGRAM REVIEW COMMITTEE (1) The developmental disabilities program review committee (D.D.P.R.C.) shall be a standing committee appointed by, and responsible to, the division administrator. The make-up of the committee shall represent at least the following three disciplines:

Subsections (1)(a) through (3)(i) remain as proposed.

AUTH: Sec. 53-20-204 MCA
IMP: Sec. 53-20-203 and 53-20-205 MCA

46.8.1215 EMERGENCY PROCEDURES Subsections (1) through (2)(b) remain as proposed.

(c) Seclusion time-out (time-out room must conform to the minimum requirements established by the D.D.P.R.C.), and be approved by the area manager prior to its use).

Subsection (3) remains as proposed.

AUTH: Sec. 53-20-204 MCA
IMP: Sec. 53-20-203 and 53-20-205 MCA

6. The Department has thoroughly considered all commentary received:

COMMENT: Several individuals requested clarification of the role and purpose of the Area Program Review Committee (A.P.R.C.'s). One individual questioned the need for such committees.

RESPONSE: The A.P.R.C.'s are a group of qualified individuals who advise the Developmental Disabilities Division (D.D. Division) administrator on the appropriateness of the decisions of the area manager in approving or disapproving Level II procedures. A.P.R.C. members do not provide direct services to the individuals whose programs are being reviewed nor are they employees of the Department of Social and Rehabilitation Services (the Department). The development of A.P.R.C.'s represents an attempt to establish competent, independent third party groups capable of carrying out the function of review and approval of aversive procedures at the local level. We agree with the comment of one individual that, "We would like to see the program review process evolve so that the Area Program Review Committee becomes the sole approving authority for Level II programs." Until it is demonstrated that the necessary resources can be developed, A.P.R.C. recommendations will not be required prior to implementation of a procedure. Therefore, the need for A.P.R.C. review will not create an additional delay in obtaining program approval. The standards of the Accreditation Council on Mental Retardation and other Developmental Disabilities (A.C.M.R.D.D.) require that aversive procedures be approved by independent groups such as the A.P.R.C.'s. The development of committees at the local level will bring Montana's review process into closer agreement with those required by A.C.M.R.D.D.

COMMENT: The lack of timelines in the rules for responding to requests for review of programs was questioned in several responses. One individual suggested a response time of five (5) working days.

RESPONSE: The suggested timeline of five (5) working days has been incorporated into the rules.

COMMENT: There was some concern expressed regarding the time limits placed by rule on the use of certain aversive procedures. Several persons suggested that the time limits be longer, or that different time limits be applied separately for day program and residences when the same procedure is employed.

RESPONSE: The restrictions placed on the number of applications, or length of application, of aversive procedures do not preclude the possibility for the use of such procedures. The limits are a recognition of the increased probability for abuse with more frequent or longer use of certain procedures.

Consequently, a more thorough review at a higher level is justified. For example, a program that exceeds the limits specified for Level II procedures may be employed but must meet the requirements for Level III review. The time limits are specific to each type of procedure and are to be applied to each corporation or service setting. This will necessitate close coordination between day programs and residential programs. Such coordination must be present if treatment strategies are to have the optimal chance for success. The current time limits on procedures outlined in these rules are necessary and, in the opinion of the department, appropriate.

COMMENT: "Token/point systems which are not inclusive of response cost or educational fines should be listed as non-aversive procedures rather than Level I procedures."

RESPONSE: Because token systems that do not contain response cost or educational fines are similar to Differential Reinforcement and other procedures already covered in these rules, token systems have been removed from the list of Level I procedures.

COMMENT: A definition of 'antecedent stimulus modification' should be included in the rules.

RESPONSE: A definition has been included in the rules.

COMMENT: Time out rooms should be individually reviewed and approved. Just advising people that they need to meet D.D.P.R.C. guidelines does not adequately address this matter.

RESPONSE: A requirement for prior approval of time out rooms has been included in the rules.

COMMENT: It is very unclear at this point what the difference is between "graduated guidance" and "physical restraint".

RESPONSE: A definition of "graduated guidance" has been included in the rules for the purpose of differentiating those procedures.

COMMENT: Concerning the list of emergency procedures, one person wrote, "It is our opinion that many emergency situations can be handled by using less restrictive procedures (e.g., a verbal command/reprimand) than the three procedures listed. It is our assumption that the fact that only three procedures are listed does not preclude the use of less restrictive procedures when appropriate."

RESPONSE: The use of less restrictive procedures is not only allowed, but is preferred.

COMMENT: Concerning the provisions in proposed rule IV, (8)(f)(vi) and IV (8)(f)(viii) [46.8.1204], one commenter stated: "I suggest specifying that we want these items data based on a behavior".

RESPONSE: The suggested change has been incorporated in the rules.

COMMENT: "How is an I.H.P. team agreement documented?"

RESPONSE: Procedures for documenting I.H.P. agreement will be part of the operating procedures and guidelines developed by the D.D.P.R.C. as called for in Rule IX (3) [46.8.1211].

COMMENT: Rule VII (3)(c)(iii) [46.8.1208] and Rule VII (4)(c)(i)(C) [46.8.1208], should be worded to reflect mandatory documentation of attempts to work with the behavior problem or problems, prior to requesting aversive programs for a D.D. person.

RESPONSE: While it may not always be possible to provide complete documentation of prior attempts to work on a problem behavior, a requirement to justify the lack of documentation has been included in the rules.

COMMENT: "What does 'professionally justified' in proposed rule V [46.8.1206] mean?"

RESPONSE: Based upon the criteria in rule VI [46.8.1207], a procedure is "professionally justified" if there is evidence of the use of similar procedures in the current, relevant, published professional literature. In general, the procedure should be constructed in such a way as to be consistent with the procedures of the same type as found in the current, relevant, published professional literature.

COMMENT: One individual questioned the use of the word "efficient" in proposed rule III(2) [46.8.1203].

RESPONSE: The word has been deleted.

COMMENT: One individual questioned the use of the word "consequate" in rule IV (8)(e)(i) [46.8.1204].

RESPONSE: The wording has been changed to, "as a consequence for".

COMMENT: "I do feel that the M.D. (physician) should at least endorse any aversive program and make the determination as to whether it affects the health of the client."

RESPONSE: The rules currently require a physician to endorse any procedure which "might affect the person's health". Because physicians are not routinely members of an I.H.P. team, it would be difficult to secure their approval. Since many procedures covered under these rules involve no known health risk, it would be inappropriate to require a physician's approval. For example, Differential Reinforcement procedures clearly are not health threatening under normal circumstances.

COMMENT: "I feel that there should be a medical professional, [physician or registered nurse] on the D.D. program committee that is listed in rule IX [46.8.1211]."

RESPONSE: Because of the voluntary nature of the positions, we are hesitant to require participation by a physician or registered nurse on the D.D.P.R.C. when such participation might be difficult to obtain. Such involvement may not be generally necessary to the process or specifically necessary in certain cases. We have amended the rules, however, to allow such participation if it can be obtained and will pursue the possibility in the future.

COMMENT: "A 48-hour requirement to report an emergency situation is not always a realistic timeline. I recommend that the [D.D.] Division consider 72 hours as a more appropriate length of time."

RESPONSE: Given the fact that emergencies are by definition out of the ordinary situations that should and do require special attention, the 48-hour reporting requirement is considered to be prudent and appropriate.

COMMENT: One person commented that, "While we appreciate the ability to reimplement Level I and Level II I.P.P's [Individual Program Plans] as proposed through the rule, we question the restriction placed on the reimposition of Level III I.P.P.'s, especially since the behaviors in question are usually more severe...."

RESPONSE: Level III procedures are the most restrictive and aversive available for use in the habilitation process. As such, they have the greatest potential for damage should they be misused or improperly applied. Formal approval by the D.D.P.R.C. prior to implementation provides a degree of protection for the person being subjected to the procedure.

COMMENT: Several comments similar to the following were received: "I believe that the restriction of a clients personal monies, and/or possessions, should be a Level I restriction."

RESPONSE: These rules govern the use of personal monies or possessions only in those instances where an individual's money or possessions are used as a consequence to control or eliminate a maladaptive target behavior. If an individual is to be denied access to his or her money as a consequence for some inappropriate behavior, we feel that review at the area manager level is appropriate. In money matters, it is an appropriate exercise of authority by the IHP [Individual Habilitation Planning] team to manage a person's finances in the context of a program of financial training for the person which prepares him/her for life in the community.

COMMENT: One person questioned whether the costs associated with the implementation of these rules is justified.

RESPONSE: One of the objectives in the development of these rules was to streamline and clarify the approval process in order to develop an efficient system of program review that protects the rights of the persons receiving services. A majority of both service providers and D.D. Division staff expressed the opinion that more responsibility for review and approval should and could be taken at the local level. In the case of D.D. Division staff this will mean an increased "cost" associated with program review. The rationale has been, and continues to be, that these costs will be more than offset by the decrease in work and frustration associated with a more centralized system of review, as well as the benefits in terms of improved decisions made at a more local level.

COMMENT: "As technical knowledge has increased, more and more professionals recognize the need to try to teach our clients self-monitoring and self-reinforcement skills. This policy puts attempts by us to teach a person to use their own resources to reward themselves under your Level II aversive policy. This is only one application of many possibilities in which I feel this particular item is misplaced."

RESPONSE: Self-reinforcement procedures are increasingly valuable tools used to teach people to manage their own behavior. Self-reinforcement has been included on the list of Level I techniques. The distinction between self-reinforcement and contingencies imposed and controlled by others is an important one. In a self-reinforcement situation, people, if they choose, are always free to violate the contingencies they have established for themselves. If the person does not really have a choice, it is not self-reinforcement. A definition of self-reinforcement has been included in the rules to help clarify the situation.

COMMENT: One person argues for the creation of a category of "mild aversives" to be used in at least children's facilities.

RESPONSE: It is our belief that the rules as currently written allow sufficient latitude in the use of aversive procedures such as Contingent Observation and Exclusion Time-out. To create a category of mild aversive procedures that require no prior approval would circumvent the I.H.P. process that serves as the focal point for service delivery.

COMMENT: What guidelines will be followed should a client's meal be delayed due to the implementation of an aversive procedure just prior to or during a meal?

RESPONSE: The following provision has been adopted as Rule 46.8.1214: "No meal may be delayed for a period greater than one hour from its scheduled starting time due to the implementation of an Individual Program Plan. In no instance may a person miss a regularly scheduled meal as a result of the implementation of an Individual Program Plan."

COMMENT: Rule XIII [46.8.1218] outlines an appeal process that would be non-functional. Since each decision in the process as well as the final decisions are made by department employees, they have complete control over the process and there remains no fair appeal. We suggest a disinterested third party (like the Montana Advocacy Program) make the final decision in an appeal.

RESPONSE: The Department intends that a person subject to an aversive procedure and those persons participating in the individual habilitation planning team have the opportunity for appeal of a decision concerning aversive procedures. The appeal to a higher authority not involved in the actual decision making provides adequate due process. Resort to the department's fair hearings office was not incorporated here for certain reasons. The fair hearings office is utilized principally in appeal of eligibility and benefit issues. The issues arising out of I.H.P. and aversive procedures decisions are typically technical matters and do not result in a loss of benefits. The fair hearings office, due to its governing procedures and large caseload, cannot expeditiously handle issues as would be desirable or necessary for matters relating to the I.H.P. or aversive procedures process.

COMMENT: A.C.M.R.D.D. recommends that the phrase "developmentally disabled persons" be changed to "persons with developmental disabilities" to reflect the preference of the major associations in the field (e.g., the Epilepsy Foundation of America, the Association for Retarded Citizens of the U.S., the United Cerebral Palsy Associations, and the American

Association on Mental Deficiency). The phrase "persons with developmental disabilities" emphasizes the individual first and that the person is usually very much more than "a developmentally disabled person."

RESPONSE: The phrase "developmentally disabled persons" has been changed to read "persons with developmental disabilities" throughout these particular rules.

COMMENT: In rule I [46.8.1201], we suggest you add the word "ethical" to "sage, humane, and efficient" in describing the type of training programs the rule is designed to foster.

RESPONSE: The suggested word change has been made in the rules.

COMMENT: "Add a statement to the effect that corporal punishment and verbal abuse (shouting, screaming, swearing, name calling, or any other activity that would be damaging to an individual's self-respect) are prohibited and cannot be employed."

RESPONSE: A statement has been added to Rule III [46.8.1203] which reads:

"(3) Corporal punishment and verbal or physical abuse are prohibited."

COMMENT: "Seclusion time out" needs to be further defined. A.C.M.R.D.D. Standard 1.4.6.3 states "Seclusion (defined as the placement of an individual alone in a room or other area from which egress is prevented and not under observation as part of a systematic time-out program that meets all applicable standards is not employed."

RESPONSE: The department believes the definition of "seclusion time-out" adopted at rule 46.8.1204(22) is sufficient.

COMMENT: "The proposed rule does not address the use of behavior modifying drugs. The procedures that maintain quality assurance when medication is used as an integral part of an individual program plan designed by an interdisciplinary team to lead to a less restrictive way of managing, and ultimately to the elimination of, the behaviors for which the drugs are employed are very similar, require much of the same data collected, and require review and prior approval by specified committees."

RESPONSE: The question of the appropriate use of behavior modifying drugs is an issue between a physician and his/her patient. In community-based services, unlike the institutional setting, the physician is not an employee of the service

provider and is not bound by the regulations governing the Individual Habilitation Planning process. I.H.P. teams routinely discuss the use of medications, but in the context of making recommendations and assessing effectiveness rather than approving or disapproving their use. Given the reality of the doctor-patient relationship, it would be impossible to require D.D.P.R.C. approval for the use of medications.

COMMENT: Written authorizations for restraint may not be in force for longer than 12 hours according to A.C.M.R.D.D. Standard 1.4.6.9.2.1.

RESPONSE: Standing orders for restraints are not permitted under these rules. A physical restraint procedure that is part of an Individual Program Plan approved in accordance with these rules may be in place for more than 12 hours. Individual Program Plans employing restraint have a place in the habilitation process and as a result, no change in the rules regarding the use of restraints have been made.

COMMENT: A person placed in restraint is checked at least every 30 minutes by staff trained in the use of restraints, and a record of such checks is kept according to A.C.M.R.D.D. Standard 1.4.6.9.2.2.

RESPONSE: Procedures for the use of physical restraint will be part of the guidelines and operating procedures developed by the D.D.P.R.C. as called for in rule IX (3) [46.8.1211].

COMMENT: A major difference between the proposed rule and the A.C.M.R.D.D. Standards is the A.C.M.R.D.D. requirement that each program plan utilizing aversive procedures is approved by a Behavior Management Committee and a Human Rights Committee. Your A.P.R.C. functions to fill the goals of both committees and we don't think that is a good idea.

RESPONSE: The inclusion of an advocate on both the A.P.R.C. and the D.D.P.R.C. is intended to address the role outlined by A.C.M.R.D.D. for the Human Rights Committee. The inclusion of the habilitation specialist on each committee addresses the role of the Behavior Management Committee. We feel the protection afforded by one committee is sufficient. As a result, the Department is reluctant to require two separate committees. However, service providers may develop an additional committee to meet the A.C.M.R.D.D. requirement if they desire.

COMMENT: The proposed rule provides that consent must be obtained from the parents of a child or the guardian of a ward before implementation of a procedure. The rule fails to provide for informed consent in other circumstances.

RESPONSE: The Department determined that delineation of the nature and parameters of informed consent in rule form would be inappropriate.

The Department chose in the rule to recognize those circumstances where a third person has explicit legal authority over the daily life of the person for whom a procedure is proposed and, therefore, is responsible by law for providing consent on behalf of the person.

Otherwise, the Department seeks to assure that the due process of persons subjected to aversive training is provided in an appropriate manner. Those persons capable of giving informed consent should have that consent sought from them. For those persons for whom the I.H.P. determines that the training is necessary and who refuse to give informed consent, guardianship should be considered. The appropriate choice as to guardian, in accordance with state statute, would be in the following priority: relative, friend, advocate, state of Montana. Guardianship should only be sought for the necessary purposes. The court, of course, is the final arbiter of a matter of guardianship.

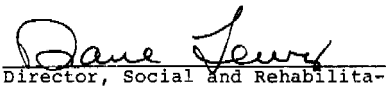
The lack of guardianship does not preclude the imposition of aversive training. In those circumstances where the behavior warrants expeditious action or where guardianship does not prove to be readily available, the authority and resultant rules and procedures governing the implementation of the training provide adequate due process protection for the person being subjected to the training. The Department, in accordance with statutory authority and direction, has by rule implemented the individual habilitation planning process for recipients of services. The I.H.P. team initiates and oversees the implementation of training procedures. That process which includes recipient participation is a structured process involving professionals familiar with the recipient's behaviors and needs. These program review rules provide further protection for the recipient by instituting a structured process for review of the proposed training procedures by a panel constituted of professionals in legal, advocacy and training matters related to persons with developmental disabilities. That panel must approve of a training procedure before it may be implemented. Further protection is available in that any decisions of either the I.H.P. team or the D.D.P.R.C. are subject to appeal before the Department director.

A further protection for recipients is the classification of training procedures in these program review rules by the nature of the procedure and the effects on the recipient's rights. The degree of review is in accordance with the classification.

The Department by these rules and policies provides a rational decision making process that recognizes the best interests of the recipient and does so with the recipient's or

guardian's involvement. The process has various components including relevant professional perspectives to assure that the procedures implemented are state of the art, in the best interests of the client and reviewed for legal considerations.

7. These rules will be effective April 21, 1986.



Director, Social and Rehabilitation Services

Certified to the Secretary of State March 3, 1986.

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

| | | |
|---|---|---|
| In the matter of the amendment of Rules 46.12.102 and 46.12.303 pertaining to billing, reimbursement, claims processing and payment for the Medicaid program | ) ) ) ) ) | NOTICE OF THE AMENDMENT OF RULES 46.12.102 AND 46.12.303 PERTAINING TO BILLING, REIMBURSEMENT, CLAIMS PROCESSING AND PAYMENT FOR THE MEDICAID PROGRAM |

TO: All Interested Persons

1. On January 30, 1986, the Department of Social and Rehabilitation Services published notice of the proposed amendment of Rules 46.12.102 and 46.12.303 pertaining to billing, reimbursement, claims processing and payment for the Medicaid program at page 94 of the 1986 Montana Administrative Register, issue number 2.

2. The Department has amended Rules 46.12.102 and 46.12.303 as proposed.

3. The Department has thoroughly considered all commentary received:

COMMENT: This amendment is necessary based upon the fact that with the type of tests concerned here, there is no direct physician contact. This slows down the claim process if the patient accounts department must wait for doctor verification of indirect services rendered. This is particularly a problem in rural areas where the physician often travels and is not at the hospital, or at the hospitals that send their tests across the telephone lines to bigger hospitals.

RESPONSE: The department agrees.

COMMENT: This change will prove to be most beneficial to providers. It is with this sort of cooperation that payors and providers can affect changes that will be cost effective to everyone.

RESPONSE: No response required.

Dave Lewis
Director, Social and Rehabilitation Services

Certified to the Secretary of State March 3, 1986.

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

| | | |
|---|---|---|
| In the matter of the emergency amendment of Rule 46.12.1205 pertaining to payment procedures for skilled nursing and intermediate care services | ) ) ) ) | NOTICE OF EMERGENCY AMENDMENT OF RULE 46.12.1205 PERTAINING TO PAYMENT PROCEDURES FOR SKILLED NURSING AND INTERMEDIATE CARE SERVICES |

TO: All Interested Persons

1. This emergency rule is necessary to provide reimbursement to long term care providers for enteral and parenteral nutrition solutions for Medicaid patients. These solutions are necessary to sustain the life of affected Medicaid recipients, yet the long term care reimbursement rate currently paid by the Department is not contemplated to cover such costs. Thus, these services are now being provided without any additional reimbursement to long term care providers. Since these services are costly, providers are reluctant to accept patients in need of such services. The Department believes that its recipients are in jeopardy until the Department begins making payment for these necessary services.

There are approximately 20 patients now receiving enteral or parenteral nutrition therapy at approximately $800/month for the solutions. The budgetary impact of this is $200,000 per year.

This rule must be effective before March 31, 1986, if federal funding for these services is to be available.

2. Rule 46.12.1205 is amended as follows:

46.12.1205 PAYMENT PROCEDURES Subsections (1) through (2)(a)(xiv) remain the same.

(xv) routine nursing supplies used in extraordinary amounts and prior approved by the department; ~~;~~

(xvi) nutrient solutions for parenteral and enteral nutrition therapy when such solutions are the only source of nutrition for patients who, because of chronic illness or trauma, cannot be sustained through oral feeding. These solutions will be allowable only if they are determined medically appropriate and prior authorized by the director of the department or his designee.

Subsections (2)(b) through (7) remain the same.

AUTH: Sec. 53-6-113 MCA
IMP: Sec. 53-6-141 MCA

3. Pursuant to federal regulation, copies of this change will be available for public review at county offices of human services throughout the State of Montana. Written

comments concerning this amendment may be sent to the Department of Social and Rehabilitation Services, P.O. Box 4210, Helena, Montana 59604.

4. This emergency rule amendment will be effective March 14, 1986. The amendment will be applied retroactively to allow payment on or after March 14, 1986, for nutrient solutions provided on or after January 1, 1986.

Director, Social and Rehabilitation Services

Certified to the Secretary of State March 3, 1986.

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

| | | |
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| In the matter of the amend- | ) | NOTICE OF AMENDMENT OF RULE |
| ment of Rule 46.13.401 | ) | 46.13.401 PERTAINING TO |
| pertaining to LIEAP maximum | ) | LIEAP MAXIMUM BENEFIT |
| benefit awards for wood | ) | AWARDS FOR WOOD |

TO: All Interested Persons

1. On January 30, 1986, the Department of Social and Rehabilitation Services published notice of the proposed amendment of Rule 46.13.401 pertaining to LIEAP maximum benefit awards for wood at page 96 of the 1986 Montana Administrative Register, issue number 2.

2. The Department has amended Rule 46.13.401 as proposed.

3. No comments or testimony were received.

4. This amendment was originally adopted on an emergency basis in January, 1986. This notice will ensure that the change in LIEAP benefit awards will be reflected permanently in the substantive provisions of ARM 46.13.401.

Dave Lewis

Director, Social and Rehabilitation Services

Certified to the Secretary of State March 3, 1986.

VOLUME NO. 41 OPINION NO. 48

CITIES AND TOWNS - Recommendations of local government study commission;
LOCAL GOVERNMENT - Recommendations of local government study commission;
LOCAL GOVERNMENT STUDY COMMISSIONS - Recommendation to increase size of city commission;
MONTANA CODE ANNOTATED - Sections 7-3-114, 7-3-114(2), 7-3-171 to 7-3-193, 7-3-185(1)(a)(i), 7-3-307, 7-3-704(1), 7-3-4314(1).

HELD: The local government study commission may not recommend that the number of city commissioners be increased from five to seven, unless it does so as part of a recommendation to adopt a form of government that permits a seven-member commission.

21 February 1986

David V. Gliko
City Attorney
P.O. Box 5021
Great Falls MT 59403-5021

Dear Mr. Gliko:

You have asked my opinion on the following question:

> Whether the Great Falls Local Government Study Commission may recommend an increase in the number of city commissioners from five to seven without the adoption of a charter form of government.

Great Falls adopted a commission-manager form of government in 1973. In 1975, the Legislature established five basic optional forms of local government, plus a charter form. Those municipal governments with a commission-manager form of government, that did not subsequently adopt one of the six statutory forms, are controlled by certain designated statutes which are currently listed

in section 7-3-114, MCA. One of these statutes is section 7-3-317(2), MCA, which provides in its entirety:

> The size of the commission, which shall be a number not less than three, shall be established when the form is adopted by the voters, and:
>
> ....
>
> (2) community councils to advise commissioners may be authorized by ordinance.

(Emphasis added.) Section 7-3-114(2), MCA, however, is also applicable to municipalities with commission-manager forms of government that did not adopt one of the six statutory forms of government. It provides that the size of a commission may not exceed five members.

Statutes must be harmonized if possible. Crist v. Segna, 38 St. Rptr. 150, 152, 622 P.2d 1028, 1029 (1982). Reading sections 7-3-114(2) and 7-3-317(2), MCA, together, I conclude that Great Falls is bound to have not less than three nor more than five members of its city commission under its present commission-manager form of government.

Beginning in 1979 the Legislature enacted procedures allowing voters to alter their form of local government. Sections 7-3-171 to 193, MCA, enacted in 1983, provide the mechanism by which a local government study commission can recommend a change in the local government and the electors can vote on the study commission's recommendation. A local government study commission's recommendations may include a proposal to make amendments to the existing form of government. § 7-3-185(1)(a)(i), MCA. Consequently, the Great Falls Local Government Study Commission may recommend, under the present form of government, a change in the number of city commissioners so long as the number is not less than three nor more than five, as required by sections 7-3-114(2) and 7-3-317(2), MCA.

While a seven-member commission is not permitted under the present form of government, the study commission may make such a recommendation as part of a recommendation to adopt one of the six statutory forms of government that permit a larger commission. For example, the statutory form of commission-manager government,

established under Title 7, chapter 3, part 3, MCA, and the charter form of government, Title 7, chapter 3, part 7, MCA, both permit a seven-member commission. See §§ 7-3-317, 7-3-704(1), MCA.

You refer to section 7-3-4314(1), MCA, which requires five city commissioners for all cities with a population of 15,000 or more, and is thereby inconsistent with the flexibility provided by the statutes cited above. The enactment of section 7-3-4314(1), MCA, however, precedes the enactment of Title 7, chapter 3, parts 1 to 7, MCA. Earlier statutes, to the extent of any repugnancy, are controlled by later statutes. State ex rel. Wiley v. District Court, 118 Mont. 50, 55, 164 P.2d 358, 361 (1946).

THEREFORE, IT IS MY OPINION:

> The local government study commission may not recommend that the number of city commissioners be increased from five to seven, unless it does so as a part of a recommendation to adopt a form of government that permits a seven-member commission.

Very truly yours,

MIKE GREELY
Attorney General

VOLUME NO. 41 OPINION NO. 49

CHILD ABUSE - Confidentiality of records;
DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES - Confidentiality of records kept in connection with abused and neglected children;
PRIVACY - Confidentiality of records kept in connection with abused and neglected children;
MONTANA CODE ANNOTATED - Section 41-3-205.

HELD: Absent a court order, section 41-3-205, MCA, prohibits the Department of Social and Rehabilitation Services from disclosing case records and reports of child abuse and neglect to: (1) the natural parents or parent, or other person having legal custody of a child who is the subject of a dependency and neglect action filed under section 41-3-401, MCA; (2) health care professionals who are treating a child suspected of being abused or neglected; (3) the noncustodial parent of a child who has been removed from the custodial parent following an incident of abuse or neglect; and (4) the natural parents or parent, or other person having legal custody of a child who has been abused or neglected while in the care of foster parents.

27 February 1986

David M. Lewis, Director
Department of Social and
Rehabilitation Services
111 Sanders
Helena MT 59620

Dear Mr. Lewis:

You have asked my opinion on the following questions:

1. Does section 41-3-205, MCA, prohibit the Department of Social and Rehabilitation Services from disclosing information contained in departmental files to the natural parents and/or their attorneys in connection with a dependence and neglect action filed under section 41-3-401, MCA?

2. Does section 41-3-205, MCA, prohibit the Department of Social and Rehabilitation Services from disclosing information concerning the circumstances of abuse or neglect to professionals such as psychologists, physicians, treatment centers, etc., who provide treatment to the child who has been injured or damaged by the abuse or neglect of the child's parent or custodian?

3. Does section 41-3-205, MCA, prohibit the Department from disclosing information concerning allegations of abuse or neglect to the noncustodial parent when the child has been removed from the custodial parent because of a substantiated incident of abuse or neglect?

4. Does section 41-3-205, MCA, prohibit the Department from notifying the natural parent of a child who has been placed in foster care that the child has been abused by the foster parents while in foster care?

My conclusion that section 41-3-205, MCA, prohibits disclosure in each of these situations is based on the plain language of the statute, Montana case law, and decisions from other states interpreting similar statutory language.

Section 41-3-205, incorporated within the child abuse, neglect, and dependency chapter of the Montana Code Annotated, states:

> Confidentiality. (1) The case records of the department of social and rehabilitation services and its local affiliate, the county welfare department, the county attorney, and the court concerning actions taken under this chapter and all records concerning reports of child abuse and neglect shall be kept confidential except as provided by this section. Any person who permits or encourages the unauthorized dissemination of their contents is guilty of a misdemeanor.

(2) Records may be used by interagency interdisciplinary child protective teams as authorized under 41-3-108 for the purposes of assessing the needs of the child and family, formulating a treatment plan, and monitoring the plan. Members of the team are required to keep information about the subject individuals confidential.

(3) Records may be disclosed to a court for in camera inspection if relevant to an issue before it. The court may permit public disclosure if it finds such disclosure to be necessary for the fair resolution of an issue before it.

(4) Nothing in this section is intended to affect the confidentiality of criminal court records or records of law enforcement agencies.

The language is clear and unambiguous. It expressly limits disclosure of abuse and neglect records to an interagency interdisciplinary child protective team and to a court when relevant to an issue before it.

Strict disclosure limitations are enacted for a variety of reasons. Reports of child abuse often contain information about the most private aspects of personal and family life. The information may or may not be corroborated and can be very damaging to the integrity of the family unit if released indiscriminately. Confidentiality also encourages the public to report incidents of child abuse. Case workers and those providing information rely on the confidential nature of the case records. A further reason disclosure is limited is to alleviate the potential stigma to the abused or neglected child.

As you have noted in your legal memorandum, indiscriminate disclosure may additionally lead to civil liability. In Colorado a social worker acting on an anonymous tip of sexual abuse confronted the alleged perpetrator and victim, a father and daughter. The Department of Social Services after its investigation concluded that the allegations were unfounded and proceeded no further. A complaint was then filed by the family against the Department for slander, outrageous

conduct, and negligence. On appeal the Colorado Court of Appeals held that summary judgment was improper where the Department may not have acted in good faith and remanded the case for trial on the defamation issues. Martin v. County of Weld, 43 Colo. App. 49, 598 P.2d 532 (1979). The Colorado confidentiality statutes at issue are similar in relevant part to their Montana counterparts. See § 41-3-203, MCA (persons investigating or reporting any incident of abuse or neglect are not immune from liability if acting in bad faith or with malicious purpose).

The Montana confidentiality statute was recently interpreted in two related Montana Supreme Court decisions. In Wyse v. District Court of Fourth Jud. Dist., 195 Mont. 434, 636 P.2d 865 (1981), an attorney petitioned the Court for a writ of review of a district court order finding him guilty of contempt for the unauthorized release of information contained in a dependent and neglected child file. The writ of review was denied and the Court strictly interpreted the language of section 41-3-205, MCA. The Court stated:

> The statute is clear that information relating to dependent and neglected children will not be released unless a court order is obtained.

Wyse v. District Court of Fourth Jud. Dist., 195 Mont. at 438, 636 P.2d at 867. This decision underscores the principle that anyone seeking confidential information must first obtain a court order for a determination of relevancy before the information may be released.

The second Montana Supreme Court decision arising out of the same factual circumstance was a disciplinary action taken against the petitioner in Wyse by the Commission on Practice. Matter of Wyse, 41 St. Rptr. 1780, 688 P.2d 758 (1984). In this case the Court elaborated on its prior holding and discussed the statutory terms "public disclosure" and "unauthorized dissemination":

> The provisions relating to "public disclosure" are not synonymous with nor intended to be synonymous with the term "unauthorized dissemination." Any unauthorized dissemination, public or private, is prohibited under section 41-3-205(1). The term "public disclosure" comes into play if request is made

> to the court to permit the same and the court finds such public disclosure necessary for the fair resolution of an issue before it.

41 St. Rptr. at 1786, 688 P.2d at 763 (emphasis added).

The two Wyse decisions do not address any of the factual situations presented in your opinion request. The Court was faced only with an attorney in Montana who surreptitiously gained case records for unrelated litigation in another state. The questions you have asked arguably present situations where the child's best interests would be furthered by immediate disclosure by the Department of Social and Rehabilitation Services (hereinafter Department), e.g., the release of a case record to a physician treating a child suspected to be the victim of abuse or neglect. However, the words of the statute and the Wyse decisions are clear: Any disclosure absent a court order is prohibited.

Challenges concerning the confidentiality statutes of other states have typically arisen following the judicial denial of a petition for discovery in a termination of parental rights proceeding. These cases can be roughly analogized to the first question you have asked concerning the Department's disclosure to natural parents in a dependency and neglect action filed under section 41-3-401, MCA. Ray v. Department of Human Resources, 155 Ga. App. 81, 270 S.E.2d 303 (1980) (right of discovery exists in a juvenile court proceeding for termination of parental rights subject to relevancy determination following in camera inspection); Nunn v. Morrison, 227 Kan. 730, 608 P.2d (1980) (where adversaries allowed full access to "social file" and Kansas law permitted disclosure to "parties," defendant natural mother in a deprived child proceeding had right to examine a report in the file); Matter of Damon A. R., 112 Misc. 2d 520, 447 N.Y.S.2d 237 (1982) (attorney of child who was the subject of a delinquency proceeding allowed full access to abuse and neglect reports on statutory grounds and for the purpose of allowing the attorney to prepare a thorough defense). These cases are more instructive to a district court faced with a petition for disclosure than they are to the Department faced with a request for information. Disclosure occurs under the authority of the district court, and the Department is prohibited by the plain language of the

statute from independently disseminating any information.

A Montana district court in any proceeding affecting the parent-child relationship must ensure that the parties are afforded due process. As our Supreme Court noted in an early abuse and neglect appeal:

> There are ... few invasions by the state into the privacy of the individual that are more extreme than that of depriving a natural parent of the custody of his children.

In Matter of Guardianship of Doney, 174 Mont. 282, 285, 570 P.2d 575, 577 (1977). The due process clause of the Fourteenth Amendment of the United States Constitution requires that parents be permitted a fair hearing on their fitness before children may be taken away from them in a dependency proceeding. Stanley v. Illinois, 405 U.S. 645 (1972). A hearing in which a parent was denied access to abuse and neglect reports that were used to terminate parental rights would not comport with basic notions of due process including the rights of representation, confrontation of witnesses, and introduction of evidence.

Section 41-3-205(3), MCA, establishes a procedure whereby a party may petition a district court for release of records, thereby invoking the in camera review process. The petitioning party could be inter alia a parent, a physician, or the Department. This procedure provides a process for recognition of the basic due process rights of the parent, guardian, or other person having legal custody of a child subject to a dependency and neglect action. When case records are relevant to an issue before a court they must be released.

Attorneys acting on behalf of parents are similarly barred from receiving information directly from the Department. The Montana Supreme Court addressed this issue in the second Wyse decision:

> No application was made here to the court for the right to disseminate, privately or publicly, the information in the juvenile proceedings. The zeal of a lawyer to protect his client is not a sufficient excuse for the

abuse of the confidentiality provisions of section 41-3-205, MCA, without application to the court for permission to disseminate the information.

Matter of Wyse, 41 St. Rptr. at 1786, 688 P.2d at 765. This admonition would apply equally to attorneys representing any of the individuals or parties discussed in this opinion.

The second question you have asked is whether the Department may disclose information to health professionals treating an abused or neglected child. The Montana statute is silent on this point. Research indicates that most state statutes expressly provide for dissemination to a physician treating a suspected victim of abuse or neglect. Our Legislature chose not to provide such an exemption from confidentiality. A doctor is included on interagency interdisciplinary child protective teams as described in section 41-3-108, MCA. These teams are allowed access to records for assessing needs, formulating a treatment plan, and monitoring the plan. § 41-3-205(2), MCA. However, in communication submitted with your opinion request you have indicated that in practice the doctor on the protective team is not always the treating doctor of the abused child.

Where a youth has been abused or neglected or is in danger of being abused or neglected the Department may petition for temporary investigative authority and protective care (commonly known as a TIA petition). See §§ 41-3-401, 41-3-402, MCA. After such a filing the court may direct the child or parents to undergo medical and psychological evaluation or counseling as part of an "order for immediate protection of youth." § 41-3-403(2), MCA. The TIA petition can be used as a vehicle to carry the Department's request for disclosure of confidential records. Upon petition by the Department the court could order disclosure of confidential case records to the examining health professionals as part of its order for immediate protection. Regardless of the confidentiality inherent in all doctor-patient relationships, the Department is barred by the terms of section 41-3-205, MCA, from physician disclosure absent a court order.

Your third question addresses disclosure to a noncustodial parent when the child has been removed from a custodial parent because of a substantiated incident of abuse or neglect. As the above discussion has indicated, the confidentiality statute contains no special exemptions. Where the Department determines that it is essential that a noncustodial parent receive confidential information, a petition for disclosure must be filed. This request could accompany a petition filed pursuant to emergency protective service, § 41-3-301(1), MCA, or temporary investigative authority, §§ 41-3-401, 41-3-402, MCA.

Your final question asks whether the Department may inform the natural parents of a child who has been placed in foster care that the child has been abused by the foster parents. Section 41-3-205, MCA, prohibits such notification to the same extent it bars disclosure in other situations. The Department's duty lies primarily with providing protective services for the abused child, encouraging reports of abuse and neglect, ensuring the confidentiality of case records, and otherwise arranging for the youth's well-being. Nowhere in Chapter 3 of Title 41 is the Department given a duty to notify natural parents of difficulties their children experience.

This primary duty to the abused child was highlighted in a recent appellate opinion of the Oregon Court of Appeals, Brasel v. Children's Services Division, 56 Or. App. 559, 642 P.2d 696 (1982). Brasel was a wrongful death action brought by the parents of an 18-month-old girl who died as a result of injuries suffered in a day care center certified by the Children's Services Division (CSD) of the State. The plaintiffs alleged that the defendant agency was negligent in failing to inform them of a prior incident of child abuse. CSD argued that it was forbidden to disclose the existence of the child abuse report by Oregon's confidentiality statute. The appellate court agreed:

> [The confidentiality statute] forbids public access to reports and records of child abuse. We take it to forbid as well publication to prospective users of a certified day care facility the fact that a report involving the facility had been made. CSD's duty, in regard to reports of child abuse, is to investigate

and to take appropriate action to protect the children; it is not authorized to advise parents of reports of child abuse. It follows that CSD had no duty to disclose the report.

Brasel v. Children's Services Division, 642 P.2d at 699-700. The Oregon confidentiality statute is similar in relevant part to section 41-3-205, MCA. Brasel is instructive because it highlights the Department's duty to the abused child and strictly construes the confidentiality statute. In Montana the Wyse decisions have similarly construed section 41-3-205, MCA. For this reason the Department is prohibited from making disclosures of continuing abuse to parents and, under the reasoning of Brasel, may be protected from alleged negligence for such a refusal to disclose.

THEREFORE, IT IS MY OPINION:

Absent a court order, section 41-3-205, MCA, prohibits the Department of Social and Rehabilitation Services from disclosing case records and reports of child abuse and neglect to: (1) the natural parents or parent, or other person having legal custody of a child who is the subject of a dependency and neglect action filed under section 41-3-401, MCA; (2) health care professionals who are treating a child suspected of being abused or neglected; (3) the noncustodial parent of a child who has been removed from the custodial parent following an incident of abuse or neglect; and (4) the natural parents or parent, or other person having legal custody of a child who has been abused or neglected while in the care of foster parents.

Very truly yours,

MIKE GREELY
Attorney General

VOLUME NO. 41 OPINION NO. 50

SCHOOL DISTRICTS - Eligibility of resident county for elementary tuition offset;
TAXATION AND REVENUE - Eligibility of resident county for elementary tuition offset;
MONTANA CODE ANNOTATED - Sections 20-5-302, 20-5-303, 20-5-305;
OPINIONS OF THE ATTORNEY GENERAL - 38 Op. Att'y Gen. No. 110 (1980), 40 Op. Att'y Gen. No. 42 (1984).

HELD: A school district paying the tuition of a resident elementary pupil who attends a school outside of the district pursuant to section 20-5-302, MCA, is not eligible to claim a tuition offset under section 20-5-303, MCA, for property taxes paid by the parents to the county or district in which the child attends school.

28 February 1986

Richard A. Simonton
Dawson County Attorney
Dawson County Courthouse
Glendive MT 59330

Dear Mr. Simonton:

You have requested my opinion on the following question:

> Whether a resident elementary school district is entitled to deduct from its payment of tuition to a nonresident district the taxes paid by the resident family in the nonresident county and school district when the resident child has been accepted by the nonresident district pursuant to section 20-5-302, MCA.

I conclude that the plain language of the statutes does not allow the resident elementary school district to claim such a tuition offset. Before discussing the issue directly, however, a brief review of the statutes pertaining to tuition agreements generally is helpful.

Elementary-age school children in Montana may attend school outside of the district in which they live under three different statutory provisions. These provisions are distinguished by the manner in which a tuition agreement is reached and by whom the tuition is paid.

Under the first provision, § 20-5-301, MCA, the child must be granted permission to attend a nonresident school (a school located out of the elementary district in which the child resides) where certain statutory criteria are met. The criteria are based on necessity and geographical considerations. When the requirements of the statute are satisfied, the tuition approval agents in the resident and nonresident districts must approve the application for tuition. § 20-5-301(3), MCA. The tuition approval agents are identified in section 20-5-301(2), MCA, as the trustees of the elementary district in which the child resides, the trustees of the district where the child wishes to attend school, and the county superintendent of the child's resident district.

Elementary tuition for attendance in a nonresident school may also be obtained through a discretionary process. Section 20-5-302, MCA, allows a tuition application to be approved because of various general considerations, e.g., the distance to the resident school, the availability of transportation, and the type of educational programs available at the nonresident school.

Under both sections 20-5-301 and 20-5-302, MCA, the parents of the child essentially reach an agreement with the tuition approval agents. The principal difference between the two sections is that approval is mandatory in section 20-5-301, MCA, and discretionary in section 20-5-302, MCA. An important similarity between these methods, for present purposes, is the manner in which tuition is paid. Section 20-5-305, MCA, states:

> Elementary tuition rates. Whenever a pupil of an elementary district has been granted approval to attend a school outside of the district in which he resides, under the provisions of 20-5-301 or 20-5-302, such district shall pay tuition to the elementary district where the pupil attends school on the basis of the rate of tuition determined by the

attended district. The rate of tuition shall be determined by:

(1) totaling the actual expenditures from the district general fund, the debt service fund, and, if the pupil is a resident of another county, the retirement fund;

(2) dividing the amount determined in subsection (1) above by the ANB of the district for the current fiscal year, as determined under the provision of 20-9-311; and

(3) subtracting the total of the per-ANB amount allowed by 20-9-316 through 20-9-321 that represents the foundation program as prescribed by 20-9-303 plus the per-ANB amount determined by dividing the state financing of the district permissible levy by the ANB of the district, from the amount determined in subsection (2) above.

ANB is simply a code acronym for Average Number Belonging. § 20-9-311, MCA. The significance of the tuition formula to the question you have raised is that, where the resident district contributes the tuition, there is no provision for a tuition offset for taxes paid to the nonresident county or district by the parents of the child.

The third method by which a child can attend a nonresident school is on the election of the parents. This process is set out in section 20-5-303, MCA. The section recognizes the right of the parent to send his child at his own expense to the school of his choice. This section provides a discretionary approval process involving the trustees of the district where the nonresident school is located. If attendance is approved, the rate of tuition paid by the parents is established by the formula of section 20-5-305, MCA, with one significant modification: The tuition to be paid is determined by the section 20-5-305, MCA, formula, modified in the following manner:

[T]uition as determined in 20-5-305 shall be reduced by the amount the parent of the child paid in district and county property taxes

> during the immediately preceding school fiscal year for the benefit and support of the district in which the child will attend school.

§ 20-5-303(1), MCA.

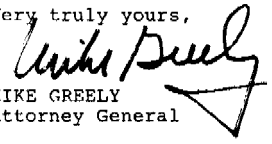
The issue your request has raised is whether this tuition offset for taxes paid is available to a school district that is paying the tuition of a resident elementary school pupil attending school in a nonresident district under a section 20-5-302, MCA, tuition agreement. You have indicated that there appears to be no logical reason for charging a resident school district a greater tuition than the resident parents would pay if they elected to send their child to the favored school under section 20-5-303, MCA. You suggest that, regardless of whether the taxpayer seeks approval of his resident district (under the section 20-5-302, MCA, approval process whereby the resident district pays the section 20-5-305, MCA, amount) or elects to pay individual tuition, the payer of the tuition should be uniformly credited for taxes paid by the parent in the nonresident district.

The concern you have raised is not without merit, although it could be argued that, over time, the tuition offsets between districts will equalize. As the statutes read, however, the Legislature has unambiguously provided that only the parents paying the tuition receive the tuition offset. I nonetheless note that the Legislature has not been hesitant to correct such arguable anomalies. Thus, after I interpreted the term "parent" in section 20-5-303, MCA, to exclude a shareholder in a family-type Subchapter S corporation in 40 Op. Att'y Gen. No. 42 (1984), the Legislature amended that section to specifically include such a shareholder in the definition of parent. 1985 Mont. Laws, ch. 611. See also 38 Op. Att'y Gen. No. 110 (1980) (individual tuition for a high school pupil attending a school outside of his district may not be waived where statute is silent as to tuition waiver). The statutory provision addressed in the latter Attorney General Opinion was amended. 1981 Mont. Laws, ch. 249; 1983 Mont. Laws, ch. 263. While legislative relief may be appropriate I am bound to construe and apply relevant statutory provisions as now drafted.

THEREFORE, IT IS MY OPINION:

A school district paying the tuition of a resident elementary pupil who attends a school outside of the district pursuant to section 20-5-302, MCA, is not eligible to claim a tuition offset under section 20-5-303, MCA, for property taxes paid by the parents to the county or district in which the child attends school.

Very truly yours,



MIKE GREELY
Attorney General

VOLUME NO. 41 OPINION NO. 51

COUNTY COMMISSIONERS - Shortening terms of office of commissioners;
LOCAL GOVERNMENT - Recommendations of local government study commission;
LOCAL GOVERNMENT STUDY COMMISSIONS - Recommendation to shorten terms of county commissioners;
MONTANA CODE ANNOTATED - Title 7, chapter 3, parts 2 to 7; Title 7, chapter 3, part 4; sections 7-3-102, 7-3-111, 7-3-171 to 7-3-193, 7-3-185(1)(a)(i), 7-3-224, 7-3-318, 7-3-418, 7-3-517, 7-4-2105;
MONTANA CONSTITUTION - Article XI, section 3(2).

HELD: A local government study commission may recommend that the terms of office for county commissioners be less than six years if the county has adopted the statutory county "commission form" of government. A local government study commission may not, however, recommend that the terms of office for county commissioners be less than six years if the county retained the form of government organized under the general statutes listed in section 7-3-111, MCA.

3 March 1986

Michael G. Alterowitz
Carbon County Attorney
Carbon County Courthouse
Red Lodge MT 59068

Dear Mr. Alterowitz:

You have asked my opinion on the following question:

> May a local government study commission recommend that county commissioner terms of office be shortened from six years to four years?

The answer to your question depends upon what form of government Carbon County has.

In 1975, the Legislature established five basic optional forms of local government, plus a charter form. § 7-3-102, MCA. The optional forms of government are provided for in Title 7, chapter 3, parts 2 to 7, MCA. Those county governments with an elected county official form of government that did not adopt one of the six statutory forms are controlled by certain designated statutes, which are currently listed in section 7-3-111, MCA. Section 7-3-111(2), MCA, provides: "This form has terms of 4 years for all elected officials except commissioners who are elected to 6-year terms." (Emphasis added.) The language of the statute does not permit any flexibility in the length of terms of office for county commissioners.

By contrast, county governments who adopted the "commission form" of government as one of the six optional statutory forms of government are governed by Title 7, chapter 3, part 4, MCA. Section 7-3-418, MCA, permits some flexibility in the length of term of county commissioners by providing that, "The term of office of elected officials may not exceed 4 years, except the term of office for commissioners in counties adopting the form authorized by Article XI, section 3(2), of the Montana constitution may not exceed 6 years." (Emphasis added.)

Beginning in 1979 the Legislature enacted procedures allowing voters to alter their form of local government. In 1983 the Legislature adopted sections 7-3-171 to 193, MCA, which provide the mechanism by which a local government study commission can recommend a change in government and the electors can vote on the study commission's recommendations. A local government study commission's recommendations may include a proposal to make amendments to the existing form of government, pursuant to section 7-3-185(1)(a)(i), MCA, so long as the change is one that is permitted in the statutes.

If a county retained its old form of government and is governed by the general statutes listed in section 7-3-111(2), MCA, which sets six-year terms for county commissioners, a local government study commission may not recommend an amendment that would change the term of office, since section 7-3-111(2), MCA, permits no such flexibility. If, however, a county has a statutory county commission form of government authorized by Article XI, section 3(2) of the Montana Constitution,

and is thereby governed by section 7-3-418, MCA, a local government study commission may recommend any term of office not to exceed six years, because section 7-3-418, MCA, merely provides that a six-year term is the maximum term of office. Please note that no such flexibility in terms of office for county commissioners is permitted under the statutory commission-executive form of government, the commission-manager form of government, and the commission-chairman form of government. §§ 7-3-224, 7-3-318, 7-3-517, MCA.

You refer to section 7-4-2105, MCA, the first sentence of which requires six-year terms of office for county commissioners and thereby conflicts with section 7-3-418, MCA. The enactment of the first sentence of section 7-4-2105, MCA, however, precedes the enactment of section 7-3-418, MCA. Earlier statutes, to the extent of any repugnancy, are controlled by later statutes. State ex rel. Wiley v. District Court, 118 Mont. 50, 55, 164 P.2d 358, 361 (1946).

THEREFORE, IT IS MY OPINION:

A local government study commission may recommend that the terms of office for county commissioners be less than six years if the county has adopted the statutory county "commission form" of government. A local government study commission may not, however, recommend that the terms of office for county commissioners be less than six years if the county retained the form of government organized under the general statutes listed in section 7-3-111, MCA.

Very truly yours,

MIKE GREELY
Attorney General

## NOTICE OF FUNCTIONS OF ADMINISTRATIVE CODE COMMITTEE

The Administrative Code Committee reviews all proposals for adoption of new rules or amendment or repeal of existing rules filed with the Secretary of State. Proposals of the Department of Revenue are reviewed only in regard to the procedural requirements of the Montana Administrative Procedure Act. The Committee has the authority to make recommendations to an agency regarding the adoption, amendment, or repeal of a rule or to request that the agency prepare a statement of the estimated economic impact of a proposal. In addition, the Committee may poll the members of the Legislature to determine if a proposed rule is consistent with the intent of the Legislature or, during a legislative session, introduce a bill repealing a rule, or directing an agency to adopt or amend a rule, or a Joint Resolution recommending that an agency adopt or amend a rule.

The Committee welcomes comments from the public and invites members of the public to appear before it or to send it written statements in order to bring to the Committee's attention any difficulties with the existing or proposed rules. The address is Room 138, Montana State Capitol, Helena, Montana 59620.

## HOW TO USE THE ADMINISTRATIVE RULES OF MONTANA AND THE MONTANA ADMINISTRATIVE REGISTER

Definitions:

Administrative Rules of Montana (ARM) is a looseleaf compilation by department of all rules of state departments and attached boards presently in effect, except rules adopted up to three months previously.

Montana Administrative Register (MAR) is a soft back, bound publication, issued twice-monthly, containing notices of rules proposed by agencies, notices of rules adopted by agencies, and interpretations of statutes and rules by the attorney general (Attorney General's Opinions) and agencies (Declaratory Rulings) issued since publication of the preceding register.

Use of the Administrative Rules of Montana (ARM):

Known Subject Matter

1. Consult ARM topical index, volume 16. Update the rule by checking the accumulative table and the table of contents in the last Montana Administrative Register issued.

Statute Number and Department

2. Go to cross reference table at end of each title which list MCA section numbers and corresponding ARM rule numbers.

# ACCUMULATIVE TABLE

The Administrative Rules of Montana (ARM) is a compilation of existing permanent rules of those executive agencies which have been designated by the Montana Procedure Act for inclusion in the ARM. The ARM is updated through December 31, 1985. This table includes those rules adopted during the period January 1, 1986 through March 31, 1986, and any proposed rule action that is pending during the past 6 month period. (A notice of adoption must be published within 6 months of the published notice of the proposed rule.) This table does not, however, include the contents of this issue of the Montana Administrative Register (MAR).

To be current on proposed and adopted rulemaking, it is necessary to check the ARM updated through December 31, 1985, this table and the table of contents of this issue of the MAR.

This table indicates the department name, title number, rule numbers in ascending order, catchphrase or the subject matter of the rule and the page number at which the action is published in the 1986 Montana Administrative Register.

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