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MONTANA ADMINISTRATIVE REGISTER

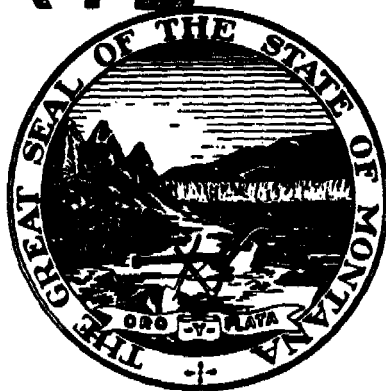
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1987 ISSUE NO. 4
FEBRUARY 28, 1987
PAGES 193-222



MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 4

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 The notice section contains state agencies' proposed new, amended or repealed rules, the rationale for the change, date and address of public hearing, and where written comments may be submitted.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 DEPARTMENT OF AGRICULTURE
OF THE STATE OF MONTANA

In the matter of amendment of rules) NOTICE OF PROPOSED ADOPTION OF
pertaining to the grading of certified) AMENDMENTS TO RULES PERTAINING TO
seed potatoes amending ARM) THE GRADING OF CERTIFIED SEED
4.12.3501 and 4.12.3503) POTATOES NO PUBLIC HEARING
) CONTEMPLATED

TO: All Interested Persons.

1. On April 6, 1987, the Department of Agriculture proposes to adopt amendments to the rules pertaining to the grading of certified seed potatoes.

2. The proposed rules provide as follows:

4.12.3501 GENERAL REQUIREMENTS subsection (1) through (9) no changes.

(10) It shall be permissible to use official tags on potatoes containing an excess of oversize, undersize, hollow heart and/or sprouts providing that the official grade certificate tags indicates that the potatoes exceed the excess tolerance. It shall be the responsibility of the grower to submit written evidence that the purchaser is willing to accept such a grade.

4.12.3503 BLUE TAGS subsections (1) through (1) (h) no changes. (1) (i) Oversize, undersize, sprouts and hollow heart shall be permissible provided the excess tolerance is indicated on the official grade certificate tags. subsection (1) (j) no change

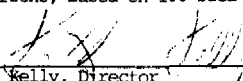
AUTH: 80-3-110, MCA IMP: 80-3-104 and 80-3-105, MCA

3. These amendments are being proposed because the potato growers association petitioned the department for this rule change. The department determined it necessary to amend this rule because under the present system it requires writing on each tag if the potatoes contain some defect. With the proposed amendments it is only necessary to indicate the defect on the certificate. This would save considerable time and money while still accomplishing the desired result of informing the buyer of the possible defects.

4. Interested parties may submit their data, views or arguments concerning the proposed adoption in writing to O. Roy Bjornson, Department of Agriculture, Agriculture/Livestock Building, Capitol Station, Helena, Montana 59620, no later than March 30, 1987.

5. If a person who is directly affected by the proposed adoption wishes to express his data, views and arguments orally or in writing at a public hearing, he must make written request for a hearing and submit this request along with any written comments he has to O. Roy Bjornson, Department of Agriculture, Agriculture/Livestock Building, Capitol Station, Helena, Montana 59620, no later than March 30, 1987.

6. If the agency receives requests for a public hearing on the proposed amendments from either 10% or 25 whichever is less, of the persons who are directly affected by the proposed adoption; 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. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be 10 persons, based on 100 seed potato growers in Montana.


Keith Kelly, Director

Certified to the Secretary of State February 5, 1987

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE BOARD OF MORTICIANS

In the matter of the proposed) NOTICE OF PROPOSED AMEND-
amendment of 8.30.407 con-) MENT OF 8.30.407 FEE
cerning fees) SCHEDULE

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On March 30, 1987, the Board of Morticians proposes to amend the above-stated rule.

2. The proposed amendment of 8.30.407 will read as follows: (new matter underlined, deleted matter interlined) (full text of the rule is located at page 8-929, Administrative Rules of Montana)

"8.30.407 FEE SCHEDULE

(1)	Morticians application	\$70.00	75.00
(2)	Original mortuary license		45.00
(3)	Intern license		30.00
(4)	Mortuary inspection fee	70.00	
(5)	Annual renewals		
(a)	Funeral director		40.00
(b)	Mortician	45.00	60.00
(c)	Mortuary (includes inspection fee)	40.00	<u>125.00</u>
(d)	Late renewal penalty (paid in addition to renewal fee)		25.00
(6) (5)	Re-examination fee		45.00"

Auth: 37-1-134, 37-19-202, MCA Imp: 37-1-134,
37-19-303, 306, 401, 403, MCA

3. The reason for the proposed amendment is that the proposed current level budget for FY 88 is \$23,202 and FY 89 is \$22,664. Revenue estimated with current fees is \$18,970. As of January 31, 1987, the board's fund balance is \$11,154.63 with half of that amount to be expended by June 30, 1987. With current fees, the board's earmarked fund balance would be depleted prior to fiscal year end 1988. Therefore a fee increase is necessary under the provisions of section 37-1-134, MCA.

4. Interested persons may submit their data, views or arguments concerning the proposed amendment in writing to the Board of Morticians, 1424 9th Avenue, Helena, Montana, 59620-0407, no later than March 26, 1987.

5. If a person who is directly affected by the proposed amendment wishes to express his data, views or arguments orally or in writing at a public hearing, he must make written request for a hearing and submit this request along with any comments he has to the Board of Morticians, 1424 9th Avenue, Helena, Montana, 59620-0407, no later than March 26, 1987.

6. If the board receives requests for a public hearing on the proposed amendment from either 10% or 25, whichever is less, of those persons who are directly affected by the proposed amendment, 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 8 based on the 80 mortuaries and 23 based on the 233 licensees in Montana.

BOARD OF MORTICIANS
DENNIS F. DOLAN, CHAIRMAN

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

Certified to the Secretary of State, February 13, 1987.

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE BUREAU OF WEIGHTS AND MEASURES

In the matter of the proposed) NOTICE OF PUBLIC HEARING ON
amendment of 8.77.101 concern-) PROPOSED AMENDMENT OF 8.77.
ing scale pit clearance) 101 SCALE PIT CLEARANCE

TO: All Interested Persons.

1. On Wednesday, March 18, 1987, at 3:00 p.m., a public hearing will be held in the downstairs conference room of the Department of Commerce, 1424 9th Avenue, Helena, Montana, to consider the amendment of the above-stated rule.

2. The proposed amendment of 8.77.101 will read as follows: (new matter underlined, deleted matter interlined) (full text of the rule is located at page 8-2203, Administrative Rules of Montana)

"8.77.101 SCALE PIT CLEARANCE (1) will remain the same.

(2) Scale pits shall not be required unless they are necessary for the installation, operation or maintenance of the particular scale.

(3) Scales which do not require a pit for their installation, operation, or maintenance shall be installed in strict compliance with the manufacturers specification for each specific model and with the U.S. Bureau of Standards Handbook 44."

Auth: 30-12-202, MCA Imp: 30-12-202, MCA

3. This amendment is being proposed because "State of the Art" electronic digital platform scales with electronic load cells do not utilize components which are only accessible through "pits". This amendment allows the Bureau of Weights and Measures to inspect, calibrate and license these new scales.

4. Interested persons may submit their data, views or arguments either orally or in writing, at the hearing. Written data, views, and arguments may also be submitted to the Bureau of Weights and Measures, Department of Commerce, 1424 9th Avenue, Helena, Montana, no later than March 26, 1987.

5. Raymond Brault of Helena, Montana, will preside over and conduct the hearing.

BUREAU OF WEIGHTS AND MEASURES

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

Certified to the Secretary of State, February 13, 1987.

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

In the matter of the amend-	)	NOTICE OF PUBLIC HEARING ON
ment of Rules 46.12.555,	)	THE PROPOSED AMENDMENT OF
46.12.556 and 46.12.557	)	RULES 46.12.555, 46.12.556
pertaining to personal care	)	AND 46.12.557 PERTAINING TO
attendant services	)	PERSONAL CARE ATTENDANT
	)	SERVICES

TO: All Interested Persons

1. On March 18, 1987, at 10:00 a.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 46.12.555, 46.12.556 and 46.12.557 pertaining to personal care attendant services.

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

46.12.555 PERSONAL CARE ATTENDANT SERVICES, DEFINITION

~~(1) Personal care attendant services in a recipient's place of residence means medically oriented tasks which include basic personal hygiene and grooming (bathing, dressing, shaving), assistance with toileting, assistance with self-administered medications, assistance with food, nutrition, diet, (including the preparations of meals if incidental to medical need), and accompanying the patient to obtain medical diagnosis or treatment.~~

~~(a) Except as allowed under the home and community-based program, personal care attendant services do not include basic homemaker/chore services, such as cleaning, dishwashing, repair or laundering of clothing, friendly visiting, or baby sitting.~~

~~(2) Place of residence includes a person's own home, foster home or a community home for the developmentally disabled. Place of residence does not include a hospital or a long-term care facility as defined in 50-5-101(20), MCA.~~

(1) Personal care services are medically necessary in-home services provided to recipients whose chronic health problems cause them to be functionally limited in performing activities of daily living. Personal care services are intended to prevent or delay institutionalization by providing the medically necessary, long-term maintenance or supportive care in the home.

(2) Personal care services include, but are not limited to, assistance with personal care functions such as bathing, grooming, transferring, walking, eating, dressing, toileting, self-administered medications, meal preparation, escort and home management.

(a) Home management services are limited to housekeeping activities that are essential to maintaining a recipient's health and safety in the home.

(3) Personal care services are delivered by attendants supervised by registered nurses.

(4) Personal care services can include the following services only if the services are provided by a licensed practical or registered nurse:

(a) insertion and sterile irrigation of catheters;

(b) irrigation of any body cavities;

(c) application of sterile dressings involving prescription medications and aseptic techniques;

(d) injections of fluids intravenously, in muscles or skin;

(e) administration of medication; and

(f) any other skilled nursing service.

(5) Personal care services do not include services which maintain an entire household or family or which are not medically necessary. These include but are not limited to the following:

(a) cleaning floor and furniture in areas recipients do not use or occupy;

(b) laundering clothing or bedding recipients do not use;

(c) supervision, respite care, babysitting or visiting;

(d) maintenance of pets; and

(e) maintenance outside the home.

AUTH: Sec. 53-6-113 MCA

IMP: Sec. 53-6-101, 53-6-131 and 53-6-141 MCA

46.12.556 PERSONAL CARE ATTENDANT SERVICES, REQUIREMENTS

~~(1) A provider of personal care attendant services will comply with all provider requirements for Medicaid as provided for in sub-chapter 3 of ARM, Title 46, chapter 12.~~

~~(2) Personal care attendant services must be prescribed in accordance with a plan of treatment by a physician and must be supervised in accordance with a plan of treatment by a registered nurse.~~

(1) To qualify for personal care, a person must be Medicaid eligible and demonstrate a medical need for personal care.

(2) Personal care services are available only to a recipient who resides at home or in a licensed foster home or a licensed group home. Persons residing in licensed foster or group homes must have personal care services prior authorized by the department.

(3) Personal care services shall not be provided to persons who reside in a hospital or long-term care facility as defined in 50-5-101, MCA, and licensed under 50-5-201, MCA.

(4) Personal care services must be prescribed at least annually by a physician and must be supervised by a registered nurse in accordance with a plan of care.

(5) Providers of personal care services must comply with all contractual requirements outlined by the department.

(6) Personal care attendant services may shall not be provided to a person by a member of that person's the recipient's immediate family. For the purposes of this provision a member of that person's the recipient's immediate family includes the following:

- (a) husband or wife;
- (b) natural parent;
- (c) natural child;
- (d) natural sibling;
- (e) adopted child;
- (f) adoptive parent;
- (g) stepparent;
- (h) stepchild;
- (i) step-brother or step-sister;
- (j) father-in-law or mother-in-law;
- (k) son-in-law or daughter-in-law;
- (l) brother-in-law or sister-in-law;
- (m) grandparent;
- (n) grandchild;
- (o) foster parents; or
- (p) foster child.

~~(4) -- A provider of personal care attendant services must be:~~

~~(a) -- literate and able to communicate as appropriate with recipients;~~

~~(b) -- trained to perform personal care attendant tasks; and~~

~~(c) -- willing to accept specialized training from and supervision by a registered nurse.~~

(7) Personal care services may be terminated for any of the following reasons:

(a) the recipient becomes ineligible for medicaid;

(b) the recipient leaves the state;

(c) the recipient dies;

(d) the recipient is admitted to a skilled or intermediate nursing facility, intermediate care facility for the mentally retarded, hospital, licensed personal care facility or placement other than a full-time residence;

(e) the recipient requests termination of services or refuses to accept help;

(f) the recipient's physician requests termination of services; or

(g) the recipient's health and safety needs in the home cannot be adequately met by the provision of personal care services.

AUTH: Sec. 53-6-113 MCA

IMP: Sec. 53-6-101, 53-6-131 and 53-6-141 MCA

46.12.557 PERSONAL CARE SERVICE, REIMBURSEMENT (1) ~~The department will pay the lowest of the following for personal care services not covered by Medicare: the provider's actual (submitted) charge for the service or the department's fee schedule contained in this rule.~~

~~The department will pay the lowest of the following for personal care services which are also covered by Medicare: the provider's actual (submitted) charge for the service; the amount allowable for the same service under Medicare; or the department's fee schedule contained in this rule.~~

~~(2) Payment for personal care service shall be minimum wage plus 15 percent in lieu of fringe benefits except where exigent circumstances exist, a reasonable payment rate may be negotiated between the department and the provider.~~

~~(3) On a weekly basis, payment shall not exceed 80 percent of the cost of nursing home per diem except when prior authorized.~~

~~(4) Payment for registered nurse supervision shall be (a) established by a contract with the department when provided by a licensed home health agency;~~

~~(b) \$9.98 per hour when provided by an independent registered nurse; or~~

~~(c) where exigent circumstances exist, a reasonable payment rate may be negotiated between the department and the provider.~~

(1) Personal care services are limited to 56 units per week per recipient. The department may authorize hours in excess of this limit. Hours in excess of the limit must be prior authorized by the department.

(2) Personal care services shall be delivered by providers contracting with the department.

(a) Reimbursement for personal care services is based on contracted unit rates. The rates are for units of attendant service or units of nursing supervision service.

(i) A unit of attendant service is one hour and means an on-site visit specific to a recipient.

(ii) A unit of nursing supervision service is one hour and means an on-site recipient visit plus related activity specific to that recipient.

(b) Under exigent circumstances, the department may negotiate directly with an attendant to deliver personal care services.

(4) Transportation of provider personnel to and from a recipient's home is not a reimbursable service.

AUTH: Sec. 53-6-113 MCA

IMP: Sec. 53-6-101 and Sec. 53-6-141 MCA

3. This rule extensively revises existing language in the Personal Care Service rules (ARM 46.12.555 through 46.12.557).

The major impetus for the rule change is a change in how the program will be administered effective January 1, 1987. Management of the program is being contracted statewide to improve program administration and service delivery, provide training and closer supervision of attendants and reduce the Department's liability for insurance coverage.

The contract does not represent a significant increase in program expenditures. The small increase is offset by increased benefits for personal care attendants and savings projected by significantly reducing Department staff time spent administering the program. There will be minor impact on county workload or budget since the program was primarily administered out of the Medicaid Bureau in Helena.

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 March 26, 1987.

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 13, 1987.

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE MONTANA ECONOMIC DEVELOPMENT BOARD

In the matter of the amendment of 8.97.308 concerning fee schedule) NOTICE OF AMENDMENT OF 8.97.308 RATES, SERVICE CHARGES AND FEE SCHEDULE)

TO: All Interested Persons:

1. On December 11, 1986, the Montana Economic Development Board published a notice of amendment of the above-stated rule at page 1998, 1986 Montana Administrative Register, issue number 23.
2. The board has amended the rule exactly as proposed.
3. No comments or testimony were received.

MONTANA ECONOMIC DEVELOPMENT
BOARD
D. PATRICK McKITTRICK,
CHAIRMAN

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

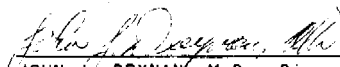
Certified to the Secretary of State, February 13, 1987.

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

In the matter of the amendment of)	NOTICE OF
rule 16.44.102 which consolidates)	AMENDMENT OF RULE
and updates all incorporations by)	
reference of federal agency regu-)	
lations contained in rules)	
16.44.103 through 16.44.823)	(Hazardous Waste Rules)

To: All Interested Persons

1. On January 15, 1987, the department published notice of proposed amendment of rule 16.44.102, consolidating and updating all incorporations by reference of federal agency regulations contained in rules 16.44.103 through 16.44.823, at page 1 of the 1987 Montana Administrative Register, issue number 1.
2. The department has amended the rule as proposed.
3. No comments or testimony were received by the department.



JOHN J. DRYNAN, M.D., Director

Certified to the Secretary of State February 17, 1987.

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

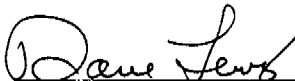
In the matter of the amend-	)	NOTICE OF THE AMENDMENT OF
ment of Rule 46.10.317 per-	)	RULE 46.10.317 PERTAINING
taining to AFDC protective	)	TO AFDC PROTECTIVE AND
and vendor payments	)	VENDOR PAYMENTS

TO: All Interested Persons

1. On January 15, 1987, the Department of Social and Rehabilitation Services published notice of the proposed amendment of Rule 46.10.317 pertaining to AFDC protective and vendor payments at page 10 of the 1987 Montana Administrative Register, issue number 1.

2. The Department has amended Rule 46.10.317 as proposed.

3. No comments other than the Department's supporting testimony were received.



Director, Social and Rehabilitation
Services

Certified to the Secretary of State February 13, 1987.

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

In the matter of the amend-)
ment of Rules 46.12.514,)
46.12.515 and 46.12.516)
pertaining to Early Periodic)
Screening Diagnosis and)
Treatment (EPSDT))

NOTICE OF THE AMENDMENT OF
RULES 46.12.514, 46.12.515
AND 46.12.516 PERTAINING TO
EARLY PERIODIC SCREENING
DIAGNOSIS AND TREATMENT
(EPSDT)

TO: All Interested Persons

1. On January 15, 1987, the Department of Social and Rehabilitation Services published notice of the proposed amendment of Rules 46.12.514, 46.12.515 and 46.12.516 pertaining to Early Periodic Screening Diagnosis and Treatment (EPSDT) at page 12 of the 1987 Montana Administrative Register, issue number 1.

2. The Department has amended Rules 46.12.514 and 46.12.515 as proposed.

3. The Department has amended the following rule as proposed with the following changes:

46.12.516 EARLY PERIODIC SCREENING DIAGNOSIS AND TREATMENT, REIMBURSEMENT ~~{1}--Providers--of--EPSDT--services--shall--be--reimbursed--in--accordance--with--the--rules--of--the--department--governing--the--specific--services--provided.~~

~~{2}--Screening--services--reimbursement--rates--shall--be--based--on--reasonable--costs--and--shall--not--exceed--prevailing--charges--in--the--state--for--comparable--services--under--comparable--circumstances.~~

(1) THE DEPARTMENT WILL PAY THE LOWEST OF THE FOLLOWING FOR EARLY PERIODIC SCREENING DIAGNOSIS AND TREATMENT SERVICES:

(A) THE PROVIDER'S ACTUAL (SUBMITTED) CHARGE FOR THE SERVICE;

(B) THE AMOUNT ALLOWABLE FOR THE SAME SERVICE UNDER MEDICARE; OR

(C) THE DEPARTMENT'S FEE SCHEDULE CONTAINED IN THIS RULE.

(2) EARLY PERIODIC SCREENING DIAGNOSIS AND TREATMENT SERVICES WHICH ARE REIMBURSABLE UNDER THE MONTANA MEDICAID PROGRAM INCLUDE THE FOLLOWING:

<u>Code</u>	<u>Service</u>	<u>Rate</u>
-------------	----------------	-------------

"90751 Adolescent (age 12 through 17 years) 47.08"
through "90731 Hepatitis B vaccine 16.64" remain as proposed.

AUTH: Sec. 53-6-113 MCA
IMP: Sec. 53-6-101 MCA

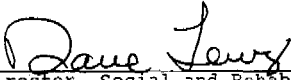
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Montana Administrative Register

4. The Department has thoroughly considered all commentary received:

COMMENT: The Department should endeavor to make all language consistent in rules dealing with basis for reimbursement rates as, for instance, in the proposed amendment to ARM 46.12.516.

RESPONSE: The Department agrees. Proposed amendments to ARM 46.12.516 have been revised to conform to wording in recent similar rule change proposals (e.g., see ARM 46.12.527 in MAR Notice No. 46-2-491). It is thought that this language clarifies the factors to be considered in reimbursement situations. Future similar rule changes will incorporate this language.



Director, Social and Rehabilitation Services

Certified to the Secretary of State February 13, 1987.

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

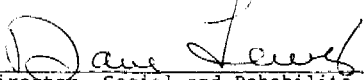
In the matter of the amend-)
ment of Rule 46.12.532) NOTICE OF THE AMENDMENT OF
pertaining to reimbursement) RULE 46.12.532 PERTAINING
for speech pathology serv-) TO REIMBURSEMENT FOR SPEECH
ices) PATHOLOGY SERVICES

TO: All Interested Persons

1. On January 15, 1987, the Department of Social and Rehabilitation Services published notice of the proposed amendment of Rule 46.12.532 pertaining to reimbursement for speech pathology services at page 8 of the 1987 Montana Administrative Register, issue number 1.

2. The Department has amended Rule 46.12.532 as proposed.

3. No comments other than the Department's supporting testimony were received.



Director, Social and Rehabilitation Services

Certified to the Secretary of State _____ February 13 _____, 1987.

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

In the matter of the amend-) NOTICE OF THE AMENDMENT OF
ment of Rules 46.12.3601 and) RULES 46.12.3601 AND
46.12.3603 pertaining to) 46.12.3603 PERTAINING TO
non-institutionalized SSI-) NON-INSTITUTIONALIZED
related individuals and) SSI-RELATED INDIVIDUALS AND
couples) COUPLES

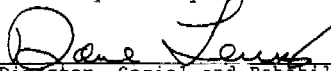
TO: All Interested Persons

1. On January 15, 1987, the Department of Social and Rehabilitation Services published notice of the proposed amendment of Rules 46.12.3601 and 46.12.3603 pertaining to non-institutionalized SSI-related individuals and couples at page 6 of the 1987 Montana Administrative Register, issue number 1.

2. The Department has amended Rules 46.12.3601 and 46.12.3603 as proposed.

3. No comments other than the Department's supporting testimony were received.

4. Based upon federal Medicaid program requirements, this rule will be applied retroactively to July 1, 1986.



Director, Social and Rehabilitation
Services

Certified to the Secretary of State February 13, 1987.

VOLUME NO. 42

OPINION NO. 7

ALCOHOL - Chemical dependency centers receiving federal funds required to report child abuse;
CHILD ABUSE - Privileges of communication partially abrogated by child abuse reporting act;
CHILD ABUSE - Child abuse reporting act not preempted by 42 U.S.C.A. § 290dd-3;
MEDICINE - Physician-patient privilege partially abrogated by child abuse reporting act;
MENTAL HEALTH - Privileges of communication partially abrogated by child abuse reporting act;
MONTANA CODE ANNOTATED - Sections 41-3-201, 41-3-201(4);
UNITED STATES CODE ANNOTATED - 42 U.S.C.A. §§ 290dd-3, 290ee-3.

- HELD: 1. The physician-patient and similar privileges of communication are abrogated by section 41-3-201(4), MCA, only when the professional obtains the information as a result of his treatment of the child.
2. The reporting requirements of section 41-3-201, MCA, are not preempted by the federal confidentiality provisions of 42 U.S.C.A. § 290dd-3.

13 February 1987

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Gentlemen:

Thank you for your letters requesting my opinion on the following questions:

1. Pursuant to section 41-3-201(4), MCA, are the physician-patient privilege and similar privileges of communication abrogated for purposes of reporting the abuse or neglect of a child only when the information is obtained as a result of the treatment of the child?
2. Do the reporting requirements of section 41-3-201, MCA, extend to a chemical dependency counselor who is covered by the federal confidentiality provisions of 42 U.S.C.A. § 290dd-3?

Your first question raises the significant issue of whether professionals who learn of child abuse or neglect as a result of their treatment of the offender are required by Montana law to report this information. In many states which have reporting statutes, this issue has been the subject of comment and controversy. See Duties in Conflict: Must Psychotherapists Report Child Abuse Inflicted by Clients and Confided in Therapy?, 22 San Diego L. Rev. 645 (1985); Annot., Validity, Construction, and Application of Statute Limiting Physician-Patient Privilege in Judicial Proceedings Relating to Child Abuse or Neglect, 44 A.L.R.4th 649. Resolution of this issue requires the delicate balancing of competing state interests. The state has a compelling interest in the prevention of child abuse and neglect. State v. Hall, 183 Mont. 511, 600 P.2d 1180 (1979). Yet, the state also has an interest in the preservation of the unity and welfare of the family through the encouragement of rehabilitative treatment of those who have abused or neglected children. § 41-3-101, MCA. Statutory privileges of communication between physicians or mental health professionals and their patients serve the purpose of encouraging persons in need of treatment to seek it. The task of weighing these competing interests and determining the point of equilibrium belongs to the Legislature.

Section 41-3-201, MCA, provides that certain enumerated professionals and officials must report to the appropriate authorities if they "know or have reasonable cause to suspect that a child known to them in their professional or official capacity is an abused or neglected child." With regard to the privileges of communication which may exist, the section provides:

No person listed in subsection (2) may refuse to make a report as required in this section on the grounds of a physician-patient or similar privilege if the person came into possession of such information as a result of his treatment of the child.

§ 41-3-201(4), MCA. The plain language of the statute abrogates the privilege when the professional obtains the information as a result of his treatment of the child. Had the Legislature intended abrogation of the privilege in other situations, it would have specifically so stated. The statute is narrowly drawn and must be so construed. I cannot insert what has been omitted. The Legislature has balanced the competing interests and has drawn the line in favor of encouragement of treatment and rehabilitation.

Your second question concerns whether the state law requires disclosure of child abuse or neglect known or suspected by a chemical dependency counselor who is covered by the confidentiality provisions of the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act Amendments of 1974, 42 U.S.C.A. § 290dd-3, and the regulations promulgated thereunder, 42 C.F.R. § 2.1-2.67 (1985). The act and regulations provide for confidentiality of records of the identity, diagnosis, prognosis, and treatment of any patient of alcohol treatment programs receiving federal funds.

On August 27, 1986, through the enactment of Public Law No. 99-401, Tit. I, § 106(a), 100 Stat. 907, Congress specifically addressed the interaction of the confidentiality provisions and state child abuse reporting laws as follows:

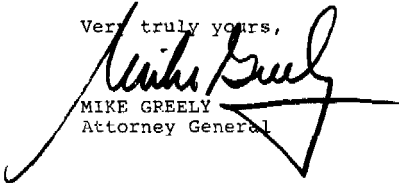
The prohibitions of this section do not apply to the reporting under State law of incidents of suspected child abuse and neglect to the appropriate State or local authorities.

42 U.S.C.A. §§ 290dd-3(e), 290ee-3(e). As a practical matter, under Montana law, there will be few instances where a conflict could have arisen, since the chemical dependency programs will generally be treating the abusive parent or adult rather than the abused child.

THEREFORE, IT IS MY OPINION:

1. The physician-patient and similar privileges of communication are abrogated by section 41-3-201(4), MCA, only when the professional obtains the information as a result of his treatment of the child.
2. The reporting requirements of section 41-3-201, MCA, are not preempted by the federal confidentiality provisions of 42 U.S.C.A. § 290dd-3.

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, 1986. This table includes those rules adopted during the period December 31, 1986 through March 31, 1987 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, 1986, this table and the table of contents of this issue of the MAR.

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