MONTANA ADMINISTRATIVE REGISTER

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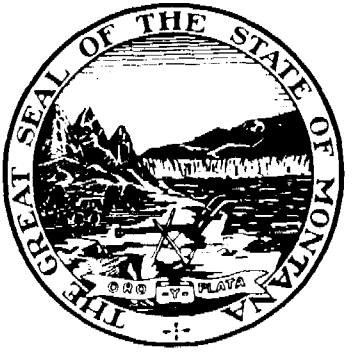

MONTANA ADMINISTRATIVE REGISTER

DEC 11 1992

OF MONTANA

ISSUE NO. 23

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 The notice section contains state agencies' proposed new, amended or repealed rules, the rationale for the change, date and address of public hearing and where written comments may be submitted.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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RULE SECTION

BEFORE THE BOARD OF OPTOMETRISTS
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the proposed adoption of new rules pertaining to surgery	NOTICE OF PUBLIC HEARING ON THE PROPOSED ADOPTION OF NEW RULES PERTAINING TO SURGERY

TO: All Interested Persons:

1. On January 4, 1993, at 9:00 a.m., a public hearing will be held in the conference room of the Professional and Occupational Licensing Bureau, Lower Level, Arcade Building, 111 North Jackson, Helena, Montana, to consider the proposed adoption of new rules pertaining to surgery.

2. The proposed new rules will read as follows:

"I ASPECTS OF SURGERY PROHIBITED (1) For the purpose of section 37-10-101, MCA, surgery is defined as any invasive ocular procedure involving the eye and/or adnexa that would require closure."

Auth: Sec. 37-10-202, MCA; IMP, Sec. 37-10-101, MCA

"II ANTERIOR SEGMENT DEFINED (1) For the purpose of the Optometry Act, the anterior segment of the eye is defined as that part of the eye anterior to the vitreous face."

Auth: Sec. 37-10-202, MCA; IMP, Sec. 37-10-101, MCA

"III OPTOMETRIST'S ROLE IN POST-OPERATIVE CARE (1) A licensed optometrist may provide post-operative and/or follow-up care for any patient who has undergone any ocular surgical procedure. The optometrist shall deliver post-operative and/or follow-up care after consultation with the surgeon and the patient."

Auth: Sec. 37-10-202, MCA; IMP, Sec. 37-10-101, MCA

REASON: The Board defines "surgery" as contained in proposed new rule I to demonstrate what sorts of procedures are forbidden by the prohibitions contained in section 37-10-101, MCA. Practicing optometrists expect that the Board of Optometrists will provide guidance on what actions are excluded.

New rule II is required to acquaint practitioners with the Board's interpretation of what constitutes the eye's anterior segment.

The Board considers post-operative care, as set forth in new rule III, to constitute a continuing optometric diagnosis of physiological functions of vision that have been diagnosed and corrected, and therefore are within the practice of optometry.

3. 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 the Board of Optometrists, Lower Level, Arcade Building, 111 North

Jackson, Box 200513, Helena, Montana 59620-0513, to be received no later than January 7, 1993.

4. Robert P. Verdon, attorney, has been designated to preside over and conduct the hearing.

BOARD OF OPTOMETRISTS
LARRY BONDERUD, O.D., CHAIRMAN

BY: _____
ANNIE M. BARTOS, CHIEF COUNSEL
DEPARTMENT OF COMMERCE

_____
ANNIE M. BARTOS, RULE REVIEWER

Certified to the Secretary of State, November 30, 1992.

BEFORE THE DEPARTMENT OF
FAMILY SERVICES OF THE
STATE OF MONTANA

In the matter of the amendment of Rule 11.7.313 pertaining to determination of daily rates for youth care facilities	NOTICE OF PROPOSED AMENDMENT OF RULE 11.7.313 PERTAINING TO DETERMINATION OF DAILY RATES FOR YOUTH CARE FACILITIES
	NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons.

1. On January 24, 1993, the Department of Family Services proposes to amend ARM 11.7.313 pertaining to determination of daily rates for youth care facility providers.

2. The proposed amendment reads as follows: (new language underlined, deleted language interlined)

11.7.313 CLASSIFICATION MODEL (1) Each facility shall be classified according to the department's classification model. The model identifies ~~five~~ six levels of supervision and three levels of treatment. A model rate has been assigned to each level of supervision and treatment.

Subsection (2) remains the same.

(3) There are ~~five~~ six levels of supervision in the classification model:

(a) In Level I the facility provides the basic living needs of the youth, including shelter, food, transportation and clothing by placing the youth in community family therapeutic foster homes. Trained foster home parents provide a skilled role model to carry out the implementation of the community based treatment plan for the youth. The facility provides supervision based upon an assessment of the youth's needs and a specific written case plan that is monitored to determine its effectiveness in reducing the need for this level of supervision.

(b) In Level II the facility provides the basic living needs of the youth, including shelter, food, transportation and clothing. In addition to the provision of these basic needs, the facility employs paid caretakers who provide day-to-day supervision of the youth in a family-like setting. This level of supervision does not require individual assessment of the youth and/or the development of treatment plans to determine structured activities or provide the day-to-day care and guidance of the youth.

(c) In Level III the facility provides the basic living needs of the youth, employs caretakers who provide the day-to-day supervision of the youth in a family-like setting, and a paid director to coordinate the facility's operations.

(d) In Level IV the facility provides the basic living needs

of the youth and employs shift staff who provide 24 hour structured supervision of the youth and administrative personnel. This level of supervision utilizes planned structured supervision by trained staff. The facility provides activities and supervision based upon an assessment of the youth's needs and a specific written case plan that is monitored to determine its effectiveness in reducing the need for structured supervision.

(e) In Level V the facility provides the basic living needs of the youth, and employs shift staff who provide twenty-four hour intensive supervision with backup staff available. The facility also employs administrative personnel. The facility provides constant control of the youth by highly trained staff in a planned treatment environment. This level of supervision requires individual assessment of the youth and the development, implementation and monitoring of an individual written treatment plan by professional staff.

(f) In Level VI the facility provides the basic living needs of the youth including food, shelter, transportation, and clothing.

Subsections (4) through (6) remain the same.

AUTH: Sec. 41-3-1103, and 52-2-111, MCA.
IMP: Sec. 41-3-1103, and 52-2-111, MCA.

3. The Department of Social and Rehabilitation Services and the Department of Family Services are in the process of implementing a plan allowing for medicaid reimbursement for treatment of youths in therapeutic group homes. The proposed amendment adds a level of supervision for classifying therapeutic group homes participating in the new medicaid reimbursement system. Participating group homes will receive a portion of their daily charge based on the new level. The remaining portion of the per diem payment will be reimbursed through medicaid. Dividing the daily cost using the new level of supervision is reasonably necessary to administer state and federal funds for services benefiting children placed in therapeutic group home care.

4. Interested persons may submit their data, views or arguments to the proposed amendment in writing to the Office of Legal Affairs, Department of Family Services, 48 North Last Chance Gulch, P.O. Box 8005, Helena, Montana 59604, no later than January 7, 1993.

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, that person must make a written request for a public hearing and submit such request, along with any written comments, to the Office of Legal Affairs, Department of Family Services, 48 North Last Chance Gulch, P.O. Box 8005, Helena, Montana 59604, no later than January 7, 1993.

6. If the Department of Family Services 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 are directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register.

DEPARTMENT OF FAMILY SERVICES

Tom Olsen, Director

John Melcher, Rule Reviewer

Certified to the Secretary of State, November 30, 1992.

BEFORE THE DEPARTMENT OF
FAMILY SERVICES OF THE
STATE OF MONTANA

In the matter of the amendment of Rules 11.18.125, pertaining to community homes for persons with developmental disabilities, and 11.19.114 pertaining to community homes for persons who are severely disabled.	NOTICE OF PROPOSED AMENDMENT OF RULES 11.18.125, PERTAINING TO COMMUNITY HOMES FOR PERSONS WITH DEVELOPMENTAL DISABILITIES, AND 11.19.114 PERTAINING TO COMMUNITY HOMES FOR PERSONS WHO ARE SEVERELY DISABLED.

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons

1. On January 28, 1993, the Department of Family Services proposes to amend ARM 11.18.125 pertaining to community homes for persons with developmental disabilities, and ARM 11.19.114 pertaining to community homes for persons who are severely disabled.

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

11.18.125 FIRE, HEALTH AND SAFETY CERTIFICATION (1) ~~A~~ Ceommunity homes are required by the Montana Department of Justice to comply with the fire safety requirements and procedures found in ARM 23.7.110. The department hereby adopts and incorporates ARM 23.7.110 by this reference. A copy of ARM 23.7.110 may be obtained from the Department of Family Services, P.O. Box 8005, Helena, Montana 59604. A community home must comply with the certification requirements of ARM 23.7.110 to obtain licensure, and during licensure, the community home must remain current on its fire safety certification under ARM 23.7.110 ~~will only be licensed by the department if there is written certification from the state fire marshal's office that the home meets the following requirements in addition to the uniform fire code and group R, division 3, of the uniform building code.~~

~~(a) Smoke detectors listed by a recognized testing laboratory shall be located at stairways and in any areas requiring separation as set forth in the uniform building code.~~

~~(b) A fire extinguisher listed by a recognized testing laboratory with a minimum rating of 2A10BC shall be readily accessible to the kitchen area.~~

~~(c) The date and signature of the person(s) checking both the batteries in the smoke detector, monthly, and the fire extinguisher, quarterly, shall be recorded and filed at the home.~~

~~(d) Procedures and routes of evacuation shall be readily available in the home.~~

~~(e) Training and evacuation drills with residents shall be conducted and recorded at least monthly and, when shift staff are used, the drills shall be conducted at those hours to cover each~~

~~shift every 90 days.~~

~~(f) A telephone or other means of notifying the fire department or other emergency services should be readily accessible in the home.~~

Subsection (2) remains the same.

AUTH: Sec. 53-20-305, MCA. IMP: Sec. 53-20-307, MCA.

11.19.114 PHYSICALLY DISABLED GROUP HOMES, FIRE SAFETY CERTIFICATION ~~(1) A~~ Ceommunity homes are required by the Montana Department of Justice to comply with the fire safety requirements and procedures found in ARM 23.7.110. The department hereby adopts and incorporates ARM 23.7.110 by this reference. A copy of ARM 23.7.110 may be obtained from the Department of Family Services, P.O. Box 8005, Helena, Montana 59604. A community home must comply with the certification requirements of ARM 23.7.110 to obtain licensure, and during licensure, the community home must remain current on its fire safety certification under ARM 23.7.110. ~~will only be licensed by the department if there is written certification from the state fire marshal's office that the home meets uniform fire code, group R, division 3, of the uniform building code and the following requirements:~~

~~(a) Smoke detectors listed by a recognized testing laboratory shall be located at stairways and in any areas requiring separation as set forth in the uniform building code.~~

~~(i) Smoke detectors in homes with hearing impaired or deaf residents shall be equipped with strobe lights to be activated when the smoke detector goes into the alarm mode.~~

~~(b) A fire extinguisher listed by a recognized testing laboratory with a minimum rating of 2A10BC shall be readily accessible to the kitchen area.~~

~~(c) The date and signature of the person(s) checking both the batteries in the smoke detector, monthly, and the fire extinguisher, quarterly, shall be recorded and filed at the home.~~

~~(d) Procedures and routes of evacuation shall be readily available in the home.~~

~~(e) Training and evacuation drills with residents shall be conducted and recorded at least monthly and, when shift staff are used, the drills shall be conducted at those hours to cover each shift every 90 days.~~

~~(f) A telephone or other means of notifying the fire department or other emergency services should be readily accessible in the home.~~

AUTH: Sec. 52-4-205, MCA. IMP: Sec. 52-4-203, MCA.

3. The department implements duties from Section 53-20-307, MCA, and Section 52-4-203, MCA, (under the authority of Section 53-20-305, MCA, and Section 52-4-205, MCA) by adopting rules setting licensing requirements and standards for community homes for persons with developmental disabilities and severe disabilities. The amendments in this notice concern fire safety requirements imposed by licensing rules for such homes.

The Department of Justice is specifically authorized to control fire safety requirements in community homes. Recently, the Department of Justice adopted ARM 23.7.110, which, as a result of the specific grant of authority to the Department of Justice, supersedes Department of Family Services rules on fire safety. Therefore, to provide for consistency and clarity in the licensing requirements, this notice proposes deletion of the Department of Family Services specific fire safety requirements, and proposes adoption and incorporation of ARM 23.7.110.

4. Interested persons may submit their data, views or arguments to the proposed amendment in writing to the Office of Legal Affairs, Department of Family Services, 48 North Last Chance Gulch, P.O. Box 8005, Helena, Montana 59604, no later than January 7, 1993.

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, that person must make a written request for a public hearing and submit such request, along with any written comments, to the Office of Legal Affairs, Department of Family Services, 48 North Last Chance Gulch, P.O. Box 8005, Helena, Montana 59604, no later than January 7, 1993.

6. If the Department of Family Services 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 are directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register.

DEPARTMENT OF FAMILY SERVICES

Tom Olsen, Director

John Melcher, Rule Reviewer

Certified to the Secretary of State, November 30, 1992.

BEFORE THE DEPARTMENT OF
CORRECTIONS AND HUMAN SERVICES

In the matter of the proposed amendments, the proposed repeal, and the adoption of New Rules pertaining to the certification system for chemical dependency personnel	) NOTICE OF PUBLIC HEARING ON) THE PROPOSED AMENDMENTS OF) RULES 20.3.413 AND 20.3.416,) REPEAL OF 20.3.414, AND ADOPTION OF NEW RULES I, II,) III, IV, AND V PERTAINING) TO THE CERTIFICATION SYSTEM) FOR CHEMICAL DEPENDENCY) PERSONNEL

TO ALL INTERESTED PERSONS:

1. On December 30, 1992 at 9:00 a.m., the department will hold a public meeting in the Main Conference Room, Department of Corrections and Human Services, 1539 11th Avenue, Helena, Montana, to consider amendments of Rules 20.3.413 and 20.3.416, repeal of Rule 20.3.414, and adoption of new rules I, II, III, IV, and V, regarding the certification system for chemical dependency personnel.

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

20.3.413 CONTINUING EDUCATION (1) Once certified, the individual will be required to earn ~~seven (7) points~~ twenty-one (21) continuing education hours per year on the average; averages being run four (4) years for a total of ~~28 points~~ eighty-four (84) hours. ~~Points can come from FTE work experience up to fourteen (14) points, workshop or academic courses taken within each 4-year period. A certified chemical dependency counselor employed full-time would need to receive three and one-half (3.5) points or 21 hours of training per year for a total of fourteen (14) points or 84 hours in four (4) years.~~

(2) Remains the same.

(3) Criteria for continuing education are previously stated in ARM 20.3.404 through 405 and guidelines published by the department of corrections and human services. All documentation of continuing education must be received by the department, ~~one month prior to the~~ by the date of expiration ~~date~~ listed on the certificate.

(4) Certified counselors, who allow their certificate to expire due to failure to meet continuing education requirements, will lose their certification. In this case, the individual must reapply and successfully complete the current certification requirements which include the entire examination process, in order to reinstate certification.

AUTH: 53-24-204 MCA
53-24-208 MCA

IMP. 53-24-204 MCA

20.3.416 REQUIREMENT FOR HIRING PERSONNEL

(1) Remains the same.

(2) All personnel providing counseling hired after March 1, 1991, not involved in the certification process prior to this date, must have completed one of the three educational requirements. It is the program's responsibility to validate the information before hire.

(a) Individuals meeting the educational requirement may be hired by an approved chemical dependency program to earn the two thousand (2000) hours of work experience. Upon completion of the two thousand (2000) hours, the individual must register and begin the examination process. Total time limit from the date of hire is twenty eight (28) months.

(b) Individuals meeting both the educational and work experience requirements will have sixteen (16) months from date of hire to complete certification. Documentation must be submitted to the department within thirty (30) days.

(3) Failure to comply with the above requirements may result in loss of program approval.

AUTH: 53-24-204, 53-24-208 MCA IMP: 53-24-204 MCA

3. The rule as proposed to be repealed is 20.3.414 and can be found on Pages 20-71 and 20-72, Administrative Rules of Montana. Auth. and Imp. Sec. are:

AUTH: 53-24-204 MCA IMP. 53-24-204 MCA
53-24-208 MCA

4. The new rules will provide as follows:

I. CONTINUOUS EFFORT (1) This section applies to individuals who have registered for certification prior to March 1, 1991, or were enrolled in a chemical dependency specific degree program prior to March 1, 1991. Individuals within this section may follow rules in effect on March 1, 1991, including ARM 20.3.202(44). Existing rules include ARM 20.3.401 through 20.3.412 and 20.3.202.

(2) Individuals in the certification process must demonstrate continuous effort as follows:

(a) Attempting competency based exams whenever available, based on previous rules:

(b) Successfully completing all certification requirements by January 1, 1995. The department will not allow extensions beyond this date including those individuals with a one year waiting period due to three failed exams.

(3) Individuals who fail to complete all certification requirements by January 1, 1995, must reapply and meet all new eligibility requirements.

AUTH: 53-24-204 MCA IMP. 53-24-215 MCA
53-24-208 MCA
53-24-215 MCA

II. APPLICABILITY (1) Pursuant to 53-24-215, MCA, persons registering for certification as a chemical dependency counselor on or after March 1, 1991, must comply with the following rules for eligibility.

(2) Certification shall be granted upon successful completion of three competency based examinations. Rules governing the competency based examinations are listed in ARM 20.3.406 through 20.3.409, 20.3.411, and 20.3.412.

(3) Applicants employed in an approved chemical dependency program will have sixteen (16) months to complete the examination process. This time limit does not include time employed earning the two thousand (2000) hours.

(4) Applicants not employed in an approved chemical dependency program will have twenty eight (28) months from date of registration to complete the examination process.

(5) Applicants will be eliminated from the system if they fail to attain certification within twenty eight (28) months from their date of registration. Applicants who have failed any one of the exams after three attempts will also be eliminated from the system. Eliminated applicants must wait two (2) years before reapplying for certification.

AUTH: 53-24-204 MCA
53-24-208 MCA
53-24-215 MCA

IMP. 53-24-204 MCA

III. MINIMUM ELIGIBILITY REQUIREMENTS (1) Persons applying for certification as a chemical dependency counselor must have one of the following:

(a) A baccalaureate degree in alcohol or drug studies, psychology, sociology, social work, counseling or a related field. A related field shall be accepted provided the transcript reveals twenty (20) semester (30 quarter) credits of alcohol and drug studies courses or counseling courses.

(b) An associate of arts degree in alcohol and drug studies, chemical dependency, or substance abuse. An associate of applied sciences or an associate of science will also be accepted. A specific curriculum of alcohol and drug studies shall include at least twenty (20) semester (30 quarter) credits of specific alcohol and drug studies coursework. A list of required core courses must include: introduction to chemical dependency counseling, counseling theory and techniques, group process, assessment and evaluation, case management, pharmacology in drugs of abuse, ethics and professional concerns, and a practicum.

(c) A credential demonstrating successful completion of a formalized training in chemical dependency counseling in a program approved by the department of corrections and human services or recognized by another state. The practicum must consist of at least four hundred (400) hours of classroom preparation and sixteen hundred (1600) hours of structured experiential learning activities. Additional criteria are identified in ARM 20.3.209.

and:

(2) Two thousand (2000) hours of supervised work experience in chemical dependency counseling in a state approved chemical dependency treatment program, an internship supervised by the college or university and endorsed by the department of corrections and human services, or a similar program recognized by another state.

(a) Work experience must include experience in twelve (12) core function areas including: screening, intake, orientation, assessment, treatment planning, individual and group counseling, case management, crisis intervention, client education, referral, recordkeeping, and consultation with other professionals. Experience in the core areas must be documented on forms distributed by the alcohol and drug abuse division which identify the total number of hours and signed by the supervisor.

(b) An internship meeting the two thousand (2000) hours of work experience requirements may be supervised by a faculty member of the college or university if an approved chemical dependency program is not available locally. The two thousand (2000) hour internship must have the prior endorsement of the department of corrections and human services. Endorsement will be granted based on the demonstration of appropriate supervision, experience in the twelve (12) core areas and the onsite direction of a certified chemical dependency counselor.

(c) State approved programs may hire individuals who meet minimum educational requirements and allow them to accumulate their two thousand (2000) hours of supervised work experience. The time limits for these individuals would be twenty eight (28) months, i.e. one year work experience and sixteen (16) months to complete the testing process. Programs must report the names of these individuals, their status, date of hire and completion of work experience requirement to the alcohol and drug abuse division.

AUTH: 53-24-204 MCA
53-24-208 MCA
53-24-215 MCA

IMP: 53-24-215 MCA

IV. APPLICATION PROCEDURE (1) Individuals requesting chemical dependency counselor certification must submit documentation verifying eligibility to the alcohol and drug abuse division. A registration form and application packet will be mailed to the applicant providing they are determined eligible.

(2) The applicant must submit the registration form with the written examination fee to an agency designated by the department of corrections and human services within ninety (90) days.

(3) Upon receipt of the paid registration form and signed code of ethics, the applicant will be scheduled for the written examination. The date the registration form was received will become the official registration date. The

applicant will have sixteen (16) months from the date of registration to become certified.

(4) The applicant must successfully complete all requirements for certification within twenty eight (28) months. Applicants not completing certification within twenty eight (28) months will be eliminated from the system and must wait two (2) years before reapplying for certification.

AUTH: 53-24-204 MCA
53-24-215 MCA

IMP: 53-24-204 MCA

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

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

(b) Have sexual relations with a client, solicit sexual relations with a client, or to commit an act of sexual misconduct or a sexual offense with a client.

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

(d) Interfere with or encourage termination of any legitimate relationship of a client.

(e) Provide unnecessary service to a client either by providing services not needed or by providing more service than necessary or longer than necessary.

(f) Use language of an abusive, obscene or profane nature in a clinical setting.

(g) Failure to comply with the federal rules and regulations regarding client's rights of confidentiality.

(h) Use of mood-altering chemicals in a manner adversely affecting work performance, effectiveness, credibility or professional integrity.

(i) Failure to disclose to the client, or prospective client, the fee to be charged for the professional services, or the basis upon which such fees will be computed.

(j) Accepting gifts or gratuities of significant monetary value or borrow money from a client or former client within two (2) years after termination of service.

(k) Pay or receive any commission, fee, rebate or compensation for referral of clients for professional services.

(l) Use relationships with clients to promote commercial enterprises of any kind for personal gain or the profit of an agency.

(m) Enter into a professional counseling relationship with members of one's own family, friends or close associates.

(n) Failure to recognize boundaries and limitations of his or her competencies or offering services outside of these professional competencies.

(o) Misrepresent the type or status of certificate by performing or holding himself/herself out as able to perform

professional services beyond his/her field of competence or outside the scope of the certificate.

(p) Recommend a client discontinue prescribed medication or failure to provide a supportive environment for a client who is receiving prescribed medication.

(q) Failure to demonstrate respect for clients by maintaining an objective, non-possessive professional relationship at all times.

AUTH: 53-24-204 MCA
53-24-208 MCA

IMP. 53-24-217 MCA

5. The purpose of the rule revisions is to implement 53-24-215 MCA; enhance professionalism by clarifying minimum eligibility requirements; define continuous effort for individuals registered prior to March 1, 1991; establish professional ethical standards and develop appropriate procedures and timelines.

6. 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 the Legal Unit, Department of Corrections and Human Services, 1539 11th Avenue, Helena, Montana 59620, not later than January 7, 1993.

7. The Legal Unit, Department of Corrections and Human Services, has been designated to preside over and conduct the hearing.

CURT CHISHOLM, Director
Department of Corrections and
Human Services

JAMES OBIE
Rule Reviewer

Certified to the Secretary of State November 30th, 1992.

BEFORE THE BOARD OF PARDONS
OF THE STATE OF MONTANA

In the matter of the Proposed revision of the Rules of the Board of Pardons	))))	NOTICE OF PROPOSED REVISION OF RULES (ARM Title 20, Chapter 25) NO PUBLIC HEARING CONTEMPLATED

TO: ALL INTERESTED PERSONS

1. At its regular meeting on June 29, 1992, in Deer Lodge, Montana the Board of Pardons proposed to revise its rules now published at pages 20-251 through 20-266 of the Administrative Rules of Montana.

2. Since rule-making by the Board is exempted from the notice and comment or opportunity for hearing requirements of the Montana Administrative Procedure Act, this notice is published in the Administrative Register as a courtesy to those persons who may wish to offer comments and suggestions before the Board makes its final decision.

3. The text of the proposed major revision will be mailed to each district judge and county attorney and to the Montana Defender Project, UM School of Law, the Montana State Prison law library, Montana Attorney General and the American Civil Liberties Union. This text will be mailed to any other person who requests a copy by writing to the Legal Counsel, Department of Corrections and Human Services, 1539 11th Avenue, Helena, Montana 59620 or to the Montana Board of Pardons.

4. Many of the changes are proposed merely to arrange the rules more logically or to conform to amendments of the statutes enacted in legislative sessions and more clearly outline the activities of the Board.

5. Comments and suggestions concerning the proposed revision will be considered by the Board of Pardons if sent prior to December 26, 1992, to: John G. Thomas, Chair, Board of Pardons, 300 Maryland Avenue, Deer Lodge, Montana 59722.

6. Authority to adopt the proposed changes is based upon section 46-23-218, MCA. Imp. 46-23-218, MCA.

JOHN G. THOMAS, Chair
Montana Board of Pardons

CURT CHISHOLM, Director
Department of Corrections and Human Services

JAMES B. OBIE
Rule Reviewer

Certified to the Secretary of State November 30th, 1992.

MAR Notice No. 20-7-9

BEFORE THE BOARD OF NURSING HOME ADMINISTRATORS
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the amendment of a rule pertaining to examinations and the adoption of new rules pertaining to definitions and applications	) NOTICE OF AMENDMENT OF 8.34.414 EXAMINATIONS AND THE ADOPTION OF NEW RULES PERTAINING TO DEFINITIONS AND APPLICATIONS

TO: All Interested Persons:

1. On September 10, 1992, the Board of Nursing Home Administrators published a notice of public hearing on the proposed amendment and adoption of the above-stated rules, at page 1903, 1992 Montana Administrative Register, issue number 17. The hearing was held on October 16, 1992, in Helena, Montana.

2. The Board has amended ARM 8.34.414 and adopted new rules I (8.34.404A), II (8.34.414A) as proposed but with the following changes:

"8.34.414 EXAMINATIONS (1) Examinations will be administered ~~in May and November~~ ON THE SECOND THURSDAY IN APRIL AND OCTOBER of each year.

(2) through (4) will remain the same as proposed."

"8.34.404A DEFINITIONS (1) "Experience in health care administration" shall mean having management responsibility, which shall include supervision of at least three (3) staff persons of a health care facility ~~or of an agency providing healthcare services. For the purposes of this provision only, agencies providing healthcare services shall include out-patient clinics, home health agencies, agencies providing rehabilitative services and other non-institutional businesses or agencies which provide direct healthcare services to individuals.~~

(2) will remain the same as proposed.

(3) "Healthcare facility" shall mean ~~a~~ licensed long-term FACILITY, or LICENSED acute care facility, AS DEFINED BY SECTION 50-5-301(3), MCA.

(4) will remain the same as proposed."

"8.34.414A APPLICATION FOR EXAMINATION (1) THE MINIMUM CUMULATIVE POINT-VALUE REQUIRED FOR ADMISSION TO THE EXAMINATION SHALL BE THIRTY-SIX HUNDRED (3600) POINTS.

(1) will remain the same but will be renumbered (2).

~~(2) A signed physician's statement dated within 60 days of application attesting to applicant's physical and mental health will be accepted as evidence that the applicant is of sound physical and mental health.~~

(3) through (ii)(A) will remain the same as proposed.

(B) BS/BA in nursing ~~(RN)~~ (OR 3-YEAR diploma nurse) equals 1800 points;

(C) through (iii) will remain the same as proposed.

(A) Associate degree in healthcare administration (including a minimum of 21 semester hours or 28 quarter hours

of coursework directly in healthcare administration), equals ~~3600~~ 3000 points;

(B) Associate degree nurse equals ~~1800~~ 1500 points;

(C) Associate degree in other healthcare related areaS equals 1500 points; and

(D) through (iv) will remain the same as proposed.

(A) ~~Licensed~~ RECOGNIZED nurse practitioner equals 2000 points;

(B) ~~Licensed~~ CERTIFIED physician assistant equals 1800 points;

(C) through (v) will remain the same.

(A) Courses in healthcare administration equals 150 points per semester hour CREDIT;

(B) Courses in business administration equals ~~50~~ 75 points per semester hour CREDIT;

(C) Courses in other healthcare related area equals ~~50~~ 75 points per semester hour CREDIT;

(D) Courses not specifically healthcare related equals 15 points per semester hour CREDIT WITH A MAXIMUM OF 800 POINTS ALLOWED.

(c) through (i)(A) will remain the same as proposed.

(B) Business administration equals ~~10~~ 5 points per approved clock hour;

(C) Other healthcare content equals ~~10~~ 5 points per approved clock hour; and

(D) through (4) will remain the same as proposed."

3. The authority and implementing sections remain the same as shown in the original proposed notice.

4. The Board has thoroughly considered all comments and testimony received. Ms. Rose Hughes, representing the Montana Health Care Association, submitted comments. Other comments duplicating Ms. Hughes' concerns were also submitted. Those comments and the Board's responses are as follows:

COMMENT: What is the applicability of the changes in the rules to the existing licensees?

RESPONSE: The Board affirmed that it did not intend to affect existing licensees with the proposed rule changes.

COMMENT: The definition of healthcare facility in the rules is inconsistent with the definition of healthcare facility in section 50-5-301, MCA.

RESPONSE: The Board concurs and has changed the definition of healthcare facility to refer to the definition of healthcare facility in section 50-5-301, MCA, as shown above.

COMMENT: The requirement in new rule 8.34.414A(2), that requires a statement of a physician as to the mental health of the administrator violates the Americans With Disabilities Act.

RESPONSE: The Board concurs and has deleted subsection 8.34.414A(2) which required a physician's statement as to the mental health of the applicant, as shown above.

COMMENT: It is inappropriate for there to be assigned the same number of points for an Associate Degree, Bachelor's Degree, and Master's Degree.

RESPONSE: The Board responded to this criticism by restructuring the point values to differentiate according to the level of knowledge obtained, as shown above.

COMMENT: A comment was received from Ms. Rose Hughes inquiring about credit for continuing education courses toward the point value total?

RESPONSE: The Board referred Ms. Hughes to the subsection of new rule 8.34.414A referring to continuing education, specifically referring to seminars/workshops/short courses attended in the last five years.

COMMENT: Why is there no standard for determining the total number of points needed to qualify for examination?

RESPONSE: The Board responded that the cumulative point value of 3600 points, necessary to qualify for examination, had been inadvertently left out of the original notice. Legal counsel, Lance Melton, provided everyone in attendance with a copy of the inadvertently-deleted language, and specifically invited additional comments on these changes. No additional comments were received. The board decided to include the cumulative point value language as subsection (1) of new rule 8.34.414A. Lance Melton also drew everyone's attention to the other change, regarding subsection (1) of 8.34.414, where the language should have read "on the second Thursday in April and October," rather than "in May and November." No additional comments were received on this change.

4. No other comments or testimony were received.

BOARD OF NURSING HOME ADMINISTRATORS
MOLLY MUNRO, CHAIRMAN

BY: _____
ANNIE M. BARTOS, CHIEF COUNSEL
DEPARTMENT OF COMMERCE

_____
ANNIE M. BARTOS, RULE REVIEWER

Certified to the Secretary of State, November 30, 1992.

BEFORE THE BOARD OF SCIENCE AND TECHNOLOGY DEVELOPMENT
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the adoption of new rules pertaining to seed capital project loans to venture capital companies	))))	NOTICE OF ADOPTION OF RULES PERTAINING TO SEED CAPITAL PROJECT LOANS TO VENTURE CAPITAL COMPANIES

TO: All Interested Persons:

1. On August 27, 1992, the Board of Science and Technology Development (Board) published a notice of public hearing to consider the proposed adoption of new rules pertaining to seed capital project loans to venture capital companies, at page 1791, 1992 Montana Administrative Register, issue number 16. The Board proposed to adopt these rules in order to implement House Bill 703 (Ch. 566, Laws of Montana, 1991). In addition, the Board believes that the adoption of these rules will insure that the seed capital project loans to venture capital companies meet the requirements of section 90-3-501 through 90-3-504, MCA.

2. The Board has adopted new rules IV (8.122.804) and V (8.122.805) exactly as proposed. The Board has adopted new rules I (8.122.801), II (8.122.802) and III (8.122.803) with minor editorial changes but substantially as proposed.

"8.122.801 APPLICATION PROCEDURES FOR A SEED CAPITAL PROJECT LOAN TO A VENTURE CAPITAL COMPANY - SUBMISSION AND USE OF PROSPECTUS (1) and (2) will remain the same as proposed.

(3) The applicant must submit a copy of the venture capital company's by-laws to the ~~alliance~~ board.

(4) through (6) will remain the same as proposed."

"8.122.802 APPLICATION PROCEDURES FOR A SEED CAPITAL ~~TECHNOLOGY~~ PROJECT LOAN TO A VENTURE CAPITAL COMPANY - REVIEW PROCESS (1) through (3) will remain the same as proposed."

"8.122.803 APPLICATION PROCEDURES FOR A SEED CAPITAL ~~TECHNOLOGY~~ PROJECT LOAN TO A VENTURE CAPITAL COMPANY - BOARD ACTION (1) through (1)(d) will remain the same as proposed.

(e) compliance with ~~all other applicable provisions of the act~~ section 90-3-519, MCA.

(2) will remain the same as proposed."

3. The authority and implementing sections are the same as shown in the original proposed notice.

4. No individuals testified at the public hearing held on September 23, 1992. The only individual to submit any written comments was Mr. John McMaster, staff attorney for the Administrative Code Committee. His comments were minor and editorial in nature and have been made in ARM 8.122.801 through 8.122.803, as set forth above.

4. No other comments or testimony were received.

BOARD OF SCIENCE AND TECHNOLOGY DEVELOPMENT
RAY V. TILLMAN, CHAIRMAN

BY: _____
ANNIE M. BARTOS, CHIEF COUNSEL
DEPARTMENT OF COMMERCE

_____
ANNIE M. BARTOS, RULE REVIEWER

Certified to the Secretary of State, November 30, 1992.

BEFORE THE DEPARTMENT OF
FAMILY SERVICES OF THE
STATE OF MONTANA

In the matter of the amendment of rules pertaining to youth detention facilities.	)))	NOTICE OF AMENDMENT OF RULES PERTAINING TO YOUTH DETENTION FACILITIES

1. On August 27, 1992, the Department of Family Services published notice of the proposed amendment of ARM 11.17.101, 11.17.102, 11.17.110, 11.17.111, 11.17.113, 11.17.115, 11.17.117, 11.17.118, 11.17.120, 11.17.124, 11.17.125, 11.17.127, 11.17.129, 11.17.131, 11.17.138, and 11.17.146, pertaining to youth detention facilities at page 1813 of the 1992 Montana Administrative Register, issue number 16.

2. On September 24, 1992, the Department of Family Services published an amended notice at page 2116A of the 1992 Montana Administrative Register, issue number 18. The changes to the rules remained as first published. However, the amended notice included required information on public comment which had been inadvertently left out of the first notice.

3. Except for the proposed amendments to ARM 11.17.120, the rules are amended as proposed. As more thoroughly set out in the comment-response section, the proposed amendments to ARM 11.17.120, are not adopted because enforcement of food service regulation is more appropriately handled by health officials.

4. The department has thoroughly considered all comments received. The only comments received were from the Montana Department of Health and Environmental Sciences (DHES):

COMMENT: In regard to the last two subsections of the proposed amendment to ARM 11.17.120, the Department of Family Services, (DFS) is proposing a catch-all exception to the requirement of compliance with food service rules, as long as it is with the approval of the DFS licensing worker. Any exception should be approved by a licensed sanitarian. In addition, DFS proposes inspection for compliance with food service regulations by DFS staff. Inspection for compliance should be through local health inspectors. It is our understanding that no DFS staff are licensed sanitarians.

RESPONSE: The department agrees, however, rules requiring action by local sanitarians should be promulgated by DHES, not DFS. Therefore, the current detention facility nutrition rules are to remain in place, and in the event that DHES requires local sanitarians to inspect detention facilities, DFS will modify or repeal its rule on meal preparation if it is in conflict with requirements enforced through local sanitarians.

COMMENT: Youth Detention Facilities should not be exempted from food service regulations pertaining to dish washing machines.

If the concern is that the detention facilities will be required to purchase commercial dish washing machines, then the Department of Family Services (DFS) should also adopt the interpretation of ARM 16.10.215 promulgated by DHES through its policy which allows for small residential facilities to use non-commercial machines.

RESPONSE: The department's decision to forgo an attempt to enforce the food service rules moots this issue.

COMMENT: Youth Detention Facilities should be required to comply with food service requirements on lavatory facilities.

RESPONSE: Specific rules already cover lavatory facilities in youth detention centers.

COMMENT: Subsections (1), (8), (9), (10), and (11) of ARM 16.10.232, should be applicable to detention facilities.

RESPONSE: The department's decision to forgo an attempt to enforce the food service rules moots this issue.

DEPARTMENT OF FAMILY SERVICES

Tom Olsen, Director

John Melcher, Rule Reviewer

Certified to the Secretary of State, November 30, 1992.

BEFORE THE DEPARTMENT
OF PUBLIC SERVICE REGULATION
OF THE STATE OF MONTANA

In the Matter of Proposed Adoption of New Rules Pertaining to Fuel Cost Surcharge and Temporary Rate Reductions and the Proposed Amendment of an Existing Rule to Define "miles," all Regarding Motor Carriers.	NOTICE OF ADOPTION OF NEW RULES I AND II AND AMENDMENT OF EXISTING RULE 38.3.103

TO: All Interested Persons

1. On September 24, 1992 the Department of Public Service Regulation published notice of the proposals identified in the above titles at page 2121, issue number 18 of the 1992 Montana Administrative Register.

2. The Department has adopted and amended the following rule as proposed with the change indicated:

RULE I. 38.3.3601 FUEL COST SURCHARGE (1) through (4) Remain the same as proposed.

(5) The surcharge shall be effective for 90 days from the date of approval by the commission, but may be extended for an additional 90 days. Amendments do not extend the effective period. Before or Aafter the expiration of the times permitted by this rule, if the carrier determines that fuel cost increases are likely to remain permanent, an application for a permanent rate increase may be made.

(6) through (12) Remain the same as proposed. AUTH: Sec. 69-12-201, MCA; IMP, Secs. 69-12-501 through 69-12-511, MCA

Rationale: For the change indicated, the Commission determines that it is necessary to clarify that a carrier may file for a permanent rate increase during the term of the surcharge.

3. The Department has adopted and amended the following rules as proposed:

RULE II. 38.3.3605 TEMPORARY RATE REDUCTIONS

38.3.103 VICINITY, TRIBUTARY, RADIUS, BETWEEN

4. Written and oral comments to the proposals were received. These are summarized below, have been considered by the Commission, and are ruled upon as indicated.

At hearing, Brian Tatman, owner of Heavy Haulers, asked several questions pertaining to the amendment to 38.3.103. The questions were apparently answered to Tatman's satisfaction as no comments on the proposal were then made. The Montana Motor Carrier Association, Inc. (association), through its Executive Vice President, Ben G. Havdahl and consultant, Patrick F. Flaherty, commented that it was in general support of Rule II and the amendment to 38.3.103 and had no further comments on these rules. It also commented that it was in general support of Rule I, but with some suggestions. These suggested modifications to Rule I follow.

On Rule I(2)(a) the association comments that any amount of a fuel cost increase could have a significant effect on a carrier. It suggests that the 6 percent provision should be supplemented by an emergency provision allowing a surcharge on individual merits, case by case, without percentage limitations.

The point behind the 6 percent requirement is to limit fuel surcharges to those situations that are relatively serious and unexpected. If a carrier's existing rates cannot accommodate minor periodic fluctuations in fuel costs then an application for a permanent change might be in order. It is not the intent of this rule to be applicable to minor fluctuations -- the Commission does not have the resources to process that type of thing frequently. The suggestion is overruled.

On Rule I(2)(c) the association comments that, in most cases, it would be difficult, if not impossible, for any carrier to determine the duration of fuel cost increases. It also comments that fuel cost increases in duration less than two months can have a significant impact. It suggests that this provision be deleted from the proposed rule.

The point behind the two and six month provisions is to limit surcharges to those situations that are not likely to be either of extreme short duration or permanent. A carrier should be able to absorb some short duration increases. A carrier should apply for permanent rate changes to accommodate permanent cost increases. The suggestion is overruled.

On Rule I(3) the association makes comments similar to those made on Rule (2)(a) -- any amount could have a significant impact on a carrier. It suggests that any change, without limits, be considered on its own merits, case by case. The suggestion is overruled for the same reasons as given in Rule I(2)(a).

On Rule I(4) the association comments that the phrase "applies to all transportation" might be unclear. It suggests that language be added to clarify that it applies to affected tariffed rates.

The Commission believes that it is clearly implied in the quoted phrase that transportation means tariffed rates or maximum rates. The comment is overruled.

On Rule I(6) the association comments that the requirement that carriers "monitor" fuel costs throughout the duration of the surcharge is onerous and would be expensive to implement. It suggests that the "monitoring" requirement be stricken in favor of a triggering mechanism like "when it appears that fuel costs have decreased."

A fuel cost surcharge is a kind of special accommodation. With it special obligations are justified. The Commission believes that a monitoring requirement is fair and a proper safeguard to the public. The comment is overruled.

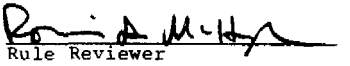
As a general matter the association comments that the Commission might want to consider some form of exceptions to the rule as proposed. These exceptions would accommodate, for good cause and with sufficient explanation, special circum-

stances such as where minimum filing requirements cannot be met or alternative proof must be used.

One of the reasons for this rule is to define certain parameters of what the Commission can reasonably accomplish in taking action to affect rates under special circumstances. The Commission will make every reasonable attempt to accommodate any carrier's unique or special circumstances, but does not envision that this rule is so complex to require any express exceptions.

5. The authority and implementing statutes are set forth in the notice of proposed action identified in paragraph 1.

Danny Oberg, Chairman



Rule Reviewer

CERTIFIED TO THE SECRETARY OF STATE NOVEMBER 30, 1992.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE ADOPTION of NEW RULES I (42.20.160), II (42.20.161), III (42.20.162), IV (42.20.163), and V (42.20.164) relating to Forest Land Property Taxes	NOTICE OF THE ADOPTION of NEW RULES I (42.20.160), II (42.20.161), III (42.20.162), IV (42.20.163), and V (42.20.164) relating to Forest Land Property Taxes

TO: All Interested Persons:

1. On June 11, 1992, the Department published notice of the proposed adoption of Rules I (42.20.160), II (42.20.161), III (42.20.162), IV (42.20.163), and V (42.20.164) relating to forest land property taxes at page 1227 of the 1992 Montana Administrative Register, issue no. 11.

2. A Public Hearing was held on July 8, 1992, to consider the proposed new rules. Written comments were received by Champion International Corporation.

3. Oral and written comments received during and subsequent to the hearing are summarized as follows along with the response of the Department:

COMMENT: Champion International felt that there should be a clarification to Rule III(1)(b). They suggested the Department change "easement" to "right-of-way easement" to include roads, power transmission lines, telephone lines, pipe lines, etc. They felt easement by itself, could include such things as scenic easements or conservation easements which could allow for unrestricted timber growth and no method for taxing that timberland.

RESPONSE: The Department has decided to drop the reference to easement entirely in that portion of Rule III. This change will address industry concerns regarding the use of the term "easement". It will give the Department the ability to appropriately classify land based on use.

4. The Department has amended the rule III as follows:

RULE III (42.20.162) EXCEPTIONS TO FOREST LAND ASSESSMENT

(1) Effective January 1, 1994, the following land shall not be classified and assessed as forest land:

(a) remains the same.

(b) land withdrawn from timber utilization by statute, ordinance, covenant, court order, ~~easement,~~ or administrative order, or other operation of law;

(c) and (d) remain the same.

AUTH: 15-44-105 MCA; IMP: 15-44-101 through 15-44-102 MCA.

5. Therefore, the Department adopts the rule III (42.20.162) with the amendments listed above and adopts rules I (42.20.160), II (42.20.161), IV (42.20.163), and V (42.20.164) as proposed.

CLEO ANDERSON
Rule Reviewer

DENIS ADAMS
Director of Revenue

Certified to Secretary of State November 30, 1992.

BEFORE THE SECRETARY OF STATE
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 1.2.419 regarding scheduled dates for the Montana Administrative Register	))))	NOTICE OF AMENDMENT OF ARM 1.2.419 FILING, COMPILING, PRINTER PICKUP AND PUBLICATION OF THE MONTANA ADMINISTRATIVE REGISTER

TO: All Interested Persons.

1. On October 15, 1992, the office of the Secretary of State published a notice of proposed amendment to ARM 1.2.419 regarding the scheduled dates for the Montana Administrative Register at page 2270 of the 1992 Montana Administrative Register, Issue number 19.

2. No comments or testimony were received, but a concern was raised over the September 30, 1993 publication date (filing date is September 20, 1993). The effective date would be October 1, 1993. The question was raised as to which quarter replacement pages would be published--third quarter ending September 30 or fourth quarter ending December 31? Replacement pages for anything published in the rule section of the September 30, 1993 register would be due for third quarter replacement pages. ARM 1.2.420 (2) states "Rulemaking agencies must submit replacement pages by the scheduled date on all rule changes that have appeared in the rule section of the Montana Administrative Register during the preceding three months." Page numbers for the history notes will be available from this office on September 22, 1993 which is about the normal time frame.

3. The rule is amended as proposed.

MIKE COONEY
Secretary of State

GARTH JACOBSON
Rule Reviewer

Dated this 30th day of November, 1992.

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

In the matter of the amendment of rules 46.12.565, 46.12.566 and 46.12.567 pertaining to private duty nursing	))))	NOTICE OF THE AMENDMENT OF RULES 46.12.565, 46.12.566 AND 46.12.567 PERTAINING TO PRIVATE DUTY NURSING

TO: All Interested Persons

1. On September 24, 1992, the Department of Social and Rehabilitation Services published notice of the proposed amendment of rules 46.12.565, 46.12.566 and 46.12.567 pertaining to private duty nursing at page 2127 of the 1992 Montana Administrative Register, issue number 18.

2. The Department has amended rules 46.12.565 and 46.12.566 as proposed.

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

46.12.567 PRIVATE DUTY NURSING SERVICE, REIMBURSEMENT

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

(2) ~~The current fee schedule for private duty nursing services is published by the department in a pricing manual. Copies of the pricing manual may be obtained from the Medical Support Section, Medicaid Services Division, Department of Social and Rehabilitation Services, P.O. Box 4210, Helena, MT 59604-4210, (406) 444-4540.~~ THE DEPARTMENT'S FEE SCHEDULE IS THE FOLLOWING:

(a) $10.00 PER 30 MINUTE UNIT OF REGISTERED NURSE SERVICE;

(b) $7.50 PER 30 MINUTE UNIT OF LICENSED PRACTICAL NURSE SERVICE; AND

(c) $7.50 PER 30 MINUTE UNIT OF PATIENT-SPECIFIC TRAINING.

AUTH: Sec. 53-6-113 MCA
IMP: Sec. 53-6-101, 53-6-111 and 53-6-113 MCA

4. The Department, since the first notice, has determined the fee schedule for private duty nursing services and is publishing the schedule in the final notice. The fee schedule provides rates specific to the skill levels and responsibilities of the providers.

5. No written comments or testimony were received.

Rule Reviewer

Director, Social and Rehabilitation Services

Certified to the Secretary of State November 30, 1992.

VOLUME NO. 44 OPINION NO. 42

APPROPRIATIONS - Authority of Legislature to direct;
HOUSING, BOARD OF - Authority to invest funds;
PUBLIC FUNDS - Investment of by Board of Housing;
STATE AGENCIES - Authority of administrative agency or board relative to legislative authority;
STATUTORY CONSTRUCTION - Plain meaning of words used;
MONTANA CODE ANNOTATED - Sections 17-2-102(b)(i)(A), 90-6-101 to 90-6-127, 90-6-104(13), 90-6-107, 90-6-116;
MONTANA CONSTITUTION - Article VII, sections 9, 12;
OPINIONS OF THE ATTORNEY GENERAL - 43 Op. Att'y Gen. No. 33 (1989).

HELD: Board of Housing funds not specifically pledged under a trust indenture must be deposited in the housing authority enterprise fund and invested in accordance with the unified investment program as provided by sections 90-6-104(13) and 90-6-107, MCA.

November 20, 1992

Michael J. Mulroney
Luxan & Murfitt
P.O. Box 1144
Helena MT 59624-1144

Dear Mr. Mulroney:

On behalf of the Montana Board of Housing, you have requested my opinion on the following question:

> Is the Board of Housing required to maintain all funds not specifically pledged to a trust indenture in the Housing Authority Enterprise Fund established by section 90-6-107, MCA?

Your question arises as a result of House Bill 41, enacted by the Special Session of the 52nd Montana Legislature in July 1992. 1992 Mont. Laws Spec. Sess., ch. 11. The Legislature was convened for the purpose of making up an anticipated revenue shortfall in the state budget; House Bill 41 transferred approximately $2.2 million held in special accounts to the general fund to assist in balancing the budget. Among the transfers ordered by the Legislature was the sum of $500,000 from the Housing Authority Enterprise Fund (HAEF). § 90-6-107(4), MCA (temporary). Because there were no monies held in that fund, and in an effort to provide assurance to its present and future bondholders, the Board resolved not to transfer any monies to the general fund as directed by Chapter 11, section 8(2), 1992 Mont. Laws Spec. Sess. The Board has acted on the assumption that funds are not required to be left in the HAEF.

Your inquiry is limited to resolution of the issue whether the Board's assumption is correct.

The Montana Board of Housing (Board) was created as part of the Housing Act of 1975, enacted for the purpose of making public monies available for affordable housing to low income persons. SS 2-15-1814, 90-6-101 to 127, MCA. The Board consists of seven members, appointed by the Governor, and is allocated to the Department of Commerce for administrative purposes only. § 2-15-1814(2), (5), MCA. The Board is authorized by law to issue notes and bonds, to make and service loans, to invest funds, to collect reasonable interest and fees to cover its operating and administrative expenses, and to work with governmental agencies and private organizations and corporations to facilitate low-income housing development. § 90-6-104, MCA. Generally speaking, the Board operates by issuing tax exempt bonds at a fixed interest rate and selling mortgages at a higher rate to pay off the bonds, fund operational expenses, cover overall risks, and fund other low-income housing programs. Its operations are funded through an administrative fee assessed on mortgages. Because of the successful operation of the program, the Board has not required or received state general fund monies since 1977.

As part of the Housing Act of 1975 (Act), the Legislature created a fund in the proprietary fund category of the state treasury, now designated as the housing authority enterprise fund. § 90-6-107, MCA. The use of a proprietary fund evinces the Legislature's intent that the Board be financed and operated in a manner similar to private business enterprises so that its operations are financed primarily through user charges. § 17-2-102(b)(i)(A), MCA. See also Minutes, Senate State Administration Committee, March 11, 1975, comments of Rep. Gerke ("This system will be as self-financing and self-sustaining as possible, with little or no cost to the state"). Although its operations are self-sustaining, the Board is subject, like other state agencies, to legislative review of its expenditures and appropriation of funds on a biennial basis.

For each of the last three fiscal years, the Board's operating expenses have been less than the appropriation authorized by the Legislature. In fiscal year 1992, the Board's appropriations authority exceeded its spending by approximately $767,000. The unspent appropriations, together with all other Board assets, are held outside the state treasury in revenue subaccounts administered under either a trust indenture or a trust agreement. In 1989, the Board created a Housing Trust Fund, managed under a trust agreement, which is used to finance housing needs and new programs as well as loan or grant projects. Except for this trust fund and its financial programs fund, all other funds within the Board's control are held under various trust indentures. All of the operating expenses of the Board come out of the indentured funds and are controlled by the terms of the trust indentures themselves.

In establishing the HAEF, the Legislature directed:

> All funds from the proceeds of bonds issued under this part, fees, and other moneys received by the board, moneys appropriated by the legislature for the use of the board in carrying out this part, and moneys made available from any other source for the use of the board shall be deposited in the housing authority enterprise fund except where otherwise provided by law. All funds deposited in the housing authority enterprise fund, except funds appropriated by the legislature for use of the board in payment of expenses incurred in carrying out this part, are continuously appropriated to and may be expended by the board for the purposes authorized in this part.

§ 90-6-107(1), MCA. The Act further provides that "[f]unds appropriated by the legislature for use of the board in payment of expenses incurred in carrying out this part shall be deposited in the housing authority enterprise fund." § 90-6-107(3), MCA.

The Board is empowered, pursuant to section 90-6-104(13), MCA, to invest funds in accordance with Title 17, chapter 6, MCA, which provides for the state's unified investment program. See Mont. Const. Art. VIII, § 13. The Legislature directed, however, that "all investment income from funds of the board less the cost for investment as prescribed by law must be deposited in the housing authority enterprise fund[.]" § 90-6-104(13), MCA.

The Housing Act makes available to the Board an alternative to investing funds through the unified investment program. Under section 90-6-116, MCA, the Board may, in its discretion, secure its bonds by a trust indenture between the Board and a corporate trustee. "The board may provide by a trust indenture for the payment of the proceeds of the bonds and the revenues to the trustee under the trust indenture of another depository and for the method of disbursement, with safeguards and restrictions it considers necessary." § 90-6-116(1), MCA. Expenditures incurred in carrying out a trust indenture may be treated as part of the Board's operating expenditures. § 90-6-116(2), MCA. This alternative method of securing revenue bonds was upheld by the Montana Supreme Court against a challenge that it violated the state constitution. Huber v. Groff, 171 Mont. 442, 459-60, 558 P.2d 1124, 1133-34 (1976).

The issue presented by your inquiry is not resolved by the court's decision in Huber. That case stands for the principle that the Legislature appropriately authorized the Board of Housing to utilize a trust indenture in the issuance of its revenue bonds and to allow the proceeds from the bond sale to be handled by a trustee, rather than through the unified investment program or by resolution of the Board. Your

question, in contrast, involves the power of the Legislature to direct the Board's handling of funds other than those pledged to a trust indenture.

The Montana Board of Housing is a creature of statute; the Housing Act of 1975 established it as a state agency. See Minutes, Senate State Administration Committee, March 11, 1975 (comments of Pat Melby). As a "public corporation," the Board "received all of its powers directly from the legislature and its duties and responsibilities are set out clearly by the statute which created it." Huber, 171 Mont. at 457, 558 P.2d at 1132. It is well-established in Montana that "[a]dministrative agencies enjoy only those powers specifically conferred upon them by the legislature." Bick v. State, Department of Justice, 224 Mont. 455, 457, 730 P.2d 418, 420 (1986). Thus, the Board possesses no common law powers, and may not exceed the authority conferred on it by statute. State ex rel. Anderson v. State Board of Equalization, 133 Mont. 8, 17, 319 P.2d 221, 226-27 (1958); Bell v. Department of Licensing, 182 Mont. 21, 22-23, 594 P.2d 331, 332-33 (1979); 43 Op. Att'y Gen. No. 33 at 98, 100 (1989).

The authority of the Legislature relative to that of an administrative agency is particularly well-defined in matters of revenue and spending. The Montana Constitution directs the Legislature to "insure strict accountability of all revenue received and money spent by the state," Art. VIII, § 12, and mandates a balanced budget, Art. VIII, § 9. Notwithstanding the Governor's duty to submit a proposed budget to the Legislature, "the budget in Montana is a *legislative* budget[,] not an *executive* budget[.]" State ex rel. Judge v. Legislative Finance Committee, 168 Mont. 470, 480, 543 P.2d 1317, 1322 (1975) (emphasis in original). "In other words[,] the legislature has the power to adjust and finalize the budget." Id. As recognized in Huber, the Board of Housing is a public corporation; as such, "its revenue is subject to the control of the legislature, and when the legislature directs the application of a revenue to a particular purpose, or its payment to any party, a duty is imposed and an obligation created on the [Board]." State ex rel. Wilson v. Weir, 106 Mont. 526, 533, 79 P.2d 305, 308 (1908). But see § 90-6-126, MCA (state agrees not to impair obligations of an agreement between the board and its bondholders).

Given these standards, the answer to your inquiry turns on the meaning of the language used in sections 90-6-104 and 90-6-107, MCA, requiring certain monies to be "deposited in the housing authority enterprise fund" and the extent, if any, to which those provisions conflict with the Board's discretionary authority to secure its bonds by trust indenture.

When the language of a statute is plain and unambiguous, the statute speaks for itself. Dunphy v. Anaconda Co., 151 Mont.

76, 80, 438 P.2d 660, 662 (1968). The rules of statutory construction require that the language of the statute be given its plain and ordinary meaning. Rierson v. State, 188 Mont. 522, 527, 614 P.2d 1020, 1023, on reh'g, 622 P.2d 195 (1980). My function in interpreting a statute is "simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted." § 1-2-101, MCA. In construing statutes, words employed should be given such meaning as is required by the context, and as is necessary to give effect to the purpose of the statute. In re Shun T. Takahaski's Estate, 113 Mont. 490, 494, 129 P.2d 217, 220 (1942).

Section 90-6-116, MCA, authorizes the Board, in its discretion, to enter into a trust indenture with a corporate trustee in connection with the Board's issuance of various bond offerings. Section 90-6-107(1), MCA, requires that, *except where otherwise provided by law*, all funds received by or made available to the Board be deposited in the HAEF. Likewise, except for expenses incident to the cost for investment, section 90-6-104(13), MCA, requires all investment income from funds of the Board to be deposited in the HAEF. With the exception of funds appropriated by the Legislature for use of the Board in payment of expenses, all other funds deposited in the HAEF are continuously appropriated and may be expended by the Board for the purposes authorized by law. § 90-6-107(1), MCA. Giving equal weight to each of these provisions, I conclude that the commitment of funds to a trust indenture is "otherwise provided by law" within the meaning of section 90-6-107, MCA, and accordingly that funds so pledged are an appropriate expenditure for which the Board is not required to maintain funds in the HAEF.

With respect to funds not specifically pledged to a trust indenture, you question whether they are required to be maintained in the HAEF. I look to the plain meaning of the language and the context in which it is used to resolve this issue. Generally speaking, "deposit" means to commit to custody, to place, or to lodge for safe-keeping. Black's Law Dictionary 438 (6th ed. 1990). In the context of financing and investment, "deposit" may be used either as a short- or long-term placement of funds, but usually contemplates a withdrawal at some point in time. See generally Tit. 17, ch. 6, pt. 1, MCA. Under the Housing Act, the Board's authority is circumscribed: it may either enter into trust indentures for the purpose of protecting and enforcing the rights and remedies of its bondholders, and deposit and invest the bond proceeds and revenues directly with the trustee, § 90-6-116(1), MCA, or deposit and invest funds not required for immediate use with the state treasurer for participation in the unified investment program, § 90-6-104(13), MCA. Therefore, funds not pledged to a trust indenture and, in any case, funds appropriated by the Legislature for use of the Board in payment of its expenses, § 90-6-107(3), MCA, must be deposited in the HAEF. The Board

possesses no statutory authority to otherwise direct these funds within its control.

I find the language of the Housing Act of 1975 to be clear and unambiguous. Unless the Board in its discretion invests funds through the unified investment program or pledges funds pursuant to a trust indenture, it must maintain its monies in the HAEF. Although the Board may withdraw funds from the HAEF for expenditure in accordance with its statutory authorization, the statutes are particularly clear with respect to those funds appropriated by the Legislature for use of the Board in payment of expenses. There is no provision for such funds to be withdrawn from the HAEF and invested elsewhere. § 90-6-107(1), (3), MCA. Additionally, section 90-6-104(13), MCA, makes it clear that unless the trust indenture provisions of section 90-6-116, MCA, are invoked, Board funds must be invested with the unified investment program and investment income deposited and maintained in the HAEF.

The Board makes a strong argument that these funds are better utilized when invested in accordance with its trust arrangements. Indeed, as indicated by the Board's trustee, it may be prudent on the part of the Board to continue to hold its funds in trust as additional security for bondholders relying on the Board's pledge of its general obligation. The issue raised, however, is not one of prudent investment or wise policy choices. It is, rather, a question of the Legislature's authority to direct the placement of monies under the State's control. Clearly, the Legislature has such authority and exercised it in the Housing Act of 1975 by giving the Board explicit direction in the placement and use of funds under its control. The Board's policy arguments are more appropriately directed to the legislative body in seeking additional flexibility in the handling of its funds.

Finally, there has been some suggestion of the Legislature's inability to impair the Board's existing contractual obligations with its bondholders. However, insofar as your request may seek a determination concerning the constitutionality of section 90-6-107(4), MCA (temporary), I must decline to address that issue. A presumption exists that statutes are constitutional, and, as Attorney General, I am bound to defend the validity of state law. It is therefore necessary for me to decline consideration of questions involving the constitutionality of state statutes.

THEREFORE, IT IS MY OPINION:

> Board of Housing funds not specifically pledged under a trust indenture must be deposited in the housing authority

enterprise fund and invested in accordance with the unified investment program as provided by sections 90-6-104(13) and 90-6-107, MCA.

Sincerely,

Marc Racicot

MARC RACICOT
Attorney General

NOTICE OF FUNCTIONS OF ADMINISTRATIVE CODE COMMITTEE

The Administrative Code Committee reviews all proposals for adoption of new rules, amendment or repeal of existing rules filed with the Secretary of State, except rules proposed by the Department of Revenue. Proposals of the Department of Revenue are reviewed by the Revenue Oversight Committee.

The Administrative Code 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. 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 lists 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 Administrative Procedure Act for inclusion in the ARM. The ARM is updated through September 30, 1992. This table includes those rules adopted during the period September 1, 1992 through December 30, 1992 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 September 30, 1992, 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 1992 Montana Administrative Register.

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