MONTANA ADMINISTRATIVE REGISTER

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MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 5

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 The notice section contains state agencies' proposed new, amended or repealed rules, the rationale for the change, date and address of public hearing and where written comments may be submitted.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

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BEFORE THE DEPARTMENT OF ADMINISTRATION
OF THE STATE OF MONTANA

In the matter of the proposed amendment of ARM 2.21.619 and 2.21.620 relating to holidays.	))))	NOTICE OF PUBLIC HEARING ON THE PROPOSED AMENDMENT OF ARM 2.21.619 AND 2.21.620 RELATING TO HOLIDAYS

TO: All Interested Persons.

1. On April 3, 1992, at 9 a.m. in Room 136 Mitchell Building, Helena, Montana, a public hearing will be held to consider the proposed amendment of ARM 2.21.619 and 2.21.620 relating to holidays.

2. The proposed amendments provide as follows:

2.21.619 DEFINITIONS (1) Remains the same.

(2) ~~"Heritage day" means a holiday, as provided in 1-1-216 (11), MCA, "to be observed annually on a date determined by the governor for the executive, legislative, and judicial branches of state government, including the Montana university system."~~

(3) - (7) Renumbered as (2) - (6) and remain the same.

(Auth. 2-18-102, 2-18-603, MCA: Imp. 1-1-216, 2-18-603, MCA)

2.21.620 HOLIDAYS (1) (a) Remains the same.

(b) Martin Luther King Jr. Day, the third Monday in January;

(b) - (j) re-alphabetized (c) - (k).~~;~~ ~~and~~

~~(k) Heritage Day, to be observed annually on a date determined by the governing body of each political subdivision for the purpose of that political subdivision and by the governor for the executive, legislative, and judicial branches of state government, including the Montana university system.~~

(2) - (4) Remain the same.

~~(5) Martin Luther King, Jr., day is not a legal holiday in Montana for which holiday benefits are provided. State offices will be open on this day. It is an official day of observance on which, as provided in 1-1-214, MCA, "all Montanans are urged to reflect on the contributions of this man to American society."~~

(Auth. 2-18-102, 2-18-603, MCA; Imp. 1-1-214, 1-1-216, 2-18-603, MCA)

3. It is reasonably necessary to amend these rules because the 1991 Legislature in S.B. 78 amended 1-1-216, MCA, to add Martin Luther King Jr. Day to the list of legal holidays and to remove Heritage Day. The bill also repealed 1-1-214, MCA, which designated Martin Luther King Jr. day as a day of observance.

4. Gale Kuglin, Personnel Policy Coordinator, State Personnel Division, Department of Administration, Room 130 Mitchell Building, Helena, Montana 59620, has been designated to preside over and conduct the hearing.

5. Interested parties may submit their data, views or arguments concerning the proposed amendments to Laurie Ekanger, Administrator, State Personnel Division, Department of Administration, Room 130 Mitchell Building, Helena, Montana 59620, no later than April 10, 1992.

Dal Smilie, Chief Legal Counsel
Rule Reviewer

Bob Marks, Director
Department of Administration

Certified to the Secretary of State March 2, 1992.

BEFORE THE DEPARTMENT OF ADMINISTRATION
OF THE STATE OF MONTANA

In the matter of the proposed amendment of ARM 2.21.803 and 2.21.810 relating to the Sick Leave Fund	))))	NOTICE OF PUBLIC HEARING ON THE PROPOSED AMENDMENT OF ARM 2.21.803 AND 2.21.810 RELATING TO THE SICK LEAVE FUND

TO: All Interested Persons.

1. On April 3, 1992, at 9 a.m. in Room 136 Mitchell Building, Helena, Montana, a public hearing will be held to consider the proposed amendment of ARM 2.21.803 and 2.21.810 relating to the sick leave fund.

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

2.21.803 DEFINITIONS (1) - (8) Remain the same.

~~(9) "Sick leave advisory council" means the nine-member council provided for in 2-15-216, MCA, to advise the department of administration on the sick leave fund.~~

(9) "State employee group benefits advisory council" means the council provided for in 2-15-1016, MCA, which advises the department of administration on the sick leave fund.

(10) - (11) Remain the same.

(Auth. 2-18-618, MCA; Imp. 2-18-618, MCA)

2.21.810 STRUCTURE OF SICK LEAVE FUND (1) Remains the same.

(2) The ~~sick leave advisory council shall meet as needed to~~ state employee group benefits advisory council will review the operation of the sick leave fund and ~~to~~ make recommendations to the director of the department of administration regarding the fund.

(Auth. 2-18-618, MCA; Imp. 2-18-618, MCA)

3. It is reasonably necessary to amend these rules because the 1991 Legislature in H.B. 243 repealed 2-15-216, MCA, which created the Sick Leave Fund Advisory Council and transferred its duties to the State Employee Group Benefits Advisory Council.

4. Gale Kuglin, Personnel Policy Coordinator, State Personnel Division, Department of Administration, Room 130 Mitchell Building, Helena, Montana 59620, has been designated to preside over and conduct the hearing.

5. Interested persons may submit their data, views or arguments concerning the proposed amendments to Laurie Ekanger, Administrator, State Personnel Division, Department of Administration, Room 130 Mitchell Building, Helena, Montana 59620 no later than April 10, 1992.

Dal Smilie, Chief Legal Counsel
Rule Reviewer

Bob Marks, Director
Department of Administration

Certified to the Secretary of State March 2, 1992.

**BEFORE THE STATE AUDITOR
AND COMMISSIONER OF SECURITIES
OF THE STATE OF MONTANA**

In the matter of the proposed adoption of rules implementing the second tier of the limited offering exemption	)))	NOTICE OF PUBLIC HEARING ON PROPOSED ADOPTION OF RULES IMPLEMENTING SECTION 30-10-105(8)(b)

TO: All Interested Persons.

1. On April 1, 1992, at 9:00 a.m., a public hearing will be held in Room 270 of the Mitchell Building, 126 North Sanders, Helena, Montana, to consider the proposed adoption of rules implementing the second tier limited offering exemption.

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

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

RULE I PURPOSE AND SCOPE (1) In accordance with 30-10-107(1), MCA, the commissioner of securities declares that these rules are necessary to carry out the provisions of 30-10-101, et seq., MCA.

(2) The purpose of the rules is to set forth procedures for use of the second tier of the limited offering exemption codified at 30-10-105(8)(b), MCA. This exemption is available for promoters making offers to more than 10 but not more than 25 persons.

AUTH: 30-10-107, MCA IMP: 30-10-105, MCA

RULE II AUTHORITY (1) These rules are issued pursuant to the authority vested in the commissioner of securities by 30-10-107(1), MCA.

AUTH: 30-10-107, MCA IMP: 30-10-105, MCA

RULE III SECOND TIER LIMITED OFFERING EXEMPTION (1) Pursuant to 30-10-105(8)(b), MCA, securities offered or sold in accordance with all the conditions set forth in this rule are exempt from the requirements of 30-10-201 through 30-10-207, MCA. This exemption may be cited as the "Second Tier Limited Offering Exemption."

(2) An issuer using the Second Tier Limited Offering Exemption shall file with the commissioner of securities:

(a) an original, manually signed copy of the Second Tier Limited Offering Exemption form;

(b) a filing fee of $50.00;

(c) a consent to service of process which is attached to and made part of the Second Tier Limited Offering Exemption Form;

(d) such other information as the commissioner of securities may require.

(3) Upon the entry of an order denying or revoking the use of this exemption, the commissioner of securities shall promptly notify the issuer of the securities that an order has been entered and of the reasons therefor and that, if requested by the issuer within 15 days after the receipt of the commissioner of securities' order, the matter will be promptly set down for hearing. If no hearing is requested within 15 days and none is ordered by the commissioner of securities, the order will remain in effect until it is modified or vacated by the commissioner of securities. If a hearing is requested or ordered, the commissioner of securities, after notice of and opportunity for hearing, may affirm, modify, or vacate the order.

AUTH: 30-10-107, MCA IMP: 30-10-105, MCA

4. The State Auditor and Commissioner of Securities is proposing these rules because they are necessary to implement the recently enacted second tier limited offering exemption in 30-10-105(8)(6), MCA, and assist issuers and offerors in complying with Title 30, Chapter 10, Part 1, MCA.

5. Interested persons may present their date, views, or arguments, either orally or in writing, at the hearing. Written data, views or arguments may also be submitted to Melissa C. Broch, Staff Attorney, State Auditor's Office, Mitchell Building, P.O. Box 4009, Helena, Montana 59604-4009, no later than April 10, 1992.

6. Melissa C. Broch, Staff Attorney for the Securities Department of the State Auditor's Office, has been designated to preside over and conduct the hearing.

David Barnhill
Deputy Securities Commissioner

Susan C. Witte
Rules Reviewer

Certified to the Secretary of State this 28th day of February, 1992.

BEFORE THE BOARD OF MEDICAL EXAMINERS
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the proposed amendment of rules pertaining to definitions, applications, fees and renewals and the adoption of new rules pertaining to reactivation of in-active or in-active retired licenses, verifications and fees	)))))))	NOTICE OF PUBLIC HEARING ON THE PROPOSED AMENDMENT AND ADOPTION OF RULES PERTAINING TO THE PRACTICE OF MEDICINE

TO: All Interested Persons:

1. On April 1, 1992, at 9:00 a.m., a public hearing will be held in the downstairs conference room of the Department of Commerce building, 1424 - 9th Avenue, Helena, Montana, to consider the proposed amendment and adoption of rules pertaining to the practice of medicine.

2. The proposed amendments will read as follows: (new matter underlined, deleted matter interlined)

"8.28.402 DEFINITIONS (1) through (6) will remain the same.

(7) "Surgery" means any procedure in which human tissue is cut or altered by mechanical or energy forms, including electrical or laser energy or ionizing radiation."

Auth: Sec. 37-3-203, MCA; IMP, Sec. 37-3-102, 37-3-325, 37-3-326, MCA

REASON: This amendment is being proposed to define "surgery" as one of the privileges of licensed physicians under section 37-3-101. The word "surgery" is not defined elsewhere. The amendment will provide guidance in determining what constitutes the unauthorized practice of medicine.

"8.28.409 APPLICATIONS FOR LICENSURE (1) and (2) will remain the same.

(3) An applicant who has not engaged in the active practice of medicine for the two or more years preceding his or her application must, in addition to meeting all other requirements for licensure, pass the special purpose examination given by the federation of state medical boards, or its successor."

Auth: Sec. 37-3-203, MCA; IMP, Sec. 37-3-101, 37-3-202, MCA

REASON: This amendment will establish a testing requirement for physicians out of active practice for two or more years to ensure current medical knowledge. This amendment applies to both new applicants and inactively licensed Montana physicians.

"8.28.420 FEE SCHEDULE (1) The following fees will be charged:

(a) through (c) will remain the same.

(d) Examination fee		
(i) Component I - FLEX		$270.00
(ii) Component II - FLEX		325.00
(iii) Component III - FLEX		520.00
(iv) SPEX		290.00
(e) Renewal fee (active)	~~125.00~~	140.00
(f) Renewal fee (inactive)	~~50.00~~	55.00
(g) will remain the same.		
(h) Penalty fee	~~125.00~~	140.00
(i) Verification fee		10.00"

Auth: Sec. 37-1-134, 37-3-203, MCA; IMP, Sec. 37-1-134, 37-3-203, MCA

"8.28.504 FEES (1) will remain the same.

(2) The annual renewal fee to practice acupuncture will be ~~$20~~ 25. An additional ~~$20~~ 25 will be charged for late renewal."

Auth: Sec. 37-13-201, MCA; IMP, Sec. 37-1-134, 37-3-203, MCA

"8.28.1701 FEES (1) The annual renewal fee for a podiatrist whether actively engaged or not, in the practice of podiatry in the state of Montana shall be ~~$25.00~~ 140.00.

(2) The following fees will be charged:

(a) Endorsement or Rreciprocity	~~$50.00~~	200.00
(b) will remain the same.		
(c) ~~Original application~~	~~35.00~~	
(c) Penalty fee		140.00"

Auth: Sec. 37-6-106, MCA; IMP, Sec. 37-1-134, 37-3-203, MCA

REASON: The 1991 Legislature (under section 37-3-203(6), MCA) created a paralegal position on staff of the Board of Medical Examiners. The above fee amendments are being proposed to cover the cost of this position and to make the fees commensurate with program area costs.

"8.28.1804 LICENSE RENEWAL (1) and (2) will remain the same.

(3) License fees will be treated as delinquent and subject to a later charge or fee on all renewal applications postmarked more than 30 days after expiration of existing license.

(4) will remain the same.

(5) The annual renewal date for a nutritionist license is October 31.

(6) During the year that subsection (5) takes effect, the annual renewal fee will be waived for each licensee who has obtained initial licensure or has renewed within six months of the first October 31 annual renewal."

Auth: Sec. 37-25-201, MCA; IMP, Sec. 37-25-307, MCA

REASON: This amendment is necessary to establish annual renewal dates to promote administrative efficiency.

"8.28.1806 FEES (1) The board has adopted the following fee payment schedule:
(a) will remain the same.
(b) Renewal fee - ~~20.00~~ 25.00
(c) Late fee - ~~10.00~~ 25.00"
Auth: Sec. 37-1-134, 37-25-201, MCA; IMP, Sec. 37-1-134, 37-3-203, MCA

REASON: This amendment is being proposed to make the fees commensurate with program area costs.

3. The proposed new rules will read as follows:

"I TESTING REQUIREMENT (1) A physician seeking to reactivate a license which has been inactive or inactive-retired for the two or more years preceding the request for reactivation must pass the special purpose examination given by the federation of state medical boards."
Auth: Sec. 37-3-203,MCA; IMP, Sec. 37-3-101, 37-3-202, MCA

REASON: This proposed new rule will establish a testing requirement for physicians out of active practice for two or more years, to ensure current medical knowledge. The new rule applies to both new applicants and inactively licensed Montana physicians.

"II ANNUAL RENEWAL DATE (1) The annual renewal date for an acupuncture license is October 31."
Auth: Sec. 37-13-201, MCA; IMP, Sec. 37-13-306

REASON: This amendment is necessary to establish annual renewal dates to promote administrative efficiency.

"III ANNUAL RENEWAL (1) The annual renewal date for a podiatry license is October 31.
(2) During the year that subsection (1) above takes effect, each podiatrist license otherwise expiring on July 31 shall be extended without fee to October 31 of that year."
Auth: Sec. 37-6-106, MCA; IMP, Sec. 37-6-304, MCA

REASON: This amendment is necessary to establish annual renewal dates to promote administrative efficiency.

4. Interested persons may submit their data, views and arguments, either orally or in writing, at the hearing. Written data, views and arguments may also be submitted to the Board of Medical Examiners, Lower Level, Arcade Building, 111 North Jackson, Helena, Montana 59620-0407, no later than April 9, 1992.

5. Patricia I. England, attorney, of Helena, Montana, has been designated to preside over and conduct the hearing.

BOARD OF MEDICAL EXAMINERS
PETER BURLEIGH, M.D., PRESIDENT

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

Anne M. Bartos
ANNIE M. BARTOS, RULE REVIEWER

Certified to the Secretary of State, March 2, 1992.

BEFORE THE BOARD OF SANITARIANS
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the proposed amendment of rules pertaining to employment responsibilities, registration certificates, renewals and fees; adoption of new rules pertaining to continuing education and sanitarian-in-training; and repeal of a rule pertaining to environmental sanitation	NOTICE OF PROPOSED AMENDMENT, ADOPTION AND REPEAL OF RULES PERTAINING TO SANITARIANS

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On April 11, 1992, the Board of Sanitarians proposes to adopt the above-stated rules.

2. The proposed amendments will read as follows: (new matter underlined, deleted matter interlined)

"8.60.406 EMPLOYMENT RESPONSIBILITIES (1) will remain the same.

~~(2) Sanitarians, registered in accordance with paragraph (1) above, may also be involved in an must be knowledgeable about such other environmental health areas as air quality control, water pollution control, occupational health, consumer safety, solid waste disposal, vector and pest control, and accident prevention.~~"

Auth: Sec. 37-40-203, MCA; IMP, Sec. 37-40-101, MCA

REASON: The material being deleted is unnecessary because it repeats statutory language defining the practice of sanitarians.

"8.60.408 MINIMUM STANDARDS FOR REGISTRATION CERTIFICATE (1) through (1)(a)(i) will remain the same.

(2) The applicant must successfully complete ~~an~~ a written examination within ~~30~~ 90 days from the date of application with a minimum score of 70%. Additional time may be allowed at the discretion of the board.

(3) The applicant must be available to participate for an oral interview after submitting the application for registration and after passing the written examination. The oral interview will be scheduled at a time and place set by the board. A passing score is 70%."

Auth: Sec. 37-40-203, MCA; IMP, Sec. 37-40-302, MCA

REASON: This amendment will establish requirements for oral interview.

"8.60.410 REGISTRATION EXAMINATION AND CERTIFICATE (1) through (4) will remain the same.

(5) If an applicant fails the written examination two (2) times consecutively, the applicant will be required to wait for a period of six (6) months before re-examination."

Auth: Sec. 37-40-203, MCA; IMP, Sec. 37-40-302, MCA

REASON: This amendment is being proposed to establish limit on re-examination so applicant will have a period for study between examinations. Limit also assists in testing of actual knowledge rather than familiarization with exam format.

"8.60.411 ANNUAL CERTIFICATE (LICENSE) RENEWAL (1) A certificate (license) renewal will be granted to any registered sanitarian who pays the prescribed renewal fee and complies with the requirements of this section including proof of continuing education.

(2) will remain the same."

Auth: Sec. 37-40-203, MCA; IMP, Sec. 37-40-304, MCA

REASON: The proposed amendment implements mandatory continuing education requirements.

"8.60.413 FEE SCHEDULE (1) through (6) will remain the same.

(7) Sanitarian-in-training application fee 25.00"

Auth: 37-1-134, 37-40-203, MCA; IMP, Sec. 37-1-134, 37-40-302, 37-40-303, 37-40-304, MCA

REASON: The proposed amendment will make the fees commensurate with program area costs to cover application process for the new sanitarian-in-training status.

3. The proposed new rules will read as follows:

"I CONTINUING EDUCATION (1) Continuing education is that education obtained after registration of a sanitarian which is in addition to the educational requirements set by statute for licensure. Continuing education must be related to the practice of the profession of a sanitarian.

(2) A licensee must submit proof with his license renewal form of obtaining 15 clock hours (50 to 60 minutes per hour) or 1.5 continuing education units in every odd numbered year beginning in 1993. Copies of continuing education certificates shall be attached to the renewal form.

(3) It is the responsibility of the licensee to maintain records of his continuing education.

(4) Credit for continuing education shall not be carried over to a subsequent reporting period.

(5) Credit for any continuing education courses, workshops, seminars, educational conferences and other programs is subject to approval by the board.

(6) The following continuing education programs are approved by the board for continuing education credit:

(a) Workshops, seminars and educational conferences sponsored by the national environmental health association,

the Montana environmental health association and the Montana department of health and environmental sciences; and

(b) Accreditation and refresher courses in specialized programs (i.e., UST licensure, asbestos accreditation, FDA standardization, etc.) sponsored by the environmental protection agency or state agencies.

(7) Continuing education may be obtained by correspondence course work through the national environmental health association, centers for disease control, food and drug administration and other organizations, subject to approval by the board.

(8) Any continuing education which has been obtained in another state that meets the continuing education requirements of that state may be approved for credit by the board.

(9) The board may approve a waiver of the continuing education requirement of a registered sanitarian who has retired from active practice of the profession and submits a written request to the board before the renewal date."

Auth: Sec. 37-40-203, MCA; IMP, Sec. 37-40-203, MCA

"II SANITARIAN-IN-TRAINING (1) The board may issue a sanitarian-in-training permit to an applicant who meets the minimum educational requirements for a registered sanitarian under sections 37-40-301 and 37-40-302, MCA, and ARM 8.60.408.

(2) A sanitarian-in-training must work under the direct supervision of a licensed sanitarian. The supervising sanitarian must submit a plan for supervision for approval by the board. The supervising sanitarian must file quarterly reports with the board regarding the status and progress of the sanitarian-in-training.

(3) A sanitarian-in-training permit may be issued to an applicant one time and for a maximum duration of one year only."

Auth: Sec. 37-40-203, MCA; IMP, Sec. 37-40-203, MCA

REASON: The new rules are being proposed to implement continuing education requirements and sanitarian-in-training status as required by Section 4, Chapter 545, Laws of 1991.

4. ARM 8.60.405 is being proposed for repeal. Full text of the rule can be located at pages 8-1647 and 8-1648, Administrative Rules of Montana. This rule is being repealed because the material is covered by section 37-40-101(5), MCA. Auth: Sec. 37-40-203, MCA; IMP, Sec. 37-40-101, MCA.

5. Interested persons may present their data, views or arguments concerning the proposed adoption in writing by delivery to the Board of Sanitarians, Arcade Building, 111 North Jackson, Helena, Montana 59620-0407, no later than April 9, 1992 at 5:00 p.m.

6. If a person who is directly affected by the proposed adoption wishes to present his data, views or arguments orally or in writing at a public hearing, he must make written request for a hearing and submit the request along with any comments he has by delivery to the Board of Sanitarians, Lower Level, Arcade Building, 111 North Jackson, Helena, Montana, no later than April 9, 1992 at 5:00 p.m.

7. If the board receives requests for a public hearing on the proposed adoption from either 10 percent or 25, whichever is less, of those persons who are directly affected by the proposed adoption, 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 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 17 on the 170 licensees in Montana.

BOARD OF SANITARIANS
SAM KALAFAT, CHAIRMAN

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

_____
ANNIE M. BARTOS, RULE REVIEWER

Certified to the Secretary of State, March 2, 1992.

BEFORE THE BOARD OF PUBLIC EDUCATION
OF THE STATE OF MONTANA

In the matter of amendment of the Withholding of funds for non-accredited status	)))	NOTICE OF PROPOSED AMENDMENT OF ARM 10.67.102

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons

1. On May 4, 1992 the Board of Public Education proposes to amend 10.67.102 ARM, Reporting and Accreditation Requirements.

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

10.67.102 REPORTING AND ACCREDITATION REQUIREMENTS (1) through (6) will remain the same.

~~(7) Where the board of public education has determined at a hearing held pursuant to ARM 10.67.103 that a school district has failed to maintain accredited status, the board of public education shall withhold funds pursuant to the following schedule:~~

~~(a) If the district's accreditation has been designated as accreditation with advice status for a second year as defined in ARM 10.55.605(3) or for its deviation from accreditation standards, the board shall withhold up to 20 percent of the funds to which the district is entitled and shall give the district 90 days to cure the violation. If the violation is not cured within the 90 days, the board shall withhold up to 25 percent of the funds to which the district is entitled until such time as the district cures the violation. At such time as the district cures the violation, the board shall release the withheld funds to the district. Where the district has more than one pending violation, the board may release a proportionate amount of any withheld funds for each violation that is cured.~~

~~(b) If the accreditation of a school in the district has been designated as on deficiency status as defined in ARM 10.55.605(4) for the first time, the board shall withhold up to 25 percent of the funds to which the district is entitled and shall give the district 90 days to cure the violation. If the violation has not been cured within the 90 days, the board shall withhold up to 25 percent of the funds which the district is entitled until the district cures the violation. At such time as the district cures the violation, the board shall release the withheld funds to the district. Where the district has more than one pending violation, the board may release a proportionate amount of any withheld funds for each violation that is cured.~~

~~(c) If the accreditation of a school in the district has been designated on deficiency status as defined in ARM 10.55.605(4) for the second consecutive year, the board shall withhold up to 50 percent of the funds to which the district is entitled and shall give the district 90 days to cure the violation. If the violation is not cured within 90 days, the board shall withhold up to 50 percent of the funds to which the district is entitled until the district cures the violation. At such time as the district cures the violation, the board shall release the withheld funds to the district. Where the district has more than one pending violation, the board may release a proportionate amount of any withheld funds for each violation which is cured.~~

~~(d) If the accreditation of a school in the district has been designated on deficiency status as defined in ARM 10.55.605(4) for the third consecutive year, the board shall withhold up to 100 percent of the funds to which the district in entitled until the district cures the violation and shall give the district 90 days to cure the violation. If the violation is not cured within 90 days, the board shall withhold up to 100 percent of the funds to which the district in entitled until the district cures the violation. At such time as the district cures the violation, the board shall release the withheld funds to the district. Where the district has more than one pending violation, the board may release a proportionate amount of any withheld funds for each violation which is cured.~~

~~(e) If the school has a deviation from accreditation standards which is so significant that there exists an imminent peril to public welfare, the board shall withhold up to 100 percent of the funds to which the district is entitled until the district cures the violation. At such time as the district cures the violation, the board shall release any withheld funds to the district.~~

AUTH: Sec. 20-2-114, 20-2-121, 20-9-344, 20-9-346, MCA
IMP: Sec. 20-9-344, 20-9-346, MCA

3. The board proposes this amendment because the board has determined that this subsection of the rule exceeds the authority delegated to the Board under 20-9-344(3)(b), MCA.

4. Interested parties may submit their data, views or arguments in writing to Bill Thomas, Chairperson of the Board of Public Education, 33 South Last Chance Gulch, Helena, MT 59620, no later than April 9, 1992.

5. If a person who is directly affected by the proposed amendments wishes to express their data, views or arguments orally or in writing at a public hearing, they must make written request for a hearing and submit this request along with any written comments they have to Bill Thomas, Chairperson of the Board of Public Education, 33 S. Last Chance Gulch, Helena, Montana 59620 no later than April 9, 1992.

6. If the Board 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 amendments; 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 54 as there are 538 school districts presently in Montana.

Bill Thomas

Bill Thomas, Chairperson
Board of Public Education

BY: Wayne B Buchanan

Certified to the Secretary of State, 3/2/92

BEFORE THE DEPARTMENT OF FISH, WILDLIFE AND PARKS
OF THE STATE OF MONTANA

In the Matter of the Proposed Repeal of Rules 12.6.1502 through 12.6.1504 and the Amendment of Rule 12.6.1506 and the Adoption of New Rules I through XVIII pertaining to Game Farms	NOTICE OF PUBLIC HEARING ON PROPOSED REPEAL, AMENDMENT AND ADOPTION OF NEW RULES PERTAINING TO GAME FARMS

TO: All Interested Persons

1. On the following dates, times and locations, the department will hold public hearings to consider the repeal, amendment and adoption of the above-captioned rules addressing game farm requirements:

April 2, 1992, 7:00 p.m., at the Montana Department of Fish, Wildlife and Parks' Regional Office in Kalispell, Montana.

April 3, 1992, 7:00 p.m., at the Montana Department of Fish, Wildlife and Parks' Regional Office in Missoula, Montana.

April 6, 1992, 7:00 p.m., at the Montana Department of Fish, Wildlife and Parks' Regional Office in Billings, Montana.

April 7, 1992, 7:00 p.m., at the Cottonwood Inn in Glasgow, Montana.

April 9, 1992, 7:00 p.m., at the Montana Department of Fish, Wildlife and Parks' Regional Office in Bozeman, Montana.

April 10, 1992, 7:00 p.m., at the Montana Department of Fish, Wildlife and Parks' Regional Office in Great Falls, Montana.

2. The rules proposed to be repealed are 12.6.1502, 12.6.1503, and 12.6.1504 on page 12-343 and 12-344 of the Administrative Rules of Montana.

3. The proposed amendment and new rules provide as follows:

RULE I BILL OF SALE/TRANSPORTATION (1) The four copies of the bill of sale/transportation must be dispensed as follows:

(a) original to the department;
(b) second copy to department of livestock;
(c) third copy to purchaser or transferee; and
(d) fourth copy retained by the game farm operator.

(2) The copies of the bill of sale/transportation required by the department (Helena office) and the department of livestock must be submitted within ten days of the sale and/or movement.

(3) The bill of sale/transportation forms must be used in numeric order.

(4) No bill of sale/transportation forms may be discarded. The first three copies of voided bill of sale/transportation must be sent to the department, Helena

office, within ten days.

(5) The licensee must account for all bill of sale/transportation receipts.

(6) Transactions must be recorded in the game farm record book within twenty-four hours.

AUTH: Sec. 87-4-422, MCA IMP: Secs. 87-4-417 and 87-4-422, MCA

RULE II FENCING REQUIREMENTS (1) Fencing of all game farms must meet the following requirements within one year of the effective date of these regulations:

(a) Conventional fences must be, at a minimum, eight feet above ground level. The bottom six feet must be mesh (maximum size 10" x 7"). The remaining two feet may be smooth, barbed, or woven wire with strands spaced not more than six inches apart. High tensile fences must be at least eight feet above ground level.

(b) Conventional fence must be at least 12 1/2 gauge woven wire, 14 1/2 gauge high-tensile woven wire, chain link, non-climbable woven fence, or other department approved fence.

(i) Any exterior boundary or quarantine fencing material must be secured to the inside of the fence posts.

(ii) If full eight foot wire is not used, wire must be overlapped one row and securely fastened at every other vertical row. If additional height is required to attain eight feet, single strand wire of at least 12 1/2 gauge may be used. Single strands may be no more than six inches apart.

(c) All gates on animal holding facilities must be self-closing and locking or have double locking mechanisms. Gates may be installed only in locations which have been approved for gate installation by the department. Double gates may be required at game farm entry points that are frequently traveled, i.e., logging and construction traffic.

(d) Posts must be:

(i) wood, six inch minimum diameter; or

(ii) studded steel posts;

(iii) spaced no more than twenty feet apart;

(iv) at least eight feet above ground level;

(v) corners braced with wood;

(vi) corner posts must be a minimum, eight inches in diameter.

(e) Existing high-tensile smooth wire fences must be modified with stays spaced at minimum intervals of eight feet.

(2) All facilities holding game farm carnivores must meet the following requirements within one year of the effective date of these rules:

(a) Fence must be a minimum of eight feet above ground level and extend a minimum of three feet below ground.

(b) Fence must be constructed of solid material or at least nine gauge woven wire. Solid fence must be of material that cannot be destroyed by the species contained therein.

(c) Cage tops must be solid or constructed of at least nine gauge woven wire.

(d) Fences must have a post or stay every ten feet.

(e) Gates must have double locks or self-closing mechanisms.

(f) Enclosures which are too large to enclose cage tops must meet the following requirements:

(i) a three-foot, 45 degree angle, Y framework at the top of each post;

(ii) at least nine gauge woven wire attached to both forks of the Y framework;

(g) any trees or obstacles which would allow carnivores to exit or enter the enclosure must be removed.

(3) Game farms must not share a fence in common with any other game farm. Fences must be a minimum of five feet apart. Existing game farms will have one year from effective date of these rules to comply with this requirement.

(4) Fence right-of-way must be cleared of all dead timber of a height over eight feet within eight feet of both sides of the fence.

(5) The fence must be maintained in a game-proof condition at all times to prevent animals from escaping or entering the enclosure. If game farm animals do pass through, under, or over the fence because of any topographic feature or other conditions, the licensee must supplement the fence to prevent continued passage.

AUTH: Sec. 87-4-422, MCA IMP: Sec. 87-4-409, MCA

RULE III GAME FARM REPORTING (1) Reports must be kept on the forms provided by the department and must be filled out completely and accurately.

(2) No pages in the game farm record book may be discarded. Voided pages must be sent to the department (Helena office).

(3) Game farm reports must be submitted four times a year, no later than five days after the following dates:

April 1, July 1, October 1

One exception is: final annual report must be submitted by January 31, and not five days later.

(4) Renewal of a game farm license is contingent upon accurate completion and submittal of required reports.

(5) Game farm record books and reports must be kept on the premises of the licensed game farm.

(6) Purchases, sales, escapes, recaptures, deaths and births must be reported in the game farm record book provided by the department.

AUTH: Sec. 87-4-422, MCA IMP: Sec. 87-4-417 and 87-4-422, MCA

12.6.1506 CLOVEN-HOOFED ANIMALS AS GAME FARM ANIMALS (1) All animals of the order Artiodactyla, except the families ~~suidae,~~ camelidae~~,~~ and hippopotamidae, are game farm animals under the definition described in section 87-4-406(4), MCA, provided that the following animals in the ~~family~~

families suidae and bovidae are not considered game farm animals under section 87-4-406(4), MCA: domestic pigs, domestic cows, domestic sheep, and domestic goats which are not naturally occurring in the wild, and bison.

AUTH: Sec. 87-4-422, MCA IMP: Sec. 87-4-416, MCA

RULE IV DEFINITIONS (1) "Bill of Sale/Transportation" is a form supplied by the department to document sale and movement of game farm animals.

(2) "Bred" means reproduction of game farm animals.

(3) "Conventional fence" is the woven or welded wire fence used to enclose game farm animals.

(4) "Department" is the department of fish, wildlife, and parks. 87-4-406 (1), MCA

(5) "Disease, communicable" means a disease that can spread from one animal to another.

(6) "Disease, dangerous" means a disease that can cause catastrophic animal loss or risk to human health.

(7) "Fence right of way" means a distance equal to the height of the conventional fence, on both sides of the fence.

(8) "Game farm" means the enclosed land area upon which game farm animals may be kept. 87-4-406 (3), MCA

(9) "Handling facility" means an enclosure which includes a squeeze chute for inspecting and handling individual game farm animals.

(10) "High tensile fence" means a fence eight feet above ground composed of wire capable of maximum stretching.

(11) "Holding facility" means a fenced enclosure (used in conjunction with the handling facility) to hold game farm animals for individual inspection, marking or treatment.

(12) "Immediate" means without delay.

(13) "Mingling" means mixing game farm animals together with other animals.

(14) "Quarantine area" means an enclosure within the game farm (separate from the holding and handling facilities) used to house newly acquired or diseased game farm animals.

(15) "Prohibited game farm animals" means animal species and hybrids, thereof which, because of behavioral traits or biological considerations, pose a substantial threat to native wildlife populations.

(16) "Ear tag request form" means a form used to request ear tags for newly acquired game farm animals.

AUTH: Sec. 87-4-422, MCA IMP: Sec. 87-4-422, MCA

RULE V GAME FARM DESCRIPTION (1) A game farm operator must provide a scaled drawing or map of the exterior boundary, holding and handling facilities, quarantine area, and location of all gates, at the time of application for a game farm license.

AUTH: Sec. 87-4-422, MCA IMP: Sec. 87-4-409, MCA

RULE VI SIZE LIMITATIONS (1) A single game farm pen, pasture or enclosure may not exceed 640 acres. Game farms licensed prior to effective date of these rules are exempt from this limitation.

(2) The maximum acreage enclosed by a single game farm may not exceed 1,280 acres. Game farms licensed prior to the effective date of these rules are exempt from this limitation.

AUTH: Sec. 87-4-422, MCA IMP: Sec. 87-4-409, MCA

RULE VII HOLDING FACILITY (1) All game farm operators must be able to handle, mark and individually identify all game farm animals on the premises. A permanent or portable handling facility must be on the game farm at all times.

AUTH: Sec. 87-4-422, MCA IMP: Sec. 87-4-409, MCA

RULE VIII QUARANTINE AREA (1) All game farms must have quarantine facilities designed to prevent mingling of animals in the quarantine facility with other game farm animals and with natural wildlife.

(2) The quarantine area must be within the exterior boundary of the game farm, situated downhill, downstream and downwind of the main facility.

(3) The quarantine area must be enclosed by a double or solid fence. If double fencing is used, there must be a minimum of five feet between each fence. Double fencing must be the same standard and quality as the exterior boundary fence.

AUTH: Sec. 87-4-422, MCA IMP: Sec. 87-4-409, MCA

RULE IX LICENSING LIMITATION (1) The department may deny a license or limit the species or area to be enclosed in order to protect the state's wildlife resources from detrimental impacts. Impacts that will be considered for limitation or denial, include but are not limited to:

(a) habitat competition, damage, or destruction;

(b) disruption of migration, breeding, or rearing areas and survival of young;

(c) predation;

(d) danger to humans or domestic livestock property; or

(e) disease.

(2) If the applicant disagrees with the department's determination, he/she may appeal the decision to the Fish, Wildlife and Parks Commission, if notice is given within ten days of the denial.

(3) Game farm animals must be identified and approved by the department before placement on a game farm.

(4) New construction or additions to an existing game farm facility must be approved by the department before it may be used for any game farm activity.

AUTH: Sec. 87-4-422, MCA IMP: Sec. 87-4-409, MCA

RULE X NEW SPECIES (1) To add a new game farm animal species to an existing game farm, the licensee must submit a new application listing the species desired. The new species may not be acquired or possessed until the department approves the new application, and inspects and approves the facility for occupancy by the new species.

(2) The game farm licensee must obtain, purchase, board, or lease game farm animals from properly licensed or legal sources.

AUTH: Sec. 87-4-422, MCA IMP: Sec. 87-4-409, MCA

RULE XI GAME FARM ANIMAL IDENTIFICATION: CLOVEN HOOFED UNGULATES (1) Game farm animals owned or transferred

to any game farm within the state must be individually identified by the method prescribed by the department and the department of livestock.

(2) Only metal tags may be used unless another method of identification is approved by the department. Tags must be placed on the lower edge of the left ear as close to the head as possible.

(3) Tags or identification numbers must be requested from the department, enforcement division, Helena 444-2452, during business hours. Licensee must state the number of animals to be marked. A department representative will deliver the tags/identification.

(4) Identification assigned to each game farm animal may not be transferred to any other animal or game farm operation.

(5) Any tag/identification that has become detached from the animal must be returned to the department immediately.

(6) All newborn game farm animals must be tagged:

(a) within 15 days of birth or;

(b) prior to the removal of the animal from the game farm facility.

(7) Game farm animals boarded, leased, or held at a licensed game farm for more than ten days must be tagged in accordance with these rules, if the owner's licensing state does not require individual identification.

(8) If a tag is lost, the licensee must notify the department within 72 hours of when the loss is discovered. The animal must be re-tagged with approved identification within ten days of notifying the department of loss.

(9) Carnivores must be identified with the proper tattooing method as required by 87-1-231, MCA, ARM 12.6.1901 et seq. Tattoo numbers must be requested from the department, enforcement division, Helena, 444-2452 during business hours.

AUTH: Sec. 87-4-422, MCA IMP: Sec. 87-4-414, MCA

RULE XII TRANSPORTATION (1) Game farm licensee must verbally notify the department no less than 72 hours prior to import, transport, transfer or disposal of any game farm animal.

(2) Game farm licensee must send the bill of sale/transportation to the department within 10 days of any of the above transactions. Copy of the bill of sale/transportation must accompany the import, transport, transfer or disposal of game farm animals.

(3) Game farm animals may be transported from out of state through Montana if:

(a) animals remain in Montana no longer than 72 hours;

(b) animals are not sold, bartered, traded, or otherwise transferred while in the state. (Transfer does not include moving animals to another transport vehicle);

(c) an official health certificate is obtained from the state of origin to show destination, origin, and proof of ownership of any game farm animals being transported;

(d) a game farm licensee requests an extension of time from the department (phone: 444-2452, business hours) if

animals are to remain in the state for more than 72 hours (An extension may be granted for good cause shown);

(e) in emergencies, game farm animals in transit are unloaded and temporarily held with prior approval and in compliance with quarantine rules promulgated by the department and the department of livestock.

(4) All game farm animals transported within the state must be marked with identification approved by the department of livestock and the department, and accompanied by a copy of the bill of sale/transportation.

(5) Game farm animal gametes (ova & sperm) must be handled, purchased, sold or transferred under the same rules and laws as game farm animals.

AUTH: Sec. 87-4-422, MCA IMP: Sec. 87-4-415, MCA

RULE XIII IMPORTATION (1) A game farm licensee may import animals into Montana only after obtaining the following:

(a) an importation permit from animal health division, department of livestock [406-444-2976];

(b) a game farm license which is valid for the species to be imported;

(c) an examination by an accredited veterinarian accompanied by an approved health certificate certifying that the animals are disease-free. Minimum specific disease test results and health statements that must be included on health certificates are:

(i) game farm animals - tested negative for tuberculosis, brucellosis and other diseases as prescribed by the department of livestock and

(ii) the statement: "To the best of my knowledge, animals listed herein are not infected with paratuberculosis (Johnes Disease) and have not been exposed to animals infected with paratuberculosis. All animals and facilities occupied by animals during the preceding 24 months are free from disease."

(2) Additional disease testing may be required by written notification from the department or the state veterinarian prior to importation if there is reason to believe other diseases, parasites or other health risks are present (i.e. a recent outbreak of a disease not listed in this section).

(3) All elk (Cervus elaphus) must be tested prior to importation for evidence of red deer hybridization. Any animal testing positive for red deer hybridization may not be brought into the state. Any health certificate required by Title 81, chapter 2, MCA, to accompany imported elk found to be negative for red deer hybridization must include a certification by an accredited veterinarian that every elk in the shipment has tested negative for red deer hybridization.

(4) Imported animals must be isolated from other animals on the licensee's premises for at least 30 consecutive days after entry into the state. Animals obtained from free-ranging wild stock by state or federal agencies are exempt from this isolation requirement.

(5) The department finds that the following species, hybrids, or viable gametes (ova and semen), are detrimental to existing wildlife and their habitats through genetic dilution,

parasites, disease, habitat degradation or competition. Possession of the following prohibited species, hybrids or viable gametes is prohibited except as authorized by the department in writing:

(i) In the family Bovidae, all members of the following genera and hybrids thereof:

Subfamily Caprinae
Rudicapra (chamois)
Hemitragus (tahr)
Capra (goats, ibexes--except domestic goat, Capra hircus)
Ammotragus (Barbary sheep or Aoudad)
Ovis (only the mouflon species, Ovis musimon)

Subfamily Hippotraginae
Oryx (oryx and gemsbok)
Addax (addax)

Subfamily Reduncinae
Redunca (reedbucks)

Subfamily Alcelaphnae
Connochaetes (wildebeests)
Alcelaphus (hartebeests)
Damaliscus (sassabies: blesbok, bontebok, topi)

(ii) In the family Cervidae, all of the following species and hybrids thereof:

White-tailed deer (Odocoileus virginianus)
Moose (Alces alces)
All red deer (Cervus elaphus elaphus), and all hybrids with North American elk (C. elaphus canadensis, roosevelti, manitobensis, nannodes and nelsonil.
Axis deer (Axis axis)
Rusa deer (Cervus timorensis)
Sambar deer (Cervus unicolor
Sika deer (Cervus nippon)
Caribou (reindeer) - (Rangifer sp.)

(iii) All wild species in the family Suidae (Russian boar, European boar) and hybrids thereof

(iv) In the family Tayassuidae, the collared peccary (javelina) (Tayassu tajacu) and hybrids thereof.

(6) These prohibited species may not be bred, released, imported, transported, sold, bartered or traded within the state except as authorized in writing by the department. The prohibited animals may be transported out of the state in compliance with the game farm rules of the receiving state and federal laws.

(7) Persons with proof of possession prior to effective date of these rules may possess prohibited species for the life of the animals.

(8) Removal of any prohibited species named in part (5) is contingent on compelling scientific information indicating

that risks posed by these species to native wildlife populations can be eliminated or managed effectively through application of diagnostic or management technologies.

(9) Any prohibited animal that is released or escapes from a game farm may be captured or destroyed by the owner or by the department at the owner's expense.

(10) Any diseased animal determined by the department or state veterinarian to pose a significant threat to the state's wildlife resources, may be destroyed or held in quarantine at the owner's expense until disposition is determined. Possession or transfer of such animals is prohibited if contrary to the department or department of livestock's determination.

AUTH: Sec. 87-4-422, MCA IMP: Secs. 87-4-415 and 87-4-424, MCA

RULE XIV DUTY TO REPORT CONTAGIOUS DISEASES (1) Any person, including a game farm licensee who has reason to believe that game farm animals have or have been exposed to a dangerous or communicable disease, must give notice to the department of livestock immediately.

(2) The department of livestock will determine when destruction of animals, a quarantine or disinfection is required at any commercial game farm. If the department of livestock determines that destruction, quarantine or disinfection is required, a written order will be issued to the licensee describing the procedure to be followed. Required disinfection of holding facilities must be completed at the owner's expense. If the owner disagrees with the department's determination, he/she has the right to appeal the decision to the board of livestock, provided notice of such appeal is given within 48 hours of receipt of the order.

AUTH: Sec. 87-4-422, MCA IMP: Sec. 87-2-107, MCA

RULES XV ESCAPED GAME FARM ANIMALS (1) The department or any peace officer may seize, capture, or destroy game farm animals that have escaped the possessor's control, and which are determined to be detrimental to native wildlife, habitat or other wildlife resources by threat of predation, spread of disease or parasites, habitat competition, interbreeding with native wildlife, or other significant damage.

(2) Escaped game farm animals will be considered a public nuisance. The licensee is responsible for costs incurred by the department in recovering, maintaining, or disposing of such animals, as well as any damage to the state's wildlife resources.

(3) Escapes must be reported immediately to the department.

(4) The licensee must recapture or destroy the animals within ten days.

(5) If the licensee is unable to recapture the animals within ten days, the department may recapture or destroy the animal at the owner's expense.

(6) The licensee must notify the department immediately of the recapture or death of an escaped animal.

(7) The department may inspect a recaptured animal before it is returned to the game farm.

AUTH: Sec. 87-4-422, MCA IMP: Sec. 87-4-419 MCA

RULE XVI GAME FARM SHOOTING LICENSE (1) Game farm shooting tags are valid for thirty days from date of issue.

(2) All unused game farm shooting tags must be returned to the department.

(3) Ear tags from dead game farm animals must be returned to the department within ten days after death.

(4) Licensees who possess a game farm shooting license may not release animals outside the boundary of the licensed game farm.

AUTH: Sec. 87-4-422, MCA IMP: Sec. 87-4-421, MCA

RULE XVII WELFARE OF ANIMALS (1) A game farm operator may not remove a game farm animal from the existing licensed facility except as provided by statute and rules.

(2) A game farm operator may not display or house any game farm animals in such a manner as to endanger the health and safety of the public or the game farm animals.

(3) Transfer or transportation of any game farm animals from a game farm to any other location for display, filming or photographing must be approved by the department 72 hours before the transaction.

AUTH: Sec. 87-4-422, MCA IMP: Sec. 87-4-422, MCA

RULE XVIII CONFISCATION PROCEDURES (1) The department may confiscate or seize any unlawfully possessed game farm animals.

(2) The costs of any confiscations or seizures of game farm animals will be charged to the owner of the animals.

(3) Any game farm licensee whose license is revoked must lawfully dispose of game farm animals in his/her possession within a period designated by the department. Failure to comply with this time limit will result in confiscation of the game farm animals by the department and/or citations for criminal conduct.

AUTH: Sec. 87-4-422, MCA IMP: Sec. 87-4-422, MCA

4. Revision of existing game farm rules has been conducted according to provisions of HB 556, passed during the 1991 legislative session. Revised rules have been drafted through a coordinated effort by staff of the departments of fish, wildlife and parks and livestock, with input from the game farm industry. Proposed new rules, repeal of three existing rules and amendment of an existing rule are designed to accomplish the following:

- reduce the potential for escape of game farm animals from game farm facilities
- minimize the potential for "genetic pollution" of native wildlife populations as a result of mingling with closely related exotic species or hybrids
- reduce the potential for introduction of diseases or parasites to game farms in Montana, and transmission of

diseases or parasites from game farm animals to wildlife populations
- reduce the potential for habitat degradation and/or habitat competition resulting from establishment of feral populations of game farm animals
- reduce the potential for illegal activities detrimental to public wildlife resources, including illegal acquisition, transport, sale or release of game farm animals and wildlife.

5. Interested parties may submit their data, views or arguments concerning the proposed rules either orally or in writing to Heidi Youmans, Wildlife Division, Department of Fish, Wildlife and Parks, 1420 East Sixth, Helena, Montana, 59620, no later than April 10, 1992.

6. A department official will preside over and conduct the hearings.

K.L. Cool, Director
Department of Fish, Wildlife and Parks

Rule Reviewer

Certified to the Secretary of State March 2, 1992.

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

In the matter of the amendment of rules 16.24.101-111, concerning eligibility for the children's special health services program, payment for services, covered conditions, record-keeping, application procedure, advisory committee, and fair hearings	NOTICE OF PUBLIC HEARING FOR PROPOSED AMENDMENT OF RULES (Handicapped Children)

To: All Interested Persons

1. On April 3, 1992 at 9:30 a.m., the department will hold a public hearing in Room C209, side 2, of the Cogswell Building, 1400 Broadway, Helena, Montana, to consider the amendment of the above-captioned rules.

2. The proposed amendments would change the name of the Handicapped Children's Services Program to Children's Special Health Services Program; clarify the purpose of the program's rules; add eligibility requirements; add reimbursable services; disallow coverage for services provided out-of-state, with exceptions; and change some rates for payment of services.

3. The rules, as proposed to be amended, appear as follows (new material is underlined; material to be deleted is interlined):

16.24.101 PURPOSE OF RULES (1) The purpose of the ~~handicapped~~ children's special health services program rules is to ~~develop, extend, and improve services for locating, evaluating, and treating children who are physically handicapped or are suffering from physical conditions which might lead to handicapping~~ provide health care services for children with special health care needs.
AUTH: 50-1-202, MCA; IMP: 50-1-202, MCA

16.24.102 GENERAL REQUIREMENTS FOR ~~HCS~~ CSHS ASSISTANCE (1) In order to receive ~~HCS~~ CSHS financial assistance for a particular service, ~~an HCS~~ a CSHS applicant must meet the eligibility requirements of ARM 16.24.104, the service in question must be one of the covered services cited in ARM 16.24.105, and the service provider must meet the standards of ARM 16.24.106.
AUTH: 50-1-202, MCA; IMP: 50-1-202, MCA

16.24.103 DEFINITIONS Unless otherwise indicated, the following definitions apply throughout this subchapter:

(1) "Advisory committee" means a committee of representative medical providers and consumers appointed by the department director to advise the department on ~~HCS~~ CSHS program

operation.

(2) "Applicant" means a person who has applied for benefits from ~~HCS~~ CSHS.

(3) "Benefits" means payment by ~~HCS~~ CSHS for authorized medical, corrective, or surgical treatment, including evaluation and transport.

(4) Remains the same.

(5) "Client" means ~~an HCS~~ CSHS applicant who has been approved by ~~HCS~~ CSHS for ~~HCS~~ CSHS benefits.

(6) Remains the same.

(7) "CSHS" means the children's special health services program of the department, authorized by 50-1-202(13), MCA.

~~(7)~~(8) "Evaluation" means the medical examination and testing needed to determine the cause and possible treatment for a suspected or known handicapping condition.

~~(8)~~(9) "Family" means a group of related or non-related individuals who are living together as a single economic unit.

~~(9) "HCS" means the handicapped children's services program of the department, authorized by section 50-1-202, MCA.~~

(10)-(12) Remain the same.

(13) "Initial diagnosis and evaluation" means taking a medical history and performing a physical examination, medical procedures, laboratory tests, hearing tests, or other procedures deemed necessary for the diagnosis of a condition for the purpose of establishing ~~HCS~~ CSHS eligibility.

(14) "Medical director" means a physician licensed by the state of Montana who serves as an advisor to ~~HCS~~ CSHS.

(15) Remains the same.

(16) "Program" means the department's ~~handicapped~~ children's special health services program for handicapped children, ~~of the department~~ authorized by 50-1-202(13), MCA.

(17)-(20) Remain the same.

AUTH: 50-1-202, MCA; IMP: 50-1-202, MCA

16.24.104 APPLICANT ELIGIBILITY (1) With the exception noted in (7) below, an applicant, to be eligible for ~~HCS~~ CSHS benefits, must be:

(a) either a high-risk pregnant woman ~~or~~, a child with either a handicapping physical ~~deformity~~ condition that can be substantially improved or corrected with surgery or a medical condition/disease which can be either cured, improved, or definitely stabilized with medical treatment, or a child suspected of having a handicapping physical condition or a medical condition/disease; a child must also either:

(i) be under 18 years of age; or

(ii) if older, have a handicap for which a delay in treatment is necessary (e.g. cleft palate repair), prior treatment for which began before s/he was 18 and was paid for by ~~HCS~~ CSHS;

(b) a resident of the state of Montana;

(c) a member of a family whose income ~~during the 90-day period (or, if self-employed, during the year) prior to the date of application,~~ less any out-of-pocket expenses for health insurance ~~during that period~~, is at or less than ~~185%~~ 200% of

the federal poverty income guidelines; and

(d) either:

(i) ineligible for medicaid or SSI benefits~~,~~; or~~, if~~

(ii) eligible for medicaid or SSI, but in need of treatment that is not covered by medicaid or SSI but is covered by ~~HCS,~~ CSHS; and

(e) able to prove ineligibility for medicaid by providing the department with a written medicaid denial or written determination of a medicaid incurment, if the applicant has an income meeting the eligibility requirements for medicaid, including the medically needy program, and is requesting CSHS services also covered by medicaid.

(2) Eligibility for program benefits will be determined on an annual basis after a person desiring ~~HCS~~ CSHS assistance submits an application to the department.

(3) Remains the same.

(4) A new application for a subsequent year must be submitted to the department in order for the department to determine if eligibility is to continue and must be completed and approved before any ~~HCS~~ CSHS benefits in a subsequent year may be provided.

(5) Remains the same.

(6) (a)-(b) Remain the same.

(c) Income for purposes of program eligibility will be calculated by examining all available documentation of all income of the types listed in (a) above that was received in the three months prior to the date of application, and using that evidence of current income to project what the subsequent annual income will be.

(7) The above financial eligibility limits do not apply to a child who has or is suspected of having a condition covered by ~~HCS~~ CSHS and wishes to attend a clinic that is specifically for that condition and that is funded entirely by ~~HCS~~ CSHS.

(8) Effective ~~September 13, 1991~~ May 1, 1992, the department hereby adopts and incorporates by reference the ~~1991~~ 1992 federal poverty income guidelines published by the U.S. department of health and human services in the February ~~20, 1991~~ 14, 1992, federal register [~~56 FR 6859~~ 57 FR 5455]. Copies of the federal poverty income guidelines may be obtained from the Family/Maternal and Child Health Services Bureau, ~~HCS~~ CSHS Program, Department of Health and Environmental Sciences, Cogswell Building, Capitol Station, Helena, Montana 59620 [phone: (406)444-3617].

AUTH: 50-1-202, MCA; IMP: 50-1-202, MCA

16.24.105 ~~HCS~~ CSHS SERVICES (1) To the extent ~~HCS~~ CSHS funding allows and up to a maximum of $12,000 per state fiscal year (unless the ~~HCS~~ CSHS medical director grants a waiver), ~~HCS~~ CSHS will pay for the cost of providing the following to an eligible client with a diagnosed condition, subject to the exclusions set out in ~~(2)~~(3) below and the payment limits set out in ARM 16.24.107:

(a)-(b) remain the same.

(c) transport to a hospital of a child six weeks or more of age for emergency medical treatment of a life-threatening condition otherwise covered by ~~HCS~~ CSHS;

(d) Remains the same.

(e) an initial evaluation and diagnosis to determine if a condition is ~~HCS~~ CSHS-eligible for additional benefits ~~and the applicant is financially eligible~~;

(f)-(g) remains the same.

(h) infant formula or low phenylalanine dietary supplement food that is prescribed by a physician and is not covered by the special supplemental food program for women, infants and children (WIC) or medicaid;~~.~~

(i) syringes for children with diabetes or infantile seizures requiring injection of medications within a non-medical environment;

(j) reagent strips and dipsticks for testing of diabetics;

(k) tubing for children with gastrostomies;

(l) rental for up to one year of breast pumps for breastfeeding mothers of infants with unrepaired cleft lips or other covered craniofacial anomalies who are unable to suck properly.

(2) To the extent CSHS funding allows and up to a maximum of $12,000 per state fiscal year (unless the CSHS medical director grants a waiver), CSHS will pay for the cost of an initial evaluation and diagnosis of an eligible client in whom a CSHS-covered condition is suspected but not ultimately confirmed, subject to the payment limits set out in ARM 16.24.107.

~~(2)~~(3) Excluded from ~~HCS~~ CSHS benefits are:

(a)-(b) Remain the same.

(c) all appliances, with the exception of orthopedic braces and those appliances required for the correction of an orthodontic condition that affects an otherwise ~~HCS~~ CSHS-covered condition, such as that caused by the presence of a cleft palate or another syndrome-caused craniofacial anomaly;

(d) diseases associated with prematurity, including bronco pulmonary dysplasia;

(e)-(f) remain the same.

(g) speech, occupational, physical, or respiratory therapy for a condition that is not ~~HCS~~ CSHS-eligible~~.~~; and

(h) services provided outside of Montana, unless the required service is not available in-state or, due to the vast distances within Montana, the requirement to obtain in-state services places an undue hardship on the family in question, particularly one that lives on a border with another state or a Canadian province. Exceptions to this rule will be made by the CSHS medical director after reviewing the issue in conjunction with an appropriate member of the CSHS advisory committee.

~~(3)~~(4) The department hereby adopts and incorporates by reference the World Health Organization's International Classification of Diseases, Clinical Modification, 9th Revision (ICD-9-CM), which systematically classifies and assigns code to diseases and medical conditions for use by medical profes-

sionals. Copies of ICD-9-CM may be obtained from ICD-9-CM, P.O. Box 971, Ann Arbor, Michigan 48106. A volume is also available for examination at the Family/Maternal and Child Health Bureau, ~~HCS~~ CSHS Program, Department of Health and Environmental Sciences, Cogswell Building, Capitol Station, Helena, Montana 59620 [phone: 444-~~4740~~ 3622].
AUTH: 50-1-202, MCA; IMP: 50-1-202, MCA

16.24.106 ~~HCS CSHS~~ PROVIDER REQUIREMENTS (1) In order to receive ~~HCS~~ CSHS payment for his/her services to ~~an HCS~~ a CSHS client, a provider must meet whichever of the following requirements are applicable to him/her:

(a)-(e) Remains the same.

(f) A provider must immediately supply ~~HCS~~ CSHS with reports requested by the latter in order to permit effective evaluation of payment claims.

(2) A provider, in order to be eligible to receive ~~HCS~~ CSHS payment for his/her services to ~~an HCS~~ a CSHS client, must refrain from seeking additional payment from the client or those financially responsible for the client for services for which ~~HCS~~ CSHS provides reimbursement.
AUTH: 50-1-202, MCA; IMP: 50-1-202, MCA

16.24.107 PAYMENT LIMITS AND REQUIREMENTS (1) ~~DHES~~ The department will be responsible for paying for ~~HCS~~ CSHS-eligible services for ~~an HCS~~ a CSHS client only:

(a) if ~~HCS~~ CSHS has sufficient federal ~~HCS~~ CSHS funds left to pay for the services;

(b) up to a maximum of $12,000 per year, unless the ~~HCS~~ CSHS medical director approves a waiver;

(c) up to a maximum of $600 each for speech, physical, occupational, or respiratory therapy, unless the ~~HCS~~ CSHS medical director approves a waiver;

(d) remains the same.

(e) after all third parties, if any, have paid the provider, in which case ~~HCS~~ CSHS pays any balance remaining, within ~~HCS~~ CSHS limits for the services in question.

(2) ~~HCS~~ CSHS will not reimburse clients for medical expenses; rather, it will pay directly to the provider for services rendered.

(3) ~~HCS~~ CSHS will pay eligible providers only:

(a) after all third-party carriers have paid or denied payment on ~~HCS~~ CSHS-authorized care; and

(b) after ~~HCS~~ CSHS receives documentation that the service has already been provided, including a completed authorization form obtained from the department.

(4) A provider, family, or individual who erroneously or improperly is paid by ~~HCS~~ CSHS must promptly refund that payment to ~~HCS~~ CSHS.

(5) If a provider provides ~~HCS~~ CSHS-eligible services to ~~an HCS~~ a CSHS client and accepts the ~~HCS~~ CSHS-approved level of payment for those services from ~~HCS~~ CSHS and/or an insurance company, the provider must refrain from seeking additional payment from the ~~HCS~~ CSHS client or his/her family.

(6) ~~HCS~~ CSHS will pay up to the following limits for orthodontics:

(a)	initial exam	~~$20~~	25
(b)	records (per phase)	~~160~~	165
(c)	phase I orthodontics (expansion	~~450~~	525
	monthly phase I	~~55~~	60
(d)	phase II partial banding	~~450~~	570
	monthly phase II	~~55~~	65
(e)	phase III full banding	~~750~~	900
	monthly phase III	~~55~~	85
(f)	retainer repair or replacement	~~115~~	120
(g)	maintenance visit	35	(maximum ~~$105~~ 115/yr.)
(h)	specialty treatment by report,	~~90~~	85%

(7) For his/her services to ~~an HCC~~ a CSHS client, with the exception of multiple surgeries, a ~~physician will be paid the amount calculated by using the CPT 4 codes published by the American Medical Association (Physician's Current Procedures Terminology, AMA, 4th edition) together with the relative value scales (RVS) for those codes as stated in the Montana medical association's RVS (or, if Montana has no code for the particular procedure, the RVS used by Colorado, California, or any other state that has such a code will be used to determine a value comparable to the values in Montana's RVS), multiplied times the following conversion factors, whichever is relevant:~~ provider will be paid 85% of the actual submitted charge for the approved services.

~~(a) medical services (90000-99199) $1.85~~
~~(b) surgical services (10000-69999) 79.00~~
~~(c) radiology services (70000-79999) 8.50~~
~~(d) laboratory services (80000-89399) .70~~
~~(e) anesthesia services (90000 series, 10000-69999, 70000 series with modifier of -30) 30.00~~

(8) For the following types of multiple surgeries, CSHS will pay at the rates noted:

(a) 85% of the actual charge for multiple surgeries performed during the same admission, but on different days.

(b) for multiple surgeries performed on the same day, under the same anesthesia:

(i) involving a single surgical field or single surgical incision, regardless of how many organ systems are involved, performed by one or two surgeons:

(A) 85% of the actual charge for the first procedure;
(B) 42.5% of the actual charge for the second procedure;
(C) 21.25% of the actual charge for the third procedure;
(D) 8.5% of the actual charge for the fourth procedure;
(E) 4.25% of the actual charge for the fifth procedure.

(ii) involving two surgical fields or two surgical incisions performed by one surgeon, whether the surgery involves separate organ systems, different anatomical locations, or bilateral surgical procedures:

(A) 85% of the actual charge for the first procedure; and

(B) 75% of the actual charge for the second and each subsequent procedure.

(iii) involving two surgical fields or two surgical incisions performed by two surgeons, whether the surgery involves separate organ systems, different anatomical locations, or bilateral surgical procedures, 85% of the actual charge for the first and second procedures.

(iv) involving bilateral surgical procedures (e.g. bilateral Colles' fracture):

(A) 85% for the first procedure; and

(B) 75% for the second procedure.

~~(8)~~(9) Hospitals and surgicenters will be paid ~~90%~~ 85% of the actual submitted charge on the date of occurrence for in-patient and out-patient services.

~~(9)~~(10) Remains the same.

~~(10)~~(11) In addition to the above, ~~HCS~~ CSHS will pay:

(a) either the actual charge for drugs and other prescribed materials, or the price, plus $4 dispensing fee, cited in the Annual Pharmacists' Reference ~~1989~~ 1992 Redbook, whichever is less;

(b) ~~90%~~ 85% of the cost of orthotics and prosthetic devices (orthopedic only);

~~(c) for physical therapy at the rate of $1.85 multiplied times the relevant unit found in the 90000 series identified in (7)(a) above;~~

~~(d)~~(c) for ambulance services, at the following rates; ~~at the rates established by the department's improved pregnancy outcome project, as revised November 1987, with the exception of ancillary services, which will be paid at 90% of the charge; and~~

(i) ground transport base rate:

basic life support nonemergent	$165
basic life support emergent	235
advanced life support nonemergent	250
advanced life support emergent	310

(ii) mileage at a rate of $5.30 per mile.

(d) 85% of the actual submitted approved charge for all air transports and ancillary charges.

(e) Remains the same.

(f) 100% of the cost of syringes, reagent strips, dipsticks, gastrostomy tubing, and breast pump rental.

~~(11)~~(12) The services provided at a clinic funded entirely by ~~HCS~~ CSHS must be provided free of charge, regardless of income.

~~(12)~~(13) An individual utilizing a clinic supported in part by ~~HCS~~ CSHS may not be billed for the clinic operating expenses funded by ~~HCS~~ CSHS, but may be billed by the clinic for services provided that ~~HCS~~ CSHS does not pay for.

~~(13)~~(14) The department hereby adopts and incorporates by reference the ~~Physicians' Current Procedures Terminology, published by the American Medical Association, 4th edition, which assigns value units to the various medical procedures; the relative value scales adopted by the Montana Medical Association, Colorado, and California, which assign value units~~

~~to medical procedures; the~~ American Dental Association's Code on Dental Procedures and Nomenclature, which assigns units of value to the various dental procedures; and the Annual Pharmacist's Reference ~~1989~~ 1992 Redbook, which suggests prices for drugs~~; the rates for ambulance services set by the department's improved pregnancy outcome project, as revised November 1987~~. Anyone wishing to examine any of the above references may do so by contacting the department's ~~HCS~~ CSHS Program, Cogswell Building, Capitol Station, Helena, Montana 59620 [phone: 444-~~4740~~ 3622].

AUTH: 50-1-202, MCA; IMP: 50-1-202, MCA

16.24.108 APPLICATION PROCEDURE (1) A person who desires ~~HCS~~ CSHS benefits must submit a completed application, along with documentary evidence required by the department, to the department on a form it prescribes.

(2)-(3) Remains the same.

(4) If the applicant is found eligible for ~~HCS~~ CSHS benefits, the department will send the applicant a notice of that fact that also specifies which condition(s) are eligible for ~~HCS~~ CSHS assistance.

AUTH: 50-1-202, MCA; IMP: 50-1-202, MCA

16.24.109 FAIR HEARING PROCEDURE (1) An applicant who has been denied participation in ~~HCS~~ CSHS, a provider who has been denied reimbursement for ~~HCS~~ CSHS-eligible services, or anyone who is otherwise adversely affected by an action taken by ~~HCS~~ CSHS may have a fair hearing before the department director by requesting such a hearing within 60 days after notice of the adverse action in question has been placed in the mail or otherwise communicated to the aggrieved party.

(2)-(6) Remains the same.

AUTH: 50-1-202, MCA; IMP: 50-1-202, MCA

16.24.110 PROGRAM RECORDS (1) ~~HCS~~ CSHS shall retain records of ~~HCS~~ CSHS services provided for a client for a period of five years from the date on which the last service was provided unless the records are required for litigation or audit before the five years are up, in which case they must be retained until the litigation or audit is completed or until the end of the regular five-year period, whichever is later.

(2) Prior to destroying records over five years old, ~~HCS~~ CSHS shall advertise the availability of the records to the program clients or their legal guardians by publishing a notice in Montana's major newspapers once per week for three consecutive weeks.

(3) Remains the same.

AUTH: 50-1-202, MCA; IMP: 50-1-202, MCA

16.24.111 ADVISORY COMMITTEE (1) The ~~HCS~~ CSHS advisory committee:

(a) remains the same.

(b) will have a minimum of six members and be composed of health care providers representing those specialties most

often needed by ~~HCS~~ CSHS, as well as consumers of ~~HCS~~ CSHS benefits, including one each of the following: physician, orthodontist, hospital administrator, public health nurse, and parent of ~~an HCS~~ a CSHS-eligible child;

(c)-(d) remains the same.

(e) will advise the department concerning the financial eligibility limits for ~~HCS~~ CSHS beneficiaries.

AUTH: 50-1-202, MCA; IMP: 50-1-202, MCA

4. The amendments the department is proposing to the rules are necessary for several reasons:

a. Changes in the federal laws concerning the Maternal and Child Health Services Block Grant and the Medicaid program, particularly concerning medicaid eligibility for children, necessitate changes in the HCS program's requirements to recognize:

(i) the fact that more children are eligible for Medicaid and thus ineligible for HCS services, while, at the same time, studies show that families under 200% of federal poverty levels cannot afford health insurance, both factors mandating changes in the program's eligibility requirements; and

(ii) that children with special health needs are no longer referred to in the pertinent federal laws and rules or in professional literature as "handicapped".

b. Some orthodontists and transporters have been refusing to accept HCS payments because they are considerably less than actual charges; in addition, the payment procedure is cumbersome, time consuming, and in need of clarification. The proposed changes to the payment standards are the result of a year's study and have the approval of the HCS Advisory Committee.

5. Interested persons may submit their data, views, or arguments concerning the proposed amendments, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted to Ellie Parker, Department of Health and Environmental Sciences, Cogswell Building, Capitol Station, Helena, Montana 59620, no later than 5:00 p.m., April 15, 1992.

6. Ellie Parker, at the above address, has been designated to preside over and conduct the hearing.

DENNIS IVERSON, Director

Certified to the Secretary of State March 2, 1992.

Reviewed by:

Counsel for the Department

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

In the matter of the amendment of procedural rules.	))))	NOTICE OF PROPOSED AMENDMENT OF RULES ARM 24.5.316 and 24.5.323. No public hearing contemplated.

TO: All Interested Persons.

1. On May 1, 1992, the Office of the Workers' Compensation Judge proposes to amend procedural rules of the Court.

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

24.5.316 MOTIONS (1) When a petition for trial has been filed, a Mmotions to amend a pleading, to dismiss, to quash or for other summary ruling shall be filed in writing on or before the date set for pretrial conference, unless allowed at a later time for good cause shown. When an appeal is taken from the department of labor and industry's final order, pursuant to ARM 24.5.350, any motion related to the appeal must be filed and served prior to the date for submission of briefs.

(2) Upon filing ~~such a~~ motion, the moving party shall also file a supporting brief or affidavit, and failure to do so shall be deemed an admission that the motion is without merit. An adverse party shall have ~~ten~~10 days following service of the motion within which to file an answering brief or affidavit. Failure to file an answering brief may be deemed an admission that the motion has merit. A reply brief may be filed no later than five days from the date of service of the answer of the adverse party. Unless otherwise ordered, oral argument will not be permitted upon pretrial motions.

(~~3~~1) Text remains the same just renumbered.

(~~4~~2) Text remains the same just renumbered.

AUTH: Sec. 2-4-201, MCA IMP: Sec. 2-4-201, 39-71-2901, MCA

24.5.323 INTERROGATORIES (1) A party may serve upon an adverse party, at any time after the filing of a petition, written interrogatories to be answered by the party served. The answers shall be signed by the person making them, and the party upon whom the interrogatories have been served shall serve a copy of the answers on the party submitting the interrogatories ~~and on the court~~ within ~~twenty~~20 days after the service of the interrogatories, unless the court lengthens or shortens the time. In no event shall answers be due in less than ~~thirty~~30 days from the filing of the petition. A notice that interrogatories and/or answers to interrogatories have been served, must be filed with the court.

(2) Interrogatories and answers thereto shall not be routinely filed with the court. When any motion is filed making reference to interrogatories or interrogatory answers, the party filing the motion shall submit with the motion relevant interrogatory answers to which reference is made. All interrogatory answers and other discovery responses may be filed at the time of trial at either party's request.

(~~2~~3) Text remains the same just renumbered.

(~~3~~4) Text remains the same just renumbered.

(~~4~~5) Text remains the same just renumbered.

AUTH: Sec. 2-4-201, MCA IMP: Sec. 2-4-201, 39-71-2901, MCA

3. The rationale for amending these rules is to set forth the procedure for those proceedings appealed from the Department of Labor and Industry's decisions in the motion rule. The interrogatory rule change is to advise the parties that interrogatories and answers thereto need not be filed with the Court.

4. Interested parties may submit their data, views or arguments concerning these changes in writing to Workers' Compensation Court, 46 North Last Chance Gulch, P.O. Box 537, Helena, MT 59624-0537 on or before April 13, 1992.

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 Workers' Compensation Court, 46 North Last Chance Gulch, P.O. Box 537, Helena, MT 59624-0537, no later than April 13, 1992.

6. It has been determined that a change in the court rules could affect any injured worker in the state of Montana, therefore, if the agency receives requests for a public hearing on the proposed adoption from 25 persons who are directly affected by the proposed adoption; from the Administrative Code Committee of the legislature; or from a governmental subdivision or agency, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register.

7. The authority of the Court to make the proposed changes in the rules is based on and implements section 2-4-201, MCA. The implementing authority is sections 2-4-201 and 39-71-2901, MCA.

TIMOTHY W. REARDON
JUDGE

CERTIFIED TO THE SECRETARY OF STATE: March 2, 1992

BEFORE THE COMMISSIONER
OF POLITICAL PRACTICES
OF THE
STATE OF MONTANA

In the matter of the amendment of Rule 44.10.331 pertaining to limitations on receipts from political committees to legislative candidates	))))	NOTICE OF PROPOSED AMENDMENT OF RULE 44.10.331 PERTAINING TO LIMITATIONS ON RECEIPTS FROM POLITICAL COMMITTEES TO LEGISLATIVE CANDIDATES

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons

1. On April 13, 1992, the Commissioner of Political Practices proposes to amend Rule 44.10.331 which pertains to limitations on receipts from political committees by legislative candidates.

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

44.10.331 LIMITATIONS ON RECEIPTS FROM POLITICAL COMMITTEES

(1) Pursuant to the operation specified in sections 13-37-218 and 15-30-101(8), MCA, limits on total combined monetary contributions from political committees other than political party committees to legislative candidates are as follows:

(a) a candidate for the house of representatives may receive no more than ~~$900~~ $1000.

(b) a candidate for the state senate may receive no more than ~~$1500~~ $1650.

(2) These limits apply to total combined monetary receipts for the entire election cycle of ~~1990~~ 1992.

AUTH: Section 13-37-114, MCA
IMP: Sections 13-37-218 and 15-30-101(8), MCA

3. Rationale: The proposed amendment is needed to conform the rule to the mandate of section 13-37-218, MCA, requiring that the limitations set out in that statute be adjusted for each election year by the inflation factor as defined in section 15-30-101(8), MCA. The proposed amendment also is needed to clarify that contribution limitations mean total monetary amounts exclusive of in-kind contributions and that the limitations apply to the total campaign period embracing the 1992 elections.

4. Interested parties may submit their data, views or arguments concerning the proposed amendment in writing to the Commissioner of Political Practices, Capitol Station, Helena, Montana 59620, no later than April 10, 1992.

5. If any person who is directly affected by this proposed amendment wishes to express data, views and arguments orally or in writing at a public hearing, then the person must make written request for a public hearing and submit this request, along with any written comments, to the Commissioner of Political Practices, Capitol Station, Helena, Montana 59620, no later than April 10, 1992.

6. If the agency receives requests for a public hearing on the proposed amendment from either 10 percent or 25, whichever is fewer, of the persons who are directly affected by the proposed action; from the Administrative Code Committee of the legislature; from a governmental subdivision or agency; or from an association having not fewer than 25 members who will be directly affected, a hearing will be scheduled 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 25 persons based on 125 contested elections in 1992 with 2 candidates each.

Rule Reviewer
GARTH JACOBSON

Commissioner of Political Practices
DOLORES COLBURG

Certified to the Secretary of State February 18, 1992.

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

In the matter of the amendment of rule 46.10.510 pertaining to excluded earned income	)))	**NOTICE OF PUBLIC HEARING ON THE PROPOSED AMENDMENT OF RULE 46.10.510 PERTAINING TO EXCLUDED EARNED INCOME**

TO: All Interested Persons

1. On April 1, 1992, at 2:00 p.m., a public hearing will be held in the auditorium of the Social and Rehabilitation Services Building, 111 Sanders, Helena, Montana to consider the proposed amendment of rule 46.10.510 pertaining to excluded earned income.

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

46.10.510 EXCLUDED EARNED INCOME Subsection (1) remains the same.

(a) for any six months ~~per~~ of the calendar year in which the household applies for or receives AFDC, the earned income of a dependent child who is a full-time student;

Subsections (1)(b) and (1)(c) remain the same.

(2) In testing net monthly income ~~and determining grant amount~~, the following earned income shall be excluded:

(a) for any six months ~~per~~ of the calendar year in which the household applies for or receives AFDC, the earned income of a dependent child who is a full-time student;

(b) during the seventh and following months in which the household has received benefits in a calendar year, the earned income of a dependent child who is a full-time student if the household's income including the child's earned income does not exceed the gross monthly income standard for a household of that size;

Subsections (2)(b) and (2)(c) remain the same in text but will be renumbered (2)(c) and (2)(d).

(3) In determining grant amount, the following earned income shall be excluded:

(a) the earned income of a dependent child who is either a full-time or part-time student;

(b) income received by a dependent child under section 503 of the Job Training Partnership Act (JTPA) of 1982, P.L. 97-300, for the first 6 months of participation in JTPA training; and

(c) earned income tax credit (EITC) advance payments and refunds.

Auth: Sec. 53-4-212 MCA
IMP: Sec. 53-4-231, 53-4-241 and 53-4-242 MCA

3. Federal regulations at 45 CFR 233.20 (a)(3)(xix) and (xx) governing the Aid to Families with Dependent Children (AFDC) program allow states the option of disregarding the earned income of dependent children who are full-time students for certain purposes. ARM 46.10.510 currently provides that the earned income of dependent children who are full-time students may be excluded for six months of the year in determining eligibility for AFDC and grant amount.

The federal regulations do not address the treatment of earned income of dependent children who are full-time students during the seventh through the twelfth months of the year or the treatment of earned income of part-time students. However, the department has recently received a directive from the regional office of the Administration for Children and Families of the Department of Health and Human Services, which administers the AFDC program. This directive indicates that in the seventh through the twelfth months, the earned income of dependent children who are full-time students should be included in family income in determining whether the household's income exceeds the gross monthly income standard. If the family's income does not exceed the gross monthly income standard, then the child's earned income may be excluded in testing the family's income against the net monthly income standard. The directive also indicates that earned income of a part-time student may be excluded for an unlimited number of months for purposes of determining grant amount but should be counted in testing family income against the gross and net monthly income standards.

The department has chosen to exclude the earned income of children who are students to the maximum extent permitted by federal policy, in order to avoid penalizing AFDC households due to earned income of a member who is pursuing an education and working at the same time. The department is therefore amending ARM 46.10.510 to provide for the exclusion of earned income in the additional cases set forth in the recent federal directive.

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 Russell E. Cater, Chief Legal Counsel, Office of Legal Affairs, Department of Social and Rehabilitation Services, P.O. Box 4210, Helena, MT 59604-4210, no later than April 9, 1992.

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

Rule Reviewer

Director, Social and Rehabilitation Services

Certified to the Secretary of State March 2, 1992.

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

In the matter of the amendment of rule 46.12.1607 pertaining to medicaid reimbursement to rural health clinics	))))	NOTICE OF PUBLIC HEARING ON THE PROPOSED AMENDMENT OF RULE 46.12.1607 PERTAINING TO MEDICAID REIMBURSEMENT TO RURAL HEALTH CLINICS

TO: All Interested Persons

1. On April 1, 1992, 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 rule 46.12.1607 pertaining to medicaid reimbursement to rural health clinics.

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

46.12.1607 RURAL HEALTH CLINICS, REIMBURSEMENT Subsections (1) through (1)(b) remain the same.

(i) ~~Payment under the all inclusive rate system is limited by 42 USC 13951(f). The department hereby adopts and incorporates by reference 42 USC 13951(f) (effective June 1990).~~ Payment to independent clinics under the all inclusive rate system for the reasonable cost per visit shall be subject to the payment limit, applicable to the period during which the services are rendered, established by the secretary of the United States department of health and human services pursuant to 42 USC §13951(f), as may be published by the secretary from time to time. The department hereby adopts and incorporates herein by reference 42 USC §13951(f) (1991 supp.), which is a federal statute specifying the methodology for determining the payment limit. A copy of this statute or information regarding the applicable limit may be obtained from the Medicaid Services Division, Department of Social and Rehabilitation Services, P.O. Box 4210, Helena, Montana 59604-4210.

~~(ii) The payment limit for services provided on or after October 1, 1989 through March 31, 1990 is $47.38 per visit; on or after April 1, 1990 the payment limit is $49.37 per visit.~~

Subsection (2) remains the same.

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

3. The proposed amendment is necessary to effectuate the purpose of sections 53-6-101 and 53-6-113, MCA which require the department to provide medicaid coverage of rural health clinic services and to establish reimbursement rates for covered services. The current rule language requires a

rule revision each time there is a percentage increase in the Medicare Economic Index (MEI). Freestanding Rural Health Clinics (RHC) are reimbursed at a composite rate which cannot exceed a cap established according to a methodology specifically established by federal law. The cap is adjusted each year by the percentage increase in the MEI, in accordance with 42 USC §13951(f). Medicaid is required to reimburse 100% of an RHC's allowable costs up to the national cap. This rule change will allow the department to apply the federal law and respond timely to any percentage increase in the MEI without amending the rule for each MEI adjustment.

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 Russell E. Cater, Chief Legal Counsel, Office of Legal Affairs, Department of Social and Rehabilitation Services, P.O. Box 4210, Helena, MT 59604-4210, no later than April 9, 1992.

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

Dave Silvia
Rule Reviewer

Julia E. Robinson
Director, Social and Rehabilitation Services

Certified to the Secretary of State March 2, 1992.

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

In the matter of the adoption of Rule I and the amendment of Rules 46.10.803, 46.10.805 and 46.10.811 pertaining to the alternative work experience program	)))))	NOTICE OF PUBLIC HEARING ON THE PROPOSED ADOPTION OF RULE I AND THE AMENDMENT OF RULES 46.10.803, 46.10.805 AND 46.10.811 PERTAINING TO THE ALTERNATIVE WORK EXPERIENCE PROGRAM

TO: All Interested Persons

1. On April 1, 1992, at 11:00 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 adoption of Rule I and the amendment of Rules 46.10.803, 46.10.805 and 46.10.811 pertaining to the alternative work experience program.

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

[RULE I] ALTERNATIVE WORK EXPERIENCE PROGRAM (AWEP)

(1) The alternative work experience program (AWEP) is a component of the JOBS program designed to improve the employability of participants by assigning a participant to work in a nonprofit organization. The specific purposes of AWEP are to:

(a) improve the existing work history of participants;

(b) provide meaningful work experience for participants with little or no work history;

(c) provide an avenue for participants to earn a current work recommendation; and

(d) provide participants with the skills to balance the demands of home and work.

(2) The department shall determine whether the participant shall participate in the alternative work experience program (AWEP) rather than the community work experience program or some other JOBS component and how many hours per week the recipient shall be required to participate. However, participants may not be required to participate more than 40 hours per week in AWEP.

(3) A participant's assignment to a work site is subject to the following requirements:

(a) the participant may not be assigned to a work site which is more than two hours round trip from the participant's residence;

(b) the participant may request a reassignment at any time;

(c) the work site and the work activities in which the participant is engaged must be in compliance with all applicable federal, state or local health and safety standards;

(d) the participant's assignment shall take into consideration the following:

(i) family circumstances;

(ii) extent of work experience;

(iii) length of detachment from the labor market; and

(iv) barriers to employment.

(e) a participant shall not be assigned to a work site until the department's contractor and the sponsoring agency have entered into an agreement with the department.

(4) Participants will be placed only in local government or private non-profit organizations.

AUTH: Sec. 53-4-212 and 53-4-719 MCA
IMP: Sec. 53-2-201 and 53-4-705 MCA

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

46.10.803 DEFINITIONS Subsection (1) remains the same.

(2) "Alternative work experience program (AWEP)" means an alternative to the community work experience program which improves the employability of participants by giving them work experience and training in local government and private non-profit agencies.

(3) "Barriers to employment" means limitations on obtaining employment, as determined by the department, including limitations resulting from illiteracy, lack of a high school diploma or its equivalent, and lack of work skills, experience or training necessary to secure employment.

Subsections (2) through (34) remain the same in text but will be renumbered (4) through (36).

AUTH: Sec. 53-4-212 and 53-4-719 MCA
IMP: Sec. 53-2-201, 53-4-211, 53-4-215, 53-4-703, 53-4-705, 53-4-708, 53-4-715 and 53-4-720 MCA

46.10.805 ELIGIBILITY, EXEMPT STATUS (1) A person who is eligible for aid to families with dependent children, as provided ~~for~~ at ARM 46.10.301 et seq., is required to participate in the JOBS program as provided ~~for~~ in these rules unless:

(a) the person is specifically exempted~~: (a)~~ as provided ~~for~~ in subsections ~~(2)~~ (3)(a) through (3)(m);

Subsections (1)(b) and (1)(c) remain the same.

(2) The community work experience program and the alternative work experience program are components of the JOBS program designed to improve the employability of participants by assigning the participant to work in a non-profit organization. The department will determine which component or components of the JOBS program are most appropriate for the AFDC recipient.

Subsections (2) through (4)(c) remain the same in text but will be renumbered (3) through (5)(c).

(5~~6~~) In the unemployed parent track, the primary wage earner must participate unless specifically exempt under subsection (~~2~~1).

Subsections (6) through (9) remain the same in text but will be renumbered (7) through (10).

AUTH: Sec. 53-4-212 and 53-4-719 MCA
IMP: Sec. 53-2-201, 53-4-211, 53-4-215, 53-4-703, 53-4-706, 53-4-707, 53-4-708, 53-4-715, 53-4-717 and 53-4-720 MCA

46.10.811 UNEMPLOYED PARENTS TRACK PARTICIPATION AND OTHER REQUIREMENTS Subsections (1) through (4)(a) remain the same.

(b) community work experience; ~~and~~

(c) alternative work experience; and

Subsections (4)(c) through (4)(c)(ii) remain the same in text but will be renumbered (4)(d) through (4)(d)(ii).

Subsections (5) through (6) remain the same.

AUTH: Sec. 53-4-212 and 53-4-719 MCA
IMP: Sec. 53-2-201, 53-4-211, 53-4-215, 53-4-703, 53-4-706, 53-4-707 and 53-4-720 MCA

4. The department is proposing to add a new component to Montana's Job Opportunities and Basic Skills (JOBS) program for recipients of Aid to Families with Dependent Children (AFDC). This new component will be called the Alternative Work Experience Program (AWEP).

Federal regulations authorize the states to operate work experience programs as part of the JOBS program to improve the employability of recipients of AFDC by giving them work experience and training. The department is currently operating a Community Work Experience Program (CWEP) as one component of JOBS. Pursuant to the authority of 45 CFR 250.63(k), which allows states the option of offering other work experience programs in addition to CWEP, the department has designed a new component of JOBS known as the Alternative Work Experience Program. This proposed rule is necessary in order to implement a work experience program which does not limit the number of hours per month a participant can participate.

The purposes of this new program are to: (1) enhance the work history of participants; (2) provide meaningful work experience for those participants with little or no work history; (3) provide an avenue for participants to earn a current work recommendation; and (4) provide participants with the skills to balance the demands of work and home.

In many respects, AWEP will be similar to the Community Work Experience Program component of JOBS, which is aimed at

improving the employability of JOBS recipients by giving them work experience and training. In AWEP, as in CWEP, recipients will be placed in projects in their community which serve a useful public purpose. Participants will be placed only in local government or private non-profit organizations.

However, the Alternative Work Experience Program will differ from the Community Work Experience Program in one respect. The number of hours an AFDC recipient is required to participate in CWEP each week is limited by the amount of the recipient's AFDC grant. For the recipient's first nine months in CWEP, the recipient cannot be required to work more hours per month than the number of hours which is obtained by dividing the recipient's monthly grant amount by the federal minimum wage. There will be no such limitation on the number of hours an AFDC recipient can be required to participate in the Alternative Work Experience Program. This will allow a JOBS participant to obtain more work experience in AWEP than may be possible in CWEP due to the limit on hours of participation per month.

The amendment of ARM 46.10.803 is necessary to provide a definition of Alternative Work Experience Program and of the term "barrier to employment" which is used in the new rule governing AWEP. The department is also amending ARM 46.10.805 pertaining to JOBs eligibility and exempt status. This amendment explains that AWEP and CWEP are components of the JOBS program designed to improve the participant's employability. The amended rule also allows the department to determine which component is most suitable for the AFDC recipient. Subsection (4) of ARM 46.10.811 is also amended to provide that AWEP is an acceptable activity for participants in the Unemployed Parent track of JOBS.

5. 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 Russell E. Cater, Chief Legal Counsel, Office of Legal Affairs, Department of Social and Rehabilitation Services, P.O. Box 4210, Helena, MT 59604-4210, no later than April 9, 1992.

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

Rule Reviewer

Director, Social and Rehabilitation Services

Certified to the Secretary of State March 2, 1992.

MAR Notice No. 46-2-689

5-3/12/92

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

In the matter of the amendment of rule 46.10.409 pertaining to transitional child care	)))	NOTICE OF PUBLIC HEARING ON THE PROPOSED AMENDMENT OF RULE 46.10.409 PERTAINING TO TRANSITIONAL CHILD CARE

TO: All Interested Persons

1. On April 1, 1992, at 2:30 p.m., a public hearing will be held in the auditorium of the Social and Rehabilitation Services Building, 111 Sanders, Helena, Montana to consider the proposed amendment of rule 46.10.409 pertaining to transitional child care.

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

46.10.409 SLIDING FEE SCALE FOR TRANSITIONAL CHILD CARE
Subsection (1) remains the same.

(a) SLIDING FEE SCALE FOR
TRANSITIONAL CHILD CARE (TCC)
~~November 1, 1991~~ May 1, 1992

Family Size	Gross Monthly Income	Copayment (1 child)	Copayment (2 children)*
2	0 - 740	$ 4	
	741 - 840	17	
	841 - 940	28	
	941 - 1040	42	
	1041 - 1140	57	
	1141 - 1240	74	
	1241 - 1340	93	
	1341 - 1440	115	
	1441 - 1540	139	
	1541 - 1640	148	
	1641+- ineligible		
3	0 - 928	$ 6	$ 8
	929 - 1028	20	26
	1029 - 1128	34	44
	1129 - 1228	49	64
	1229 - 1328	66	86
	1329 - 1428	86	113
	1429 - 1528	107	140
	1529 - 1628	130	170
	1629 - 1728	138	181
	1729 - 1828	165	216
	1829+- ineligible		

4	0 - 1117 1118 - 1217 1218 - 1317 1318 - 1417 1418 - 1517 1518 - 1617 1618 - 1717 1718 - 1817 1818 - 1917 1918 - 2017 ~~2018 - 2117~~ 2018 ~~2118~~+- ineligible	$ 8 24 40 57 76 97 120 145 153 182 ~~191~~	$ 10 31 52 75 100 107 157 190 200 238 ~~250~~
5	0 - 1305 1306 - 1405 1406 - 1505 1506 - 1605 1606 - 1705 1706 - 1805 1806 - 1905 1906 - ~~2105~~ 2005 ~~2106~~ 2006 - ~~2205~~ 2105 ~~2206~~ 2106 - ~~2305~~ 2205 ~~2306~~ 2206+- ineligible	$ 10 28 45 64 85 108 133 ~~168~~ 160 ~~198~~ 189 ~~207~~ 198	$ 12 37 59 84 111 141 174 ~~220~~ 210 ~~259~~ 248 ~~271~~ 259
6	0 - 1493 1494 - 1593 1594 - 1693 1694 - 1793 1794 - 1893 1894 - 1993 1994 - 2093 2094 - 2193 2194 - 2293 2294 - 2393 2394+- ineligible	$ 12 32 51 72 95 120 147 175 206 215	$ 14 42 67 94 124 157 193 229 270 283
7 or more	0 - 1682 1683 - 1782 1783 - 1882 1883 - 1982 1983 - 2082 2083 - 2182 2183 - 2282 2283 - 2382 2383 - 2482 2483 - 2582 2583+- ineligible	$ 14 36 56 79 104 131 160 191 223 232	$ 16 47 73 103 136 172 210 250 292 304

* Note: There will be no additional charge if a family places more than 2 children in child care; the maximum fee will be the 2 children rate.

Subsection (2) remains the same.

AUTH: Sec. 53-4-212 and 53-4-719 MCA
IMP: Sec. 53-4-701 and 53-4-716 MCA

3. The Department of Social and Rehabilitation Services (SRS), as mandated by the Family Support Act of 1988, provides transitional child care (TCC) assistance to participants of

the Aid to Families with Dependent Children (AFDC) program who lose their financial assistance because of increased hours or earnings from employment, or as a result of the loss of income disregards used in computing eligibility due to the expiration of time limits on such disregards. Transitional child care assistance is available for 12 months from the date of termination of AFDC financial assistance.

During the TCC period, the Department pays most of the former recipient's child care costs but also requires the client to contribute toward those costs based on the client's ability to pay. ARM 46.10.409 sets forth a sliding fee scale used to determine the amount of each client's contribution.

ARM 46.10.409 currently contains a sliding fee scale for households of up to five persons. It is necessary to extend the sliding fee scale to include families of six or more members because there are families currently enrolled in the program with that many members. In addition, this rule is being amended to correct an error in the income scale for a family of five. The income scale in the rule currently progresses in increments of $100 for all household sizes except a household of five, which has increments of $200. The income scale for a family of five must be changed to be consistent with the rest of the TCC income scale.

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 Russell E. Cater, Chief Legal Counsel, Office of Legal Affairs, Department of Social and Rehabilitation Services, P.O. Box 4210, Helena, MT 59604-4210, no later than April 9, 1992.

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

Rule Reviewer

Director, Social and Rehabilitation Services

Certified to the Secretary of State March 2, 1992.

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

In the matter of the adoption of Rules I through XVI, amendment of rules 46.30.1501, 46.30.1507, 46.30.1513, 46.30.1525, 46.30.1543 and 46.30.1549 and repeal of Rules 46.30.1519, 46.30.1531 and 46.30.1537 pertaining to child support	)	NOTICE OF PUBLIC HEARING ON THE PROPOSED ADOPTION OF RULES I THROUGH XVI, AMENDMENT OF RULES 46.30.1501, 46.30.1507, 46.30.1513, 46.30.1525, 46.30.1543 AND 46.30.1549 AND REPEAL OF RULES 46.30.1519, 46.30.1531 AND 46.30.1537 PERTAINING TO CHILD SUPPORT

TO: All Interested Persons

1. On April 2, 1992, at 1:30 p.m., a public hearing will be held in the auditorium of the Social and Rehabilitation Services Building, 111 Sanders, Helena, Montana to consider the proposed adoption of Rules I through XVI, amendment of Rules 46.30.1501, 46.30.1507, 46.30.1513, 46.30.1525, 46.30.1543 and 46.30.1549 and repeal of Rules 46.30.1519, 46.30.1531 and 46.30.1537 pertaining to child support.

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

46.30.1501 AUTHORITY, APPLICATION AND PURPOSE (1) ~~This~~ These guidelines are ~~is~~ promulgated under the authority of 40-5-209, MCA, for the purpose of establishing a standard to be used by the district courts, child support enforcement agencies, attorneys and parents in determining child support obligations.

(2) ~~This~~ These guidelines are ~~is~~ based on the principle that a child's standard of living should not, to the degree possible, be adversely affected because his or her parents are not living in the same household.

(3) The intent of the guidelines is to prescribe criteria which comply with the federal Family Support Act of 1988, P.L. 100-485 and the regulations promulgated thereunder at 45 CFR section 302.56 as amended.

(4) As required by 40-4-204 and 40-6-116, MCA, these guidelines apply to all default and non-contested cases as well as contested proceedings to establish support orders or to modify existing support orders. Under the referenced statutes, if there is insufficient financial information to apply the guidelines in a particular case, a final support order is not permissible. However, there is nothing in this requirement which would prohibit a temporary order, subject to final order of the court or hearing officer based on the subsequent production of financial information. In a default

case or where a parent fails to produce financial information for use in applying the guidelines, a verified representation of the defaulting parent's income, based on the best information available, may be used.

AUTH: Sec. 40-5-202 MCA
IMP: Sec. 40-5-209 MCA

Rationale: The amendments to this rule are to accomplish two purposes. The first (new subsection 3) is to alert attorneys, judges and the public that the guidelines are not based solely on state policy considerations. Federal law and regulations affect the guidelines and in some instances control guideline content. See generally, section 103, Family Support Act of 1988 (P.L. 100-485) and 45 CFR 302.56.

The second purpose is to clarify existing Montana law which requires the guidelines to be applied in all child support determination cases. Sections 40-4-204(3) and 40-6-116(b), MCA provide that whenever a court issues or modifies a child support order, the court shall determine the obligation by applying the guidelines. What many child support practitioners have failed to understand is that this statutory language also applies to orders issued by default. If sufficient financial information is unavailable for use of the guidelines because of a default or otherwise then there can be no application of the guidelines and if the guidelines cannot be applied then there can be no order issued. A temporary order, however, would be appropriate under these circumstances. This requirement conforms with federal regulations. (See Comments 3, page 22344, Federal Register, VOL. 56 No. 94, May 15, 1991.)

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

(1) "Federal poverty index" is the minimum amount of income needed for subsistence. The amount is developed by the U.S. office of management and budget, revised annually in accordance with 42 U.S.C. 9902, and published annually in the federal register.

(2) "Gross income" is defined in [Rule II].

(3) "Guidelines" mean the administrative rules for establishment of child support as provided in ARM Title 46, chapter 30, subchapter 15.

(4) "Imputed income" is defined in ARM 46.30.1513.

(5) "Legal dependent" means natural born and adopted minor children, spouses, special needs adult children, household members covered by a conservatorship or guardianship, and parent's parents living in the household who are claimed on tax returns as legal dependents.

(6) "Net income" is defined in [Rule V].

(7) "Non-performing asset" means a non-essential item of real or personal property which is not traditionally considered income producing.

(8) "Primary child support need" is defined in [Rule VIII].

(9) "Self support reserve" is defined in [Rule VII].

AUTH: Sec. 40-5-202 MCA
IMP: Sec. 40-5-209 MCA

46.30.1507 REBUTTABLE PRESUMPTION (1) The guidelines creates a presumption of the adequacy and reasonableness of child support awards. However, every case must be determined on its own merits and circumstances and the presumption may be rebutted by evidence that a child's needs are not being met.

(2) At the request of one of the parties and upon consideration of the factors set out in the guidelines and in 40-4-204, 40-4-208 and 40-6-116, MCA, ~~a variance from~~ the guidelines may be rebutted and a variance from the guidelines amount may be granted ~~if the evidence shows that the application of the guideline would be unfair for the child or one of the parties~~. Any consideration of a variance from the guidelines must take into account the best interests of the child.

(3) A court or administrative hearing officer may find evidence to rebut the presumption and vary from the guidelines in a particular case only if the decree, separation order or support order contains a specific written finding showing justification that application of the guidelines would be unjust or inappropriate.

(4) Findings that rebut and vary the guidelines must include a statement of the amount of support that would have been ordered under the guidelines without the variance.

(5) A court or administrative hearing officer may vary from the guidelines based on a stipulation or agreement of the parties only if the stipulation or agreement meets the following criteria:

(a) it is in writing executed by the parties;

(b) the parties have signed the stipulation or agreement free of coercion;

(c) it contains specific justification as to why application of the guidelines is unjust or inappropriate; and

(d) it contains a statement of the amount of support that would have been appropriate under the guidelines without the variance.

(6) Many of the findings required by subsections (3), (4) and (5) to support a variance may be documented by attaching the parents' financial affidavit and child support worksheet provided in ARM 46.30.1549 to the support order, decree or agreement and incorporating those documents by reference. Variances not described in the affidavit and worksheet will require specific findings in the order, decree or agreement.

(7) A support order granting a variance shall provide that upon termination of the circumstances which justify the variance, the support amount shall immediately be the amount which would have been ordered under the guidelines without the variance.

(8) If a variance from the guidelines is based on performance of an act, e.g., extended visitation, the support order should contain a provision for the possibility that the parent may fail to perform the act. These guidelines recommend a provision similar to the following: "[I]f the parent fails to perform an act which is the basis for a variance from the child support guidelines, the other parent may give written notice of the failure to the non-performing parent. Upon receipt of the notice the amount of child support shall revert automatically to the amount which would be appropriate under the guidelines but for the variance." The parent affected by this reversion may request that the court or administrative agency which issued the support order for a determination of the issue and subsequent reinstatement of the variance if the facts so warrant.

AUTH: Sec. 40-5-202 MCA
IMP: Sec. 40-5-209 MCA

Rationale: Sections 40-4-204(3) and 40-6-116(b), MCA provide that the guidelines must be applied in all cases unless the court finds by clear and convincing evidence that application of the guidelines is unjust or inappropriate to the child or one of the parties. This amendment to the rule is necessary in order to insure that all essential elements are included in the contents of the court's findings. Specifically, the findings are to apply to stipulated or consent support orders as well as to court imposed orders. The findings must also show what the amount of support would have been if the court had not found the guidelines to be unjust or inappropriate. Finally, the findings must show that any variance from the guidelines does not adversely affect the best interest of the child. This amendment is necessary to conform the guidelines with federal regulations at 45 CFR 302.56(g).

To make application of the required fact finding less complicated, the CSED is also amending ARM 46.30.1549. That amendment will add a new financial affidavit and revise the existing guidelines worksheet. These forms, when completed, will contain most of the information required by the amended rule.

These guidelines are designed to apply to a broad range of cases and as with any guideline, they may not be fair or adequate in every instance. Adjustments, either upward or downward, may be appropriate to reflect particular inconsistent circumstances. However, some of the circumstances which justify a variance may either cease or never take place as contemplated. For example, a parent may seek extended visita-

tion with no intent to exercise the right. The parent only wanted a reduced monthly support payment. In other cases, extended visitation may have been exercised but with passage of time the parent no longer exercises the right. In both cases, the custodial party is required to seek a modification to bring the support up to what the guideline amount would be before the extended visitation adjustment. The problem from the CSED's perspective is that many of the custodians cannot afford the time or expense of a modification action. Therefore, the child suffers from inadequate support as a result of a circumstance that did not take place or which subsequently ceases to exist. To alleviate problems such as this, these guidelines recommend that support order contain provisions similar to that set out in subsection (8).

[RULE II] DETERMINATION OF GROSS INCOME (1) In determining for each parent the resources which can be made available for child support, the following considerations apply:

(a) "gross income" means income from any source, except as excluded in subsection (d), and includes but is not limited to income from salaries, wages, commissions, bonuses, earnings, profits, dividends, severance pay, pensions, interest, trust income, annuities, capital gains, royalties, social security benefits, veteran's benefits, workers' compensation benefits, unemployment benefits and alimony or spousal maintenance;

(b) gross income also includes expense reimbursements or in-kind payments received by the parent in the course of employment, self-employment, or operation of a business if such reimbursements or in-kind payments reduce personal living expenses. Such payments might include a company car, free housing or reimbursed meals;

(c) gross income for those who are self-employed, or who receive profits from a business enterprise such as a joint venture, a partnership, rental property, a sub-chapter S corporation, or a Montana close corporation includes gross receipts minus ordinary and necessary expenses for self-employment or business operation. Specifically excluded from ordinary and necessary expenses are depreciation and other non-cash deductions, even if it is otherwise allowable by the internal revenue service;

(d) gross income does not include benefits received from means-tested public assistance programs including but not limited to aid to families with dependent children (AFDC), supplemental security income (SSI), food stamps, general assistance and child support payments received from other sources; and

(e) interest from one-time gifts and inheritances should be considered as gross income, while the property itself or the principal should be considered as an asset under [Rule III].

AUTH: Sec. 40-5-202 MCA
IMP: Sec. 40-5-209 MCA

Rationale: This new rule was formerly part of ARM 46.30.1513. That old rule was rather long and complex. Child support practitioners complained that much valuable information was contained in the rule but that it was hard to find. They had to read most of the rule to find small but pertinent items of information. Consequently, the Department proposes to correct the problem by dividing the rule into five sub-parts, four of which, including this new rule, became part of four new rules.

From the original version appearing in ARM 46.30.1513 minor word changes were made to clarify that depreciation and other non-cash deductions from gross income are not included as proper deductions for determining income available for child support. Other clarification was added to substantiate that one-time gifts and inheritances, except for income derived from their investment, are not income. To include non-cash deductions from income and one time source of funds would result in a skewed application of the guidelines.

46.30.1513 ~~SPECIFICATION OF NET AVAILABLE RESOURCES~~ DETERMINATION OF IMPUTED INCOME ~~(1) In determining for each parent the net resources which can be made available for child support, the following considerations apply:~~

~~(a) "Gross income" includes income from any source, except as excluded below, and includes but is not limited to income from salaries, wages, commissions, bonuses, dividends, severance pay, pensions, interest, trust income, annuities, capital gains, social security benefits, worker's compensation benefits, unemployment benefits, gifts and prizes and alimony or spousal maintenance.~~

~~(i) Gross income does not include benefits received from means-tested public assistance programs including but not limited to aid to families with dependent children (AFDC), supplemental security income (SSI), food stamps, and general assistance.~~

~~(ii) Gross income for those who are self-employed, or who receive profits from a business enterprise such as a joint venture, a partnership, or a sub chapter S corporation or a Montana close corporation includes gross receipts minus ordinary and necessary expenses for self-employment or business operation. Specifically excluded from ordinary and necessary expenses are amounts allowable by the internal revenue service for the accelerated component of depreciation expenses and investment tax credits.~~

~~(iii) Gross income also includes expense reimbursements or in-kind payments received by a parent in the course of employment, self-employment, or operation of a business if such reimbursements or in-kind payments reduce personal living expenses. Such payments might include a company car, free housing, or reimbursed meals.~~

(~~b~~1) "Imputed income" ~~means if a parent is voluntarily unemployed or underemployed, income may be imputed based on the parent's ability or capacity to earn net income~~ means income not actually earned by a parent, but which may be attributed to the parent because the parent is voluntarily unemployed, is not working full-time when full-time work is available, or the parent is intentionally working below his or her ability or capacity to earn income.

(~~i~~2) ~~Imputed net income may be made~~ Income may be imputed according to one of two methods as appropriate:

(~~A~~a) Determine employment potential and probable net earnings level based on the parent's recent work history, occupational qualifications, and prevailing job opportunities and earnings level in the community. If there is no recent work history, and no higher education or vocational training, income may be imputed at the minimum wage level.

(~~B~~b) When a parent is ~~remarried,~~ married, remarried, or is living with a person ~~in a relationship akin to husband and wife~~ who is contributing labor or money to a common household, and the parent elects to stay home as homemaker, the value for homemaker services may be ~~assessed and attributed~~ imputed to the parent as income. The value of homemaker services should be imputed at the minimum wage level for a ~~forty~~ 40 hour week unless the court or administrative hearing officer determines another amount to be more appropriate.

(~~i~~c) Whenever income is imputed to an unemployed parent who is providing in-home care for the child for whom support is being calculated, and if that parent would be required to incur child care expenses if employed at the imputed level, then the imputed income should be reduced by the reasonable value of the parent's ~~in-home~~ child care service ~~should be credited against the value of the imputed income. See ARM 46.30.1525~~.

(~~ii~~d) Income should not be imputed if any of the following conditions exist:

(~~A~~i) the reasonable costs of day care for the parties ~~minor~~ dependent children ~~approach or equal~~ will offset, in whole or in substantial part, the amount of income the custodial parent can earn;

(~~B~~ii) a parent is physically or mentally disabled to the extent that ~~he or she~~ the parent cannot earn ~~a minimum wage~~ income at the federal minimum wage level for a 40 hour week;

(~~C~~iii) ~~a parent is engaged in education or retraining to establish basic job skills; or~~ the parent is engaged in a plan of economic self-improvement, including but not limited to education and retraining, which will result, within a reasonable time, in an economic benefit to the children for whom the support obligation is being determined;

(~~D~~iv) unusual emotional and/or physical needs of the child require the custodial parent's presence in the home~~.~~;

(v) the parent has made diligent efforts to find and accept suitable work or to return to customary self-employment, to no avail; or

(vi) the court or hearing officer makes a finding that other circumstances exist which make the imputation of income inequitable. However the amount of imputed income shall be decreased only to the extent required to remove such inequity.

(e) Although income is not imputed under subsection (2)(d), actual income, including grants, scholarships, third party contributions or other money intended to subsidize the parent's living expenses and which are not required to be repaid at some later date, should be included in gross income.

~~(c) "Income attributed to assets" means that in some situations, a parent may possess non-performing assets, primarily vacation homes, idle land and recreational vehicles which could yield a significant income stream if the assets were sold and the proceeds invested. In such cases a child is entitled to benefit from this potential income represented by the non-performing assets.~~

~~(i) Income will be attributed to the net value or market value of non-performing assets at the current interest rates for long-term treasury bills at the time the determination is made or at another appropriate rate determined by a district court or administrative hearing officer.~~

~~(ii) Income will not be attributed to the reasonable value of a parent's primary residence, home furnishings, and one vehicle. Also excluded will be income producing assets such as real property in the form of a farm or business, and vehicles, tools, or instruments used to produce a primary or significant source of income.~~

~~(d) "Net resources available for child support" are determined by subtracting from gross income, including imputed and attributed income, any of those deductions required by law or which are required as a condition of employment such as union dues, retirement contributions, uniforms and other legitimate occupational or business expenses. Deductions for credit unions or merely for the convenience of the parent are not to be deducted from gross income.~~

~~(i) If a parent is required by a court order to pay alimony or spousal support, the amount of the order may be deducted from gross income of the parent so paying. Support or medical insurance premiums for other children may be deducted as provided in ARM 46.30.1531.~~

~~(e) "Annualized income" refers to gross income and deductions from gross income used to derive a figure for net resources available for child support shall, to the extent possible, be annualized to provide a pattern of income producing abilities and to deter the possibility of a skewed application of the guidelines based on a temporary or seasonal aberration.~~

AUTH: Sec. 40-5-202 MCA
IMP: Sec. 40-5-209 MCA

Rationale: This rule was amended to simplify its application by dividing the rule into five sub-parts, four of which were divided out to become part of new rules. Of the one part

remaining in this rule several minor word changes were made for clarification purposes. For example, subsection (2)(d)(iii) was revised from the original because of the original's use of the word "basic". The original would not permit income to be imputed to a parent if the parent was attempting to establish a "basic" job skill. Many practitioners were confused as to what "basic" was intended to mean. Some thought "basic" applied only to acquiring high school or equivalent education. They said that if a parent graduated from high school, the parent had acquired "basic" skills and therefore income could be imputed even though the parent was enrolled in advanced training which, when completed, would result in more income for the child to share. The new rule clarifies this point by specifying the exemption applies to any parent who is making a reasonable effort to improve his or her economic situation. The ultimate question of whether the effort is reasonable is one for the trier of fact to determine.

[RULE III] DETERMINATION OF INCOME ATTRIBUTED TO ASSETS

(1) Income attributed to assets is the amount of interest income which could be earned if non-performing assets are liquidated and the proceeds invested. For example, a parent may possess non-performing assets like a vacation home, idle land, hobby farm and recreational vehicles. In such cases, a child is entitled to benefit from this potential income.

(2) Income should be attributed to the net market value of non-performing assets at the current interest rate for ten-year U.S. treasury bonds at the time determination is made, or at another appropriate rate ordered by a court or administrative hearing officer. The rate should be based on a 365 day year.

(3) Income will not be attributed to assets which are exempt by state law from attachment or execution to enforce a child support obligation.

AUTH: Sec. 40-5-202 MCA
IMP: Sec. 40-5-209 MCA

Rationale: This new rule was formerly part of ARM 46.30.1513. Other than minor word changes caused by the reorganization there is only one substantive change in the new rule over the original text. That is, the original text did not specify which of the several long term T-Bill rates should be used. Practitioners were using anywhere from one year rates up to the ten year rates. We have added clarification that it is the ten year rate which should be applied.

[RULE IV] INCOME VERIFICATION/DETERMINING ANNUAL INCOME

(1) A copy of the parent's financial affidavit and worksheet shall be submitted to the court or administrative hearing officer in each case, including cases in which agreed or stipulated orders are submitted to the court or administrative hearing office for approval. The worksheets and affidavits

should be signed by each parent under penalties for perjury or false swearing.

(2) Income statements of the parents should be verified with documentation of both current and past income to the extent such documentation is available to the parent. Verification may include pay stubs, employer statements, and profit and loss statements made by a certified public accountant if the parent is self-employed. Documentation of income may be supplemented with copies of income tax returns.

(3) To the extent possible, gross income and expenses should be annualized to avoid the possibility of skewed application of the guidelines based on temporary or seasonal conditions. Income and expenses may be annualized using one of the two following methods:

(a) seasonal employment or fluctuating income should be averaged over a period sufficient to accurately reflect the parent's earning ability. However, income should not be averaged if a reduction is due to circumstances beyond a parent's control such as a plant closure; or

(b) current income or expenses may be projected when a recent increase or decrease in income is expected to continue for the foreseeable future. For example, when a student graduates and obtains permanent employment, income should be projected at the new wage.

AUTH: Sec. 40-5-202 MCA
IMP: Sec. 40-5-209 MCA

Rationale: Subsection (3) of this new rule was formerly part of ARM 46.30.1513. The rule is proposed in order to avoid unreasonable income projections based on temporary or seasonal conditions. The proposed rule distinguishes between situations when past financial records should be used versus when current records are to be projected.

Subsections (1) and (2) of the new rule are intended to complement the amendments to ARM 46.30.1507 which permit financial affidavits and worksheets to be substituted for some of the findings of fact required by that rule as amended.

[RULE V] DETERMINATION OF NET INCOME (1) "Net income" means gross income, including imputed income and income attributed to assets, less any deductions for state or federal taxes, social security, and other similar deductions required by law or court order. Unreimbursed expenses incurred as a condition of employment such as union dues, retirement contributions, uniforms and other occupational or business expenses should also be deducted.

(a) When calculating taxes, tax tables should be used which show the maximum number of withholding exemptions allowable to the parent under the applicable tax law. Unless information to the contrary is available, presume that the parent is the head of household.

(b) Not to be included as a "deduction required by a law or court order" are attachments of income for satisfaction of judgments rendered against a parent for the enforcement of debts related to the purchase of property for the parent's personal use.

(2) Extraordinary medical expenses incurred by a parent to maintain that parent's health or earning capacity which are not reimbursed by insurance, employer, or other entity may be deducted from gross income.

(3) Reasonable expenses for items such as child care or in-home nursing care for the parent's legal dependents other than those for whom support is being determined, which are actually incurred and which are necessary to allow the parent to work, less federal tax credits, if any, may be deducted from gross income.

(4) Deductions for the convenience of the parent, such as credit union payments, deferred compensation, retirement and savings are not to be deducted from gross income.

(5) In some cases an employed parent may also operate a business or farm, or a self-employed parent may have more than one business. A net loss in the operation of a business or farm, unless the parent cannot reasonably remove himself or herself from the unprofitable situation, should not offset income from employment or from the operation of a more successful enterprise. Property associated with the unprofitable business or farm should be considered an asset under [Rule III].

(6) Net resources available for child support may differ from a determination of income for tax purposes.

AUTH: Sec. 40-5-202 MCA
IMP: Sec. 40-5-209 MCA

Rationale: This new rule was formerly part of ARM 46.30.1513. Subsections (1)(a) and (1)(b) are new. They were added to indicate when tax returns are to be used and to define what is not a deduction required by law or court order. Child support should have priority over attachments for ordinary consumer type debts.

Subsections (2), (3) and (4) assist in the evaluation of what expenses may be appropriate deductions in determining gross income. Subsection (6) was added to suggest that net income for tax purposes may not be the same as net income for child support.

Subsection (5) addresses the problem of parents who have a viable source of income and who also operate a farm or other business. In some instances the farm or business is either a hobby operation or a tax shelter, both of which will generally result in a net loss. In so far as these activities are discretional, a net loss in the operation of a hobby or tax shelter should not be permitted to reduce the amount of income a parent has available for support.

Ascertaining a parent's gross and net income is undoubtedly the most difficult part of the application of the guidelines. Two situations in particular cause the most significant factual disputes. The first is determining the net income of a parent who is self employed. In these cases the practitioner must examine business records (where available) to ascertain not only the declared take-home pay, but also the value of those personal items - such as automobiles, gasoline and retirement plans - which the business pays on the parent's behalf. These cases sometimes involve claims by one parent that the business records do not reflect all of the income of the other parent; in other words, that there are cash transactions which have not been recorded.

A second area is determining whether a parent's continued unemployment or underemployment is willful and whether he or she is actually making every effort to secure work. The latter category of cases also often involves allegations of unreported income in the form of cash contributions.

Complaints that focus on those issues will not be answered either by changing the guidelines or abandoning them. No matter what method is used to establish a parent's obligation for child support, proof of income or imputed income will always be the first step. Accordingly, if an agreement cannot be reached, these cases will necessitate a ruling by the court or hearing officer establishing net income on the basis of relevant evidence, or the lack thereof, presented by the parties.

[RULE VI] ALIMONY, MAINTENANCE, PRE-EXISTING CHILD SUPPORT OBLIGATIONS AND RESPONSIBILITY FOR OTHER CHILDREN

(1) The amount of alimony or spousal maintenance which a parent is required to pay under a court or administrative order should be deducted from gross income.

(2) For the support of children who are not subject of the child support action:

(a) the amount of the order should be deducted from the parent's gross income if there is a pre-existing support order; or

(b) the basic needs of the children are included as part of the parent's self support allowance as calculated in [Rule VII] if there is no pre-existing support order.

(3) Use of the deductions provided in this rule are appropriate at the time of the establishment of a child support order or in a proceeding to modify an existing order, unless otherwise provided in this subsection.

(a) A non-custodial parent's obligation to provide child support for natural or adopted children of a subsequent family arising after entry of an existing child support order should not be considered for the purpose of lowering an existing family's current child support order.

(b) If the custodial parent with a support order petitions to increase child support, all other natural born

and adopted children of the non-custodial parent may be considered in determining whether to increase the support order.

AUTH: Sec. 40-5-202 MCA
IMP: Sec. 40-5-209 MCA

Rationale: The first three subsections of this new rule were removed from various other sections of the original guideline and incorporated together in one place for easier recognition.

Subsection (4) was adopted from guidelines used by Colorado and Utah to show that the guidelines are not intended to provide for a modification of existing orders merely because the parent remarries and acquires an additional child. When this occurs the guidelines presume that the parent was aware of his or her obligation for existing children and voluntarily entered into a new relationship in spite of such knowledge. Children should not have their support orders and consequential standard of living lowered because of the parent's voluntary act. The court, however, under its broad ability to vary from the guidelines may nevertheless make adjustments if the equities so require.

[RULE VII] SELF SUPPORT RESERVE/NET RESOURCES AVAILABLE FOR SUPPORT (1) The "self support reserve" means the minimum amount of income which a parent must retain to meet the minimum subsistence needs of his or her household for food, clothing, shelter, medical care and job-required transportation. A parent's income is available for child support only when the parent's net income exceeds the self support reserve. These guidelines presume the support reserve to be the amount which corresponds to the parent's household size in the federal poverty index.

(2) For the purpose of this section a parent's household includes:

(a) legal dependents except those dependents for whom a pre-existing support order is established by a court or administrative process as specified in [Rule VI];

(b) persons such as stepparents, the parent's parents and domestic associates if those persons reside with the parent and have income which reduce the parent's expense of maintaining the household; and

(c) persons who are not legal dependents of the parent and who reside in the parent's household without sharing household expenses are not included as part of the household.

(3) To determine a parent's self support reserve:

(a) ascertain the size of the parent's household;

(b) determine the amount of income using the federal poverty index which corresponds to household size. Although family size in the poverty index is not defined the same as household size in this guideline, for the purpose of this determination only, household size is equivalent to family size in the poverty index;

(c) add $100.00 to the amount determined in subsection (b) as an adjustment for work-related expenses of each employed person in the household other than the parent who provides income to the household; and

(d) divide the total of subsections (b) and (c) by the number of persons, including the parent, who provide income for the household. The result of this computation is the parent's self-support reserve. For example, a parent is remarried and lives with the new spouse's parents. Both the new spouse and the father-in-law have income which reduce the parent's share of household living expenses. The parent has legal responsibility for two prior children who are residing with him. The household size would consist of five persons: the parent, the two prior children, the new spouse and the father-in-law. The mother-in-law is not included in the household size because she does not have income and the parent has no legal obligation for her support.

(4) Net available resources for primary child support is determined by subtracting from each parent's net income the amount of self support reserve determined for that parent under this section.

AUTH: Sec. 40-5-202 MCA
IMP: Sec. 40-5-209 MCA

Rationale: ARM 46.30.1537, now repealed, attempted to address the issue of low income parents by providing that the guideline determination of support would not be adhered to if the effect was to reduce a parent below the federal poverty level. Thus, it was intended to create a self-support reserve for the parent of at least the poverty index amount. The self support reserve, of course, was to permit the parent to maintain his or her standard of living at least up to the level of poverty and not below. The problem with the concept was in the application. It was necessary to completely calculate the child support obligation before it could be determined a low income adjustment was necessary. Also, the guideline did not provide for other members of the low income parent's household.

To correct this problem, guidelines from other states were reviewed to determine if there was a better and more equitable way to provide for low income obligor parents. The proposed rule relies upon the Melson formula used in the state of Delaware. That formula provides for more than just low income obligor parents. It is a complete guideline for use in all cases. It was initially developed by Delaware Family Court Judge Melson in 1979. The basic principles of Melson are as follows.

1. Parents are entitled to keep sufficient income for their most basic needs to facilitate continued employment.

2. Until the basic needs of children are met, parents should not be permitted to retain any more income than required to provide basic necessities for their own self support.
3. Where income is sufficient to cover the basic need of the parents and all dependents, children are entitled to share in any additional income so that they can benefit from the obligor parent's higher standard of living.

Borrowing from Melson, this new rule starts with net income. After determining net income for each parent, a "self support reserve" is subtracted from each parent's income. This reserve represents the minimum amount required for an adult to meet his or her own subsistence requirements. That minimal amount is presumed to be equal to the federal poverty index level. In so far as the poverty index is published annually, the allowance is always a current reflection of need. Only after the parent is assured of this minimal amount will the child support obligation be established.

By the way of example, the poverty index figures for the year 1991 are as follows:

Family Size	Monthly Amount
1	$ 551.67
2	740.00
3	928.33
4	1,116.67
5	1,305.00
6	1,493.33
7	1,681.67
8	1,870.00

(for each additional family member above add $188.33)

This new rule also makes it easier to provide for prior children and other dependents for whom the parent has a legal responsibility. The other dependents may in some cases be adults who were not even considered in the original guidelines. For the prior existing children, the original guidelines made it necessary to calculate a "dummy" support order. The "dummy" support order was then subtracted from a parent's income to arrive at net income available for the child in the action before the court. The problem in calculating the "dummy" order is that information relating to other parents of the prior children was generally unavailable. In the absence of such information, many practitioners failed to perform the dummy calculations. When this occurred, the parent was often deprived of the ability to provide support for the prior children.

The proposed rule insures that prior children's support needs are met. It does this by including prior children as part of

the parent's self support reserve. Likewise, if the parent has other legal dependents, i.e., the parent is the legal guardian of an incapacitated or invalid adult relative, that other dependent is also made part of the household.

Also provided in this new rule is the situation where a new spouse or other adult in the parent's household, who is not necessarily a legal dependent, provides income to the household which reduces the parent's share of living expenses. This was not addressed in the original guidelines except to provide at ARM 46.30.1543 that this could be a reason for variance from the guidelines. The guidelines now takes this matter into consideration by including those persons in the parent's household. For example, if the parent is cohabitating with another working adult, the self support reserve (the poverty index figure for a two member family) is reduced to one-half to account for economies of scale in living expenses.

[RULE VIII] PRIMARY CHILD SUPPORT NEED (1) "Primary child support need" means the minimum amount of money that a child requires for food, shelter, clothing and medical needs. These guidelines presume the basic primary child support need to be an amount which corresponds to 30 percent of the self support reserve determined for a one member household for the first child, 20 percent of the same level for each of the second and third children and 10 percent for each additional child.

(2) The basic primary child support need may be supplemented as provided in other sections of these guidelines.

AUTH: Sec. 40-5-202 MCA
IMP: Sec. 40-5-209 MCA

Rationale: The Melson guidelines used by the state of Delaware are premised upon the principle that until the basic needs of children are met, parents should not be permitted to retain any more income than that which is necessary to meet their own subsistence needs. (See the comments following proposed [Rule VII] for a general discussion of the Melson guidelines.)

In adopting the Melson self support reserve for the parents this rule adopts a corresponding primary support need for children. Like the self support reserve, the primary support need amount represents the minimum amount required to maintain a child at subsistence levels. The "total" primary child support needs include such factors as extraordinary medical expenses for the child which are supplemental to the child's subsistence needs.

By way of example, using the 1991 poverty index, (refer to rationale in [Rule VII]) the following basic primary child support needs are presumed:

$166 for 1 child ($551.67 x 30% = $166)
$276 for 2 children ($551.67 x 20% = $110 + $166)
$386 for 3 children ($166 + $110 + $110)
$441 for 4 children ($551.67 x 10% = $55 + $166 + $110 +$110)

46.30.1525 ~~ADJUSTMENTS TO BASIC CHILD SUPPORT~~ SUPPLEMENTS FOR PRIMARY CHILD SUPPORT NEED (1) The basic primary child support obligation may be supplemented upon the following conditions:

(a) if a child support obligation is to be calculated based in part on the earnings of a custodial parent and that parent must incur child care expenses for that child as a prerequisite to employment, the reasonable costs of child care should be pro-rated between the parents and added to supplement the basic child support obligation~~,~~;

(i) ~~D~~determination of reasonable monthly child care costs may be based on annualized, average costs of receipted expenses~~,~~ or when the history of such expenses are not available, upon estimates based on the average necessary monthly costs of such service. The value of the federal income tax credit for child care should be subtracted to arrive at a figure for net costs ~~which~~ as calculated by IRS form 2441. Net costs should be pro-rated between the parents on the same basis as the basic support obligation.

~~(b) When a parent or parents are providing health or medical insurance coverage for the child, the costs incurred for the child's portion of the premium should be allocated between the parents in proportion to income. Once the parent's share of the child's support needs is determined, the parent paying the premium shall be given a credit for the premium.~~

(~~c~~b) if "~~E~~extraordinary medical expenses" are incurred on behalf of a child which are likely to reoccur on a periodic basis, those expenses should be pro-rated between the parents and added to supplement the basic child support obligation. Extraordinary medical expenses include physical therapy, special education, mental disorders, and any other expenses to treat chronic~~,~~ or unusual health problems.

(i) ~~T~~the amount to be paid each month for extraordinary medical expenses may be determined by adding a monthly average of past expenses if future costs are expected to be comparable.

AUTH: Sec. 40-5-202 MCA
IMP: Sec. 40-5-209 MCA

Rationale: The amendments to this rule are necessary to conform terminology with several new rules which refer to "primary child support need". The amended rule also removes the contents of subsection (b). Those same contents are relocated as part of proposed [Rule IX] which expands the provision for health insurance coverage.

[RULE IX] MEDICAL NEEDS Under 40-4-204 and 40-6-116, MCA, child support orders are to include an allocation of health insurance coverage for children. When a parent or parents are providing health or medical insurance coverage for the child, the costs incurred for the child's portion of the premium should be added to the child's primary support need. Once the parent's share of the primary child support need is determined, the parent paying the premium shall be given a credit for the premium against the primary child support payment. Orders to provide health insurance coverage should apportion uninsured medical or health needs of the child between the parents at the same basis as the primary child support need is apportioned. If health or medical insurance is not available to the parent as provided in those statutes, then the support order should apportion the child's entire health needs between the parents at the same rate as the primary child support need until such time as health insurance does become available. In all cases, provisions for health insurance needs of the child must be included in all support orders and modifications of existing support orders.

AUTH: Sec. 40-5-209 MCA
IMP: Sec. 40-4-204 and 40-6-116 MCA

Rationale: Federal regulations at 45 CFR 302.56 (c)(3) require the guidelines to provide for a child's health care needs through health insurance coverage or other means. In Montana health insurance coverage is required under sections 40-4-204 and 40-6-116, MCA. However, health insurance is not referenced in the guidelines other than to give credit when coverage is provided. To insure compliance with federal requirements the provision for health insurance coverage must be contained in the guidelines. Thus it is necessary to add this new rule which incorporates the federal requirement by reference to existing law.

[RULE X] DETERMINATION OF EACH PARENT'S SHARE OF THE PRIMARY CHILD SUPPORT NEED Divide each parent's net available resources for child support, as provided in [Rule VII], by the total net available resources. The resulting percentage establishes the burden which each parent should carry with respect to the primary child support needs of their children. This percentage should then be multiplied by the total primary child support need in order to determine the primary support obligations of each parent. In no instance shall the parent's primary support obligation exceed the net resources available for child support, except as provided in [Rule XIII].

AUTH: Sec. 40-5-202 MCA
IMP: Sec. 40-5-209 MCA

Rationale: After a parent's net available resources for a child are determined and after the child's primary needs are

established, this rule prorates the primary support need between the parents on the same ratio as each parent is able to make net resources available for the child. For example, if parent A has two-thirds of the resources, then parent A should pay two-thirds of the child's primary support need, including any child care and extraordinary medical expenses. This rule is necessary in order to establish the prorationing of support among parents.

[RULE XI] STANDARD OF LIVING ADJUSTMENT (SOLA) (1) The purpose of SOLA is to insure that the child enjoys, to the extent possible, the standard of living to which the child would be accustomed if the parents were living in the same household. If a parent has income available after deducting his or her self support reserve and the parent's share of the total primary child support need, a proportion of that remaining income is applied to additional child support.

(2) To determine income available for SOLA, subtract from the parent's net resources available for support, as provided in [Rule VII], the parent's share of the total primary child support need as provided in [Rule X].

(3) If income is available for SOLA, multiply such income by the percentage from the following table which corresponds to the number of children for whom support is being determined.

Number of Children	SOLA %
1	14%
2	21%
3	27%
each additional child	4%

(4) The total amount payable by a parent as SOLA shall not exceed 50 percent of the parent's income available for SOLA unless there is a prior finding of specific need.

(5) Upon determining the total amount payable by a parent for SOLA, calculate SOLA and add it to the total primary support obligation.

AUTH: Sec. 40-5-202 MCA
IMP: Sec. 40-5-209 MCA

Rationale: For a general understanding of the rationale for this rule, refer to proposed [Rule VII and VIII] and the respective rationale to both rules. After a primary support obligation is calculated under those rules and supplemented as provided elsewhere in the guidelines, a percentage of the parent's remaining income is also allocated to the child. This standard of living allowance (SOLA) enables the child to benefit from the higher living standard of the parent.

The percentages assigned to SOLA were devised by adjusting the percentage tables in the original guidelines to reflect removal of the self support reserve. Once the reserve was

removed, the remainder was compressed into a single set of percentages. Comparison of final child support awards determined under the original version and this version of the guidelines will show the consistency of the adjustments.

Parents with large income need not worry that application of SOLA will result in the distribution of their excess wealth to their children. A parent may rebut the presumed applicability of SOLA by showing that its mechanical application would produce a support amount that far exceeds what is necessary to maintain his or her child's standard of living at a level commensurate with that of the parents. In doing so, courts and administrative hearing officers should be cautioned not to freeze the child's living standard at the pre-divorce level. A parent's support obligation should be set at an amount that will permit the child to benefit from the parent's enhanced post-divorce lifestyle. That is, in rebutting the applicability of SOLA the court or hearing officer should begin by determining the enhanced needs of the children.

This means, that for high income families, more than just mere essentials should be considered. A child's enhanced need includes all that is necessary for the children to share in the heightened standard of living of their more affluent parents. These enhanced needs should be reduced to a dollar value which should then be ordered to be paid by the parents.

[RULE XII] TOTAL MONTHLY SUPPORT AMOUNT (1) The total monthly support amount is based on the primary support obligation of each parent, with supplements, if any, plus the SOLA obligation. The total monthly support amount is divided equally among the children, but is subject to [Rule XIII]. The actual amount of monthly support to be paid depends on the custody arrangement for the children and the child support obligation of each parent.

(2) In the usual case of sole custody, the custodial parent should retain his or her child support obligation and the noncustodial parent shall pay his or her total monthly child support obligation to the custodial parent or to such other person or agency entitled to receive the payment.

(3) When there is split custody, i.e., where a parent has physical custody of one or more, but not all of the children, each parent shall retain that share of the support obligation owed to the child or children in his or her custody. After such retention, if one parent's obligation is greater than that owed by the other, the difference between the amount owed by the parents shall be paid by the parent owing the greater amount to the other parent.

(4) Where there is a serial family, i.e., when a parent with prior existing children later incurs a child support obligation as a result of a subsequent family or paternity action, refer to [Rules VI or VII] as may be appropriate.

(5) In those cases where extended visitation/shared physical custody is awarded, an adjustment to the primary

child support need is appropriate. Extended visitation/shared physical custody occurs when a child spends more than 30 percent of his or her days and nights each 365 day calendar year with the parent who in sole custody cases would pay over his or her share of the child support obligation to the primary custodian.

(a) To adjust for extended visitation/shared physical custody, reduce the payor parent's share of the basic primary child support need by one percent for each percent of time in excess of 30 percent. For example, the basic primary child support need is $400.00. Parent B has the child 40 percent of the time. Parent B is responsible for 75 percent of the primary child support need or $300.00 ($400.00 X 75 percent). Reduce that amount by 10 percent (40 percent of the time with child minus the 30 percent visitation threshold) to arrive at the parent's adjusted share of the primary child support need in the amount of $270.00. The parent's proportionate share of supplemental support needs should then be added to this sum.

(b) If an adjustment is given for extended visitation/shared physical custody arrangements, the support order should provide that if the arrangement is not exercised, the support payment, without further order of the tribunal which issued it, shall be the amount due under the guidelines for sole custody as provided in subsection (8) of ARM 46.30.1507.

AUTH: Sec. 40-5-202 MCA
IMP: Sec. 40-5-209 MCA

Rationale: This new section is basically a rewrite of the now repealed ARM 46.30.1519. The rewrite was made necessary, in part, because of the new section creating a standard of living adjustment. Subsection (3) was formerly contained in ARM 46.30.1531 which has also been generally revised. There were no substantial changes in the move from the old rule to this one.

Subsection (4) was added to provide for an adjustment to the monthly support award when extended visitation/shared physical custody is also awarded. Application of the guidelines may be inadequate when extended visitation/shared physical custody is ordered because costs attributed to the child for housing, household goods, clothing and transportation are likely to increase. Investing in Children by Thomas Espinshade estimates that, overall, costs related to children are 35% higher when two homes are maintained for the children. The largest share of these increased costs, without an adjustment, will be borne by the secondary custodian out of proportion to the amount of time the child spends with the secondary custodian. For example, the secondary custodian may acquire a larger home with a second bedroom for the child. The secondary parent will need to maintain the home for the entire year even though the child will spend only a third of the year with that parent. Therefore, some form of credit should be given to the secondary parent to adjust for these increased costs so

that the burden is borne proportionately between the parents based on the amount of time the child spends with each parent.

For the purpose of this rule, extended visitation/shared physical custody occurs when the time spent with the secondary parent exceeds 30% of the year. Times of 30% or less are considered under these guidelines to be "sole custody" with an award of traditional visitation rights to the other parent. The 30% threshold between sole custody and extended visitation/shared physical custody is based on the Espinshade studies. The rule defines 30% as the number of days with overnights that the child spends with the parent. This is to preclude argument that the 30% represents a cumulative amount of partial visitation periods of less than a day and night.

[RULE XIII] MINIMUM SUPPORT OBLIGATION (1) Except for parents with extremely low net income, a specific minimum contribution towards child support should be ordered in all cases even though a parent does not have sufficient net income to meet their own self support reserve needs. This minimum contribution is determined as follows:

(a) if net income is less than one-third of the parent's self support reserve, a zero support order is appropriate;

(b) if net income is equal to or greater than one-third of the parent's self support reserve but less than two-thirds, the parent should contribute an amount equal to five percent of his or her net income; or

(c) if net income is equal to or greater than two-thirds but less than the parent's self support reserve, the parent should contribute seven percent of his or her net income.

(2) A minimum contribution table is provided as part of the child support worksheet in ARM 46.30.1549. The table represents the midpoint of the range between one-third and two-thirds times five percent and the midpoint of the range between two-thirds and the full self support reserve times seven percent. The respective midpoints are expressed in a dollar amount which should be ordered as the parent's minimum contribution towards the support of his or her children.

(3) For parents who have net income which equals or exceeds the parent's self support reserve but which is less than a child's total primary support need, the parent's minimum contribution is:

(a) the difference between net income and the parent's self support reserve, however;

(b) the parent's minimum contribution shall not be less than an amount equal to seven percent of the parent's net income.

(4) The minimum contributions under this section are presumptive and may be rebutted by the circumstances of a particular case, provided there is an appropriate finding on the record.

(5) Although this rule expresses the minimum contribution as a percentage of net income, for ease of enforcement of this support order and for the sake of consistency the support

order should express the percentage in a specific dollar amount.

(6) A minimum contribution order is applicable only when a parent does not have sufficient net income to meet his or her own self support reserve. It is also applicable when a parent has sufficient income for his or her self support reserve but income is not sufficient to meet the child's total primary support needs. However, in some cases calculated under the guidelines, the payment level may properly be less than the minimum contribution amount, e.g., when the incomes of the parents are near equal, or in split custody cases.

AUTH: Sec. 40-5-202 MCA
IMP: Sec. 40-5-209 MCA

Rationale: These guidelines are premised upon the principle that until a parent is able to meet his or her self support reserve, the parent's income will not be subject to child support. This rule, nevertheless, establishes another principle. That is, unless the parent has virtually no income at all, all low income parents should contribute something towards the support of their children. To give guidance as to how much low income parents should minimally contribute, this rule provides a simple mathematical formula. Parents with extremely low income or no income would have a zero support order while parents who are not quite able to cover their self support reserve would pay seven percent of net income. Parents in between these two circumstances would pay five percent.

For those parents who have sufficient income to meet their self support reserve but who do not have sufficient income to meet his or her share of the children's primary support need, these guidelines also provide a minimum contribution. That is, since parents who are unable to meet their self support needs are required to pay seven percent of net income, those parents who are able to take care of self support needs should also pay at least seven percent.

[RULE XIV] EFFECT OF CESSATION OF SUPPORT FOR ONE CHILD

(1) These guidelines are based on the presumed costs of raising a given number of children in a household. Therefore, when support for more than one child is ordered under these guidelines and the duty to support one of the children terminates (e.g., child emancipates), the support order should not automatically be reduced by dividing the support amount by the number of children. Rather, the support order should be calculated separately for each combination of children. For example a support order for three children is calculated to be $600.00. Upon emancipation of the eldest child, the amount is not reduced by one-third. Instead, the parent should automatically pay the amount appropriate to guideline levels for two children.

AUTH: Sec. 40-5-202 MCA
IMP: Sec. 40-5-209 MCA

Rationale: The guidelines incorporate economies of scale for the number of children in a family unit. For example, when a second child is added to a one child household, expenses attributable to the children do not double. Likewise, when one child leaves the family unit, the expenses are not cut in half. Attorneys and private parties who draft child support orders, however, have forgotten or do not understand this principle. Consequently, this amendment is intended to make the guidelines work the way it originally was intended to work.

[RULE XV] SUPPORT PAYABLE IN MONEY (1) The child support order is to be paid in money.

(2) Gifts, clothing, food, payment of expenses, etc., in lieu of money will not be allowed as a credit for payment of a child support obligation except by court or administrative order.

(3) Unless otherwise ordered, direct payments to the child or the custodian will not be allowed as credit for payment of a child support obligation payable through the clerk of court, the child support enforcement division or other entity as specified in the court order.

AUTH: Sec. 40-5-202 MCA
IMP: Sec. 40-5-209 MCA

Rationale: Although not expressly set out in child support statutes, case law supports the proposition that support must be paid in money unless the support order permits otherwise. A parent may not unilaterally substitute clothing, food and so forth for the money payments due to the custodial parent. This rule merely gives recognition to these case law developed principles and they are included in the guidelines to give information concerning the law to parents who may not otherwise have access to the information.

[RULE XVI] CREDIT FOR BENEFITS (1) Social security benefits which are based on the earning record of the non-custodial parent shall be considered in establishing new support orders or modification of existing orders under the following conditions:

(a) only the benefits received by the parent are to be included in that parent's gross income;

(b) the parent's obligation is satisfied if the amount of the child's benefit for a given month is equal to or greater than the parent's child support obligation. Any benefit received by the child for a given month in excess of the child support obligation is not treated as an arrearage payment or as future support; and

(c) the parent must pay the difference if the amount of the child's benefit for a given month is less than the parent's child support obligation.

AUTH: Sec. 40-5-202 MCA
IMP: Sec. 40-5-209 MCA

Rationale: This new rule is added to explain existing guideline policy. The principles underlying the rule are in conformity with the apparent majority of case law in various states. Those principles indicate that dependent benefits such as social security are to be considered as a credit for the child support obligation.

46.30.1543 ~~EXCLUSION FROM GUIDELINE~~ ADDITIONAL GROUNDS ~~FOR VARIANCE~~ (1) ~~These factors may vary the strict applications of the guidelines~~ In addition to other reasons for variance set out in these guidelines, the following is a non-exclusive list of factors which may be used on a case-by-case basis to rebut the guideline amount of child support:

(a) ~~equitable~~ distribution of property between parents and to the child;

(b) tax consequences of property distribution;

~~(c) income derived from other household members, step parents or subsequent spouses;~~

~~(d) families having more than six children;~~

(e~~c~~) educational expenses for a child ~~(those~~ incurred for private, parochial, or trade schools, or other schools where there is tuition or other costs beyond state~~/~~ or local tax contributions~~);~~

(~~f~~d) specific findings of fact under ~~MCA sections 40-5-204(2)~~ 40-4-204(2) or 40-6-116(5), MCA, which shows that application of the guideline is inequitable;

~~(g) shared physical custody of one or more children; and~~

(h~~e~~) periods of extended visitation of 30 or more consecutive days~~.~~, considering child related fixed costs of custodial parent;

(f) geographical costs-of-living differential;

(g) residence of child with third party;

(h) overall financial condition of a parent;

(i) custodial parent and child have continuing right to occupy the former family home free of costs or at substantially reduced costs;

(j) allocation of dependent tax exemptions to the non-custodial parent;

(k) adjustment for older children in the 16 to 17 age bracket;

(l) long distance visitation cost; and

(m) earnings of a child if it amounts to a large sum of money.

~~(2) The guideline tables do not apply to incomes greater than $39,500.00. When incomes exceed this amount the first $39,500.00 should first be applied in the appropriate column and line which shows the number and age of the child to arrive~~

~~at a minimum support amount. The minimum support amount should be supplemented out of the remaining parental income. The amount of the supplement must be determined on a case-by-case basis.~~

AUTH: Sec. 40-5-202 MCA
IMP: Sec. 40-5-209 MCA

Rationale: The purpose of this rule is to define appropriate situations which may rebut application of the guidelines in particular cases and therefore would be grounds for varying from the guidelines determination. These grounds are in addition to those set out elsewhere in these guidelines.

Subsection (1)(a): In the give and take of divorce or legal separation proceedings, real or personal property may be exchanged in return for either a higher or lower child support award. When this occurs an adjustment from the guidelines amount may be appropriate.

Subsection (1)(b): In distributing property between parents and the child, particularly for high income families, the distribution may have tax consequences which reduce or increase a parent's income available for support. The amendment clarifies the existing rule to this effect.

Subsection (1)(c): The original content of this subsection was removed and made part of the considerations in establishing a parent's self support allowance. See generally [Rule VII]. This amended subsection was formerly subsection (1)(e).

Subsection (1)(d): The original content of this subsection was removed. This provision was rendered inconsequential by the amended guidelines which have no limitation on the number of children. This amended subsection was formerly subsection (1)(f). The original text was revised to correct a wrong citation to the MCA.

Subsection (1)(e): [Rule XI] addresses extended visitation, however, it does not change the need for this subsection. The extended visitation referred to in the new section is an accumulation of visits greater than 30 percent of the year. In this subsection the 30 consecutive days may be the only visitation the parent has with the child, a period considerably less than 30 percent of the year. When extended visitation of 30 consecutive days occurs, an adjustment or abatement of the guideline support amount may be appropriate. For example, the custodial parent may have some savings because he or she is not providing meals for the child. At the same time the parent exercising visitation with the child will have to pay 100 percent of the child's food costs for the 30 day period. If an abatement is ordered, it is recommended that the abatement be conditional upon the non-custodial parent actually exercising the extended visitation period.

In determining how much the abatement should be, the court or administrative hearing officer should take into consideration the custodial parent's fixed costs. For example, rent and utilities will not decrease because the child is visiting the other parent.

Subsection (1)(f): The Montana Supreme Court in In re the Marriage of Mitchell, 746 P.2d 598, 44 St. Rptr. 1936 (1987) established that a cost-of-living differential may be appropriate in some cases. In Mitchell, the non-custodial parent resided in Alaska. The Court judicially recognized the higher cost-of-living in Alaska and permitted a variance from the guidelines. This new subsection merely sets out what the Supreme Court has already determined.

Subsection (1)(g): The original subsection was removed and made part of [Rule XI]. The new, renumbered subsection is concerned with the possibility that a child may reside with a third party. When a child resides with a third party, e.g., a grandparent or aunt, the costs attributed to the child and each parent's share may be increased or decreased depending on the circumstance. For example, when one of several children resides with the grandmother, the guidelines and the economies of scale for the total number of children will be interrupted. Also, the support order should require each parent to contribute his or her share of support to the third party or, at the very least, to make an arrangement to insure that the child's needs are adequately met by both parents.

Subsection (1)(h): The overall financial condition of a parent may be a factor to consider on a case-by-case basis. For example, a parent may have extraordinary business or personal expenses which require the parent to invest a substantial part of his monthly income to earn income for the next month. Specifically a logger purchases a four-wheel drive, heavy duty truck which he uses to get to and from his employment. The use of the truck is limited to transportation, something most employed parents must have. However, unlike most parents, in order to get to his job site, the logger must incur added expenses to own and operate a four-wheel drive truck. Therefore, the logger will incur high monthly expenses for truck payments, gas and oil, vehicle maintenance and increased insurance premiums. This monthly investment is necessary for the logger to earn income for the next month. In cases like this, the differential between ordinary transportation needs and the logger's extraordinary needs may be reason for a variance from the guidelines.

Subsection (1)(i): It is common in many separation and divorce cases for the custodial parent and child to be given a continuing right to reside in the family home. The non-custodial parent pays the rent or mortgage so that the custodial parent's housing costs are reduced in whole or in substantial part. When this occurs an adjustment from the

guidelines amount may be appropriate. That is, the guideline amount includes housing costs attributed to the child which are shared proportionately between the parents. When one parent is bearing all or most of the costs of housing then the other parent may experience a savings on what would have been his or her proportionate share.

Subsection (1)(j): Under IRS rules, the parent having custody of the child is entitled to the dependent's tax deduction. Calculation of support under the guidelines assume that the custodial parent will indeed take the deduction. However, the deduction may be assigned by agreement or court order to the non-custodial parent. When this occurs, the non-custodial parent will have more after tax income which can be applied to child support. The custodial parent will have less after tax income which will reduce the parent's ability to contribute to the child. Therefore, an adjustment may be appropriate.

Subsection (1)(k): The guidelines are based on an average for all children without regard to age. However, as pointed out by Thomas Espinshade in his study, Investing in Children (Urban Institute Press: Washington, 1984) expenditures for older, teenage children exceed average expenditures for all children by approximately 10 to 23 percent. Therefore, the court or hearing officer may increase child support for an older child by an amount up to 10 to 23 percent of the guideline amount.

An example of how the adjustment should be made is as follows:

> An award for one child, age 16, under the guidelines is $200.00. The award could be increased by 10 percent or $20.00 extra for a total of $220.00. If all children subject to the order are not older children, the adjustment will be prorated as follows: Assume the award for three children is $300.00. If one of the children is 16 or 17 years of age, assign one-third of the total support award to the older child ($100) and increase that portion of the award by 10 percent to $110. The total award would then be $310.00. NOTE: This prorated method is limited to this rule and should not be followed in [Rule XIV].

Subsection (1)(l): This new subsection addresses long distance visitation costs. For example, when parents reside at long distances from each other the costs for visitation (airplane, bus or train tickets) may be high enough to deter visitation. It is generally concluded that frequent and regular visitation between parent and child is in the best interest of the child. Therefore, to prevent a possible deterrence of visitation a variance may be appropriate.

Subsection (1)(m): Children may be actors, musicians or be engaged in other activities which earn large sums of income. In such situations, full application of the guidelines may cause an inordinate financial windfall for the child.

Subsection (2): To conform with federal regulations, the original text of this subsection was deleted. High income parents are not distinguished as a class in the amended guidelines.

46.30.1549 SUPPORT GUIDELINES TABLE/FORMS (1) The CSED has developed a parent's financial affidavit for use in child support determinations. The affidavit, when completed, will give sufficient information to calculate a child support award under the guidelines, including a determination of the parent's household size for calculating the parent's self support reserve. The affidavit will also contain information pertaining to grounds and justification for a variance from the guideline. ~~The following table and worksheets are to be used in the calculation of child support guidelines.~~

~~(a) SUPPORT GUIDELINES TABLE~~

	~~$0 — $4,499~~	~~$4,500-$8,499~~	~~$ 8,500-$12,249~~	~~$12,250-$16,499~~	~~$16,500-$19,999~~	~~$20,000-$27,999~~	~~$28,000-$39,499~~	~~$39,500+~~
~~One Child~~								
~~0-11~~	~~21.8~~	~~21.8~~	~~21.4~~	~~19.7~~	~~18.0~~	~~17.4~~	~~16.3~~	~~13.6~~
~~12-17~~	~~27.0~~	~~27.0~~	~~26.5~~	~~24.4~~	~~22.3~~	~~21.5~~	~~20.2~~	~~16.8~~
~~Two Children~~								
~~0-11~~	~~33.8~~	~~33.8~~	~~33.2~~	~~30.7~~	~~28.0~~	~~27.1~~	~~25.3~~	~~21.1~~
~~12-17~~	~~41.8~~	~~41.8~~	~~41.0~~	~~38.0~~	~~34.6~~	~~33.5~~	~~31.3~~	~~26.1~~
~~Three Children~~								
~~0-11~~	~~42.4~~	~~42.4~~	~~41.5~~	~~38.4~~	~~35.1~~	~~33.8~~	~~31.7~~	~~26.5~~
~~12-17~~	~~52.4~~	~~52.4~~	~~51.3~~	~~47.5~~	~~43.4~~	~~41.8~~	~~39.2~~	~~32.8~~
~~Four Children~~								
~~0-11~~	~~47.7~~	~~47.7~~	~~46.8~~	~~43.4~~	~~39.6~~	~~38.2~~	~~35.7~~	~~29.8~~
~~12-17~~	~~59.0~~	~~59.0~~	~~57.9~~	~~53.6~~	~~48.9~~	~~47.2~~	~~44.1~~	~~36.9~~
~~Five Children~~								
~~0-11~~	~~52.1~~	~~52.1~~	~~51.1~~	~~47.3~~	~~43.2~~	~~41.6~~	~~38.9~~	~~32.6~~
~~12-17~~	~~64.4~~	~~64.4~~	~~63.1~~	~~58.4~~	~~53.4~~	~~51.4~~	~~48.1~~	~~40.3~~
~~Six Children~~								
~~0-11~~	~~55.7~~	~~55.7~~	~~54.6~~	~~50.5~~	~~46.2~~	~~44.5~~	~~41.6~~	~~34.9~~
~~12-17~~	~~68.9~~	~~68.9~~	~~67.5~~	~~62.4~~	~~57.1~~	~~55.0~~	~~51.4~~	~~43.1~~

~~For children in different age categories, pro-rate based on total number of children. Example: for one child age 7, one age 14, annual income of $18,000, use percentages for two children, divided by two — (28.0 / 2) + (34.6 / 2) =~~

~~(b) WORKSHEET #1~~

GUIDELINE WORKSHEET

		Mother	Father
1.	Gross income (annualized)		
	a. wages, salaries, commissions		
	b. net earnings self employment		
	c. pensions, social security		
	d. unearned income (interest, dividends, alimony, etc.)		
	e. imputed income		
	f. other		
	g. TOTAL	$	$
2.	Net value of assets		
	a. automobiles		
	b. recreational vehicles		
	c. real estate		
	d. other		
	e. other		
	f. other		
	g. TOTAL	$	$
3.	T-Bill interest rate as of		%
4.	Income attributed to assets	$	$
5.	TOTAL GROSS INCOME	$	$
6.	Allowable exemptions (annualized)		
	a. pre-existing obligations (for other families)		
	* child support		
	* health ins. premiums (adult's portion excluded)		
	b. alimony/spousal support		
	c. TOTAL	$	$
7.	Deductions (annualized)		
	a. federal taxes		
	b. state taxes		
	c. FICA		
	d. union dues		
	e. mandatory retirement		
	f. required employment exp. (tools, uniforms, etc.)		
	g. other		
	h. TOTAL	$	$
8.	Net available resources (line 5 - lines 6c + 7h)	$	$

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	Mother	Father
9. Combined net resources	$	
10. Parental share of resources	%	%
11. Percentage from table		%
12. Basic support need (line 9 x line 11)		
13. Additions to basic need (annualised)		
a. health ins. premium (child's portion)		
b. child care costs		
c. extraordinary expenses		
d. other		
e. TOTAL		
14. Combined additions		
15. Total support need (line 12 + line 14)		
16. Parental Share of Need (line 15 x line 10)		
17. Adjusted parental share (line 16 - line 13 payments)		
18. Monthly support obligation (line 17 ÷ by 12 months)	$	$

* * * * * * * * * * * * *

The non-custodial parent will pay over his/her share of line 18 to the custodial parent.

Comments, explanations, other factors:

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~~(c) WORKSHEET #2~~

~~SPLIT CUSTODY~~

	~~Mother~~	~~Combined~~	~~Father~~
~~1. Annual Child support obligation (line 15, Worksheet #1)~~			
~~2. Percent of resources (line 3 divided by line 4, Worksheet #1)~~	~~%~~		~~%~~
~~3. Parent's share of children (number of children with each parent divided by total children)~~	~~%~~		~~%~~
~~4. Pro-rated basic obligation for children with each parent (multiply line 1 by line 3)~~	~~%~~		~~%~~
~~5. Mother's adjusted obligation (line 2, times line 4, of father column)~~			
~~6. Father's adjusted obligation (line 2, times line 4, of mother column)~~			
~~7. Monthly adjusted support obligation (lines 5 and 6 each divided by 12)~~			

~~* * * * * * * * * * * * * * *~~

~~8. Amount to be paid to other parent (subtract lesser amount on line 7 from the greater)~~			

(2) The completed child support worksheet will result in an established dollar amount payable as child support. In arriving at this result, the worksheet extracts and compiles information from the parent's financial affidavit. If a variance from the guidelines is granted, the worksheet will also show what the support award would be without the variance. Included for use with the worksheet are tables for calculating the parent's self support reserve, a child's primary support need, SOLA and a minimum support obligation for low income parents. To assure that these tables are current, the child support enforcement division will republish the worksheet with tables annually in the month of April. The worksheet with tables will be identified by the year of publication or republication.

(3) The parent's financial affidavit and child support worksheet, or a replica of those forms with a similar format and containing the same information, must be used in all child support determinations under the guidelines.

(4) Copies of the parent's financial affidavit and child support worksheet may be obtained from the Department of Social and Rehabilitation Services, Child Support Enforcement Division, P.O. Box 5955, Helena, MT 59604 or any branch office.

AUTH: Sec. 40-5-202 MCA
IMP: Sec. 40-5-209 MCA

Rationale: See generally the comments to amended ARM 46.30.1507 and [Rule IV]. Those rules require certain specific findings of fact whenever the guidelines are rebutted and consequently a variation from the guidelines amount is granted. To ease the application of those rules, the rules provide that the necessary fact finding can be accomplished by incorporating a financial affidavit and guidelines worksheet as part of the support order. Consequently, it is necessary to revise this rule to add the required financial affidavit and to amend the worksheet to show the details of the guidelines determination both before and after a variance.

3. The rules 46.30.1519, 46.30.1531 and 46.30.1537 as proposed to be repealed are on pages 46-8287, 46-8295, 46-8296 and 46-8305 of the Administrative Rules of Montana.

AUTH: Sec. 40-5-202 MCA
IMP: Sec. 40-5-209 MCA

Rationale: These rules are being repealed because they have been rewritten and incorporated in other parts of these proposed rules.

4. The Child Support Enforcement Division (CSED) of the Department of Social and Rehabilitation Services is responsible under section 40-5-209, MCA for adopting guidelines for use in deciding child support awards. The CSED is also

responsible for periodically reviewing the guidelines and, if they become inadequate, the CSED is required to amend them as may be necessary. The guidelines were adopted and codified as sub-chapter 15, chapter 30, Title 46, ARM. Since their adoption, the CSED has found them to be inadequate. Therefore, the CSED proposes to amend the guidelines by revising or repealing some of the rules which make up the guidelines and by enacting several new rules.

The proposed changes to ARM 46.30.1501, 1507, 1543 and 1549 are necessary to conform the child support guidelines to federal regulations. Specifically, 45 CFR 302.56, effective May 15, 1991, requires the guidelines to include the following provisions which are not in the existing rules.

1. The guidelines are to be applied in all cases whether contested, by consent or by default.

2. Any variance from the guidelines must take into account the best interest of the child.

3. A support order which varies from the guidelines must show justification for the variance.

4. Any support order which does vary from the guidelines must show the amount which would have been ordered under the guidelines without the variance.

5. The guidelines must contain direction for when a variance may be appropriate.

6. The guidelines must apply to all parents without regard to level of income or other status of the parent.

The proposed changes to ARM 46.30.1549 and new proposed Rules I through XVI are necessary to implement recommendations made by a consultant from the American Bar Association (ABA) Child Support Project. The CSED contacted the ABA for assistance in solving several procedural and/or practical problems associated with use of the present guidelines. Those problems in general terms are:

1. The guidelines create economic hardships on low income parents, particularly low income parents with new families.

2. The guidelines make no allowance for the support needs of a parent's children of prior relationships for whom no support order exists.

3. The guidelines are extremely hard to apply in serial family situations to the extent that many child support practitioners ignore the serial family.

4. Inequities are created between parents when one or the other of the parents remarry and have subsequent children.

5. The guidelines do not sufficiently adjust for a parent's household size and for other members of the household who are in need of the parent's support or who, on the other hand, may contribute income to reduce the parent's household expenditures.

6. The provisions for high income parents do not effectively extend past incomes in excess of $39,500.00 and therefore are inadequate. Further, the failure to adequately provide for high income parents does not conform with federal regulations.

The ABA consultant compared the existing guidelines to model guidelines in use by various other states. From that effort, and a study of the guidelines themselves, the consultant concluded that the problems were inherent to this particular guideline model. Only through substantial changes could the problems be alleviated. Therefore, the ABA consultant recommended sweeping revisions to guidelines which the CSED now proposed to implement.

5. 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 Russell E. Cater, Chief Legal Counsel, Office of Legal Affairs, Department of Social and Rehabilitation Services, P.O. Box 4210, Helena, MT 59604-4210, no later than April 9, 1992.

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

Rule Reviewer

Director, Social and Rehabilitation Services

Certified to the Secretary of State March 2, 1992.

BEFORE THE BOARD OF OUTFITTERS
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the adoption of a new rule pertaining to water safety provisions) NOTICE OF ADOPTION OF NEW RULE I (8.39.704) SAFETY PROVISIONS

TO: All Interested Persons:

1. On December 26, 1991, the Board of Outfitters published a notice of proposed adoption of the above-stated rule at page 2539, 1991 Montana Administrative Register, issue number 24.

2. The Board has adopted the rule as proposed but with the following changes:

"8.39.704 SAFETY PROVISIONS ~~(1)~~ (4) Text will remain the same as proposed but is being renumbered.

~~(2)~~ (3) Text will remain the same as proposed but is being renumbered.

~~(3)~~ (2) Each watercraft, vessel, vehicle, primary, secondary and temporary base of operation with guests present will possess a basic first aid kit.

~~(4)~~ (1) Text will remain the same as proposed but is being renumbered."

Auth: Sec. 37-47-201, MCA; IMP, Sec. 37-47-201, MCA

3. The arrangement of the rule is being revised because the Board felt the proposed arrangement might be confusing to the public. The Board wanted to make clear that all outfitters and guides, not just watercraft outfitters and guides, are required to hold a current basic first aid or cardiopulminary resuscitation card.

4. No comments or testimony were received.

BOARD OF OUTFITTERS
IRVING "MAX" CHASE, CHAIRMAN

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

Annie M. Bartos
ANNIE M. BARTOS, RULE REVIEWER

Certified to the Secretary of State, March 2, 1992.

BEFORE THE LOCAL GOVERNMENT ASSISTANCE DIVISION
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the adoption of a new rule for the administration of the 1992 federal community development block grant program	))))))	NOTICE OF ADOPTION OF 8.94.3708 INCORPORATION BY REFERENCE OF RULES FOR THE ADMINISTRATION OF THE 1992 FEDERAL COMMUNITY DEVELOPMENT BLOCK GRANT (CDBG) PROGRAM

TO: All Interested Persons:

1. On January 16, 1992, the Department of Commerce published a notice of public hearing on the proposed adoption by reference of the above-stated rule at page 14, 1992 Montana Administrative Register, issue number 1.

2. The hearing was held on February 11, 1992, at 1:30 p.m., in the downstairs conference room at the Department of Commerce building, 1424 - 9th Avenue, Helena, Montana.

3. The Department has adopted new rule I (8.94.3708) exactly as proposed.

4. No members of the public attended the hearing, but the Department did receive four written comments during the public comment period provided for by the Administrative Procedure Act. A summary of those comments and the Department's responses to them follows:

COMMENT: Capital Opportunities, Bozeman: The proposed application guidelines for the economic development element of the CDBG program should be revised to allow for the lending of CDBG funds to microbusinesses (i.e. businesses employing 10 or fewer people). This change would complement the efforts of existing microbusiness development centers, which are funded by the Montana Board of Investments, and the Department of Commerce's Microbusiness Development Program. CDBG funds could be used to provide micro-loans (i.e. loans of $20,000 or less) for "gap financing" for these small businesses.

RESPONSE: By federal law microbusiness development centers are not, themselves, eligible applicants for CDBG funds. Any microbusiness program using CDBG funds, regardless of the amount of money involved, would have to meet all CDBG requirements for project management. Consequently, the administrative burden for the microbusiness program, the local community sponsoring a microbusiness program, the Department of Commerce, and, very importantly, the business being assisted, would be excessive compared to the benefits received.

Similarly, each applicant for a micro-loan of CDBG funds would have to satisfy all federal and state requirements such as providing a complete financial analysis, documenting the need for the funds and the existence of a financing gap, and hiring of low and moderate income persons. In addition, the limitations on the use of CDBG funds would make it difficult to meld CDBG micro-loans with matching funds from less restrictive micro-loan programs. Furthermore, in order to

ensure that economic development projects are financially feasible and meet federal, national objectives and eligibility requirements, the Department must review the application of every business assisted. Currently, the Department discourages applications involving loans of less than $100,000 due to the high administrative costs associated with the use of CDBG funds. This policy is based on 10 years' experience with the CDBG program.

The demand for CDBG funds for the type of projects funded since the beginning of the CDBG program in Montana has far exceeded the availability of funds. CDBG funds are being used to fill funding gaps in individual economic development projects as intended by Congress and as defined by the U.S. Department of Housing and Urban Development.

COMMENT: Capital Opportunities, Bozeman: CDBG program income or "payback funds" received by CDBG recipient communities should be made available for loans to microbusinesses.

RESPONSE: The use of program income must be consistent with federal program income regulations. As long as they meet program income requirements, recipient communities may use this income as they wish. The Department encourages communities to use program income funds for economic development projects including microbusiness lending.

COMMENT: Montana Department of Health and Environmental Sciences, Helena: The Department should modify the rule which prevents a county from receiving a CDBG grant for a new project within the county until any ongoing CDBG project for which the county was the applicant (such as for projects to be carried out by sub-county entities) are at least 75% completed. Although the rule's purpose of encouraging the timely expenditure of federal funds is legitimate, the rule unduly restricts the funding of high priority projects. The rule's objective could be better met by imposing sanctions on individual delinquent sub-county grant recipients rather than penalizing all other potential project sponsors within the county.

RESPONSE: The Department is responsible for assuring that CDBG recipients implement their projects in a timely manner. The U.S. Department of Housing and Urban Development, which administers the Act, is placing increasingly heavy emphasis on the need for CDBG recipients to promptly complete projects. Accordingly, since 1982 Montana's CDBG guidelines have incorporated minimum standards of performance which must be met in order for a previous grant recipient to reapply for CDBG funds. As proposed in the 1992 guidelines, the reapplication standard would require a recipient of a previous grant to meet the following requirements in order to apply for new grants:

a. The local government unit must have drawn down at least 75% of the nonadministrative CDBG funds from earlier grant awards or have completed all grant activities;

b. The local government unit must be in compliance with the project implementation schedule for the previous grant; and

c. There must be no unresolved audit or monitoring findings for the previous grant.

Under the federal Housing and Community Development Act only units of general local government, that is municipalities and counties, are eligible applicants for CDBG funds. As a consequence the Department does not have a direct legal relationship with a sub-county subrecipient and could not enforce sanctions against it.

COMMENT: Gallatin Development Corporation, Bozeman, and Bear Paw Development Corporation, Havre: The third and fourth comments endorsed the Department of Commerce's rule as proposed.

5. No other comments or testimony were received.

LOCAL GOVERNMENT ASSISTANCE DIVISION

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

Anne M. Bartos
ANNIE M. BARTOS, RULE REVIEWER

Certified to the Secretary of State, March 2, 1992.

BEFORE THE SUPERINTENDENT OF PUBLIC INSTRUCTION
OF THE STATE OF MONTANA

In the matter of the amendment of rule relating to guaranteed tax base (GTB)	))))	CORRECTED NOTICE OF AMENDMENT OF ARM 10.21.103, CALCULATION OF MILL LEVIES PER ANB & GTB AID

To: All interested persons

1. On December 12, 1991, the Superintendent of Public Instruction published notice of public hearing on the proposed amendment of the rules pertaining to guaranteed tax base at page 2346 of the 1991 Montana Administrative Register, issue number 23.

2. On February 13, 1992, the Superintendent of Public Instruction published notice of amendment of these rules at page 217 of the 1992 Montana Administrative Register, issue number 3.

3. The notice of ARM 10.21.103 is incorrect because section 20-9-167, MCA, was repealed by Sec. 56, Ch. 767, L. 1991. The corrected notice is as follows, new material underlined, deleted material interlined.

10.21.103 CALCULATION OF MILL VALUES PER ANB AND GTB AID PAYMENTS (1) - (6)(b) remains the same as noticed.

(7) Districts that adopt general fund budget amendments in accordance with sections 20-9-161 through 20-9-167~~6~~, MCA, are eligible for GTB aid on mills levied to pay the amount ~~calculated in 20-9-167(3), MCA~~ of the budget amendment, if:

(7)(a) - (11)(c) remains the same as noticed.

(AUTH: 20-9-369, MCA; IMP: 20-9-366 through 20-9-369, MCA)

4. Based on the foregoing, the Superintendent of Public Instruction hereby amends the rule.

Beda J. Lovitt
Rule Reviewer

Nancy Keenan
Superintendent
Office of Public Instruction

Certified to the Secretary of State March 2, 1992.

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

In the matter of the amendment of rule 16.24.410 setting day care center requirements for care of children under age two	NOTICE OF AMENDMENT OF ARM 16.24.410 (Day Care Centers)

To: All Interested Persons

1. On January 30, 1992, the department published notice of the proposed amendment of ARM 16.24.410 concerning diaper handling requirements for day care centers caring for children under two, at page 121 of the Montana Administrative Register, Issue No. 2.

2. The department has adopted the amendments as proposed.

3. No comments were received.

DENNIS IVERSON, Director

Certified to the Secretary of State March 2, 1992.

Reviewed by:

Eleanor Parker, DHES Attorney

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

In the matter of the amendment of rules 16.44.102, 16.44.105, 16.44.118, 16.44.120, 16.44.202, 16.44.302-306, 16.44.610, 16.44.804 and new rule I dealing with boiler and industrial furnace (BIF) regulations	)	NOTICE OF AMENDMENT OF RULE 16.44.306
	)	(Solid & Hazardous Waste)

To: All Interested Persons

1. On December 26, 1991, the department published notice at page 2567 of the Montana Administrative Register, Issue No. 24, to consider the amendment and adoption of the above captioned rules.

2. The Department of Health and Environmental Sciences is adopting a portion of the proposed amendments to ARM 16.44.306 at this time, leaving the balance of the proposed rulemaking for future action. The rule (1) incorporates by reference the most current (1991) issue of the Code of Federal Regulations (CFR), with the exception of subpart H and appendices I through X, and (2) implements Section 75-10-405, MCA, allowing the department to adopt regulations pertaining to the burning of hazardous waste in industrial furnaces and industrial boilers that are more stringent than federal regulations. Section 75-10-405 gives the department flexibility in adapting the federal hazardous waste burning regulations to the specific needs of the State of Montana.

Section 16.44.306, as finally amended, requires boilers and industrial furnaces burning hazardous waste as fuel to become fully permitted, rather than allowing interim status as do the federal rules. In the original notice of proposed rulemaking, the department proposed incorporating by reference the entirety of Subpart H of 40 CFR, part 266. However, the department received over five hundred written comments regarding those rules. Oral comments were received both at a public meeting attended by approximately 600 people and at a public hearing on January 27, 1992. The vast majority of the comments opposed the department's acceptance and adoption of Subpart H of 40 CFR.

After review of the comments the department determined that the federal rules, as written, do not adequately protect human health and the environment. Therefore, the department is taking a phased approach to the adoption of rules governing the burning of hazardous waste for fuel in industrial boilers and furnaces. The first rule to become final will be that rule disallowing interim status. That rule had unanimous support from the commenters. The department will, after full consideration of the technical comments received addressing the standards for burning of hazardous waste in the State of

Montana, go forward at a later date with additional amendments to the rules contained in the notice of proposed rulemaking filed with the Secretary of State on December 16, 1991.

3. The rule, as amended, appears as follows (in the amended rule, new material is underlined and material to be deleted is interlined):

16.44.306 REQUIREMENTS FOR RECYCLABLE MATERIALS

(1)(a) Same as proposed.

(b) The following recyclable materials are not subject to the requirements of this rule but are regulated under subparts C through ~~G~~ H G of 40 CFR Part 266, 40 CFR 266.101 and 266.103, and all applicable provisions in subchapters 1, 8, and 9 of this chapter:

(i) Remains the same.

(ii) hazardous wastes burned for energy recovery in boilers and industrial furnaces that are not regulated under subpart O of 40 CFR Part 264 or subpart O of 40 CFR Part 265 ~~(subpart D H~~, but are regulated under 40 CFR ~~Part 266)~~ 266.101 or 266.103;

(iii)-(v) Same as proposed.

(c) Same as proposed.

(2)-(4) Same as proposed.

(5) The department hereby adopts and incorporates by reference ~~subpart H of~~ 40 CFR ~~part~~ 266.101 and 266.103, except for the definition of "existing or in existence" set forth in 40 CFR 266.103(a)(1)(ii)~~, and appendices I through X of 40 CFR part 266~~. For the purposes of ARM 16.44.306(1)(b)(ii) and of this section, "existing or in existence" means a boiler or industrial furnace that was in operation burning or processing hazardous waste on or before August 21, 1991; facilities for which construction to burn or process hazardous waste had commenced, but which were not in operation, as of that date do not qualify for interim status. ~~Subpart H of 40 CFR part 266 is a federal agency rule which addresses the burning of hazardous waste in boilers and industrial furnaces. Appendices I through X of 40 CFR part 266 contain materials which supplement 40 CFR part 266, subpart H.~~ A copy of these provisions or any portion thereof may be obtained from the solid and hazardous waste bureau, Department of Health and Environmental Sciences, Cogswell Building, Helena, MT 59620.

AUTH: 75-10-405, MCA; IMP: 75-10-405, MCA

DENNIS IVERSON, Director

Certified to the Secretary of State March 2, 1992.

Reviewed by:

Counsel for the Department

VOLUME NO. 44 OPINION NO. 25

COUNTY OFFICERS - Clerk and recorder: survey requirements for remainder created when state obtains property for highway right-of-way;
EXEMPTIONS - Survey requirements for remainder created when state obtains property for highway right-of-way;
HIGHWAYS - Survey requirements for remainder created when state obtains property for highway right-of-way;
PROPERTY, REAL - Survey requirements for remainder created when state obtains property for highway right-of-way;
SUBDIVISION AND PLATTING ACT - Survey requirements for remainder created when state obtains property for highway right-of-way;
MONTANA CODE ANNOTATED - Sections 7-4-2613(1), 76-3-103(3), (15), 76-3-201(1), 76-3-209, 76-3-302;
OPINIONS OF THE ATTORNEY GENERAL - 42 Op. Att'y Gen. No. 121 (1988), 42 Op. Att'y Gen. No. 101 (1988), 37 Op. Att'y Gen. No. 88 (1977).

HELD: A county clerk and recorder may not require a survey or plat for the recordation of an instrument transferring title to a remainder that was created when the state of Montana obtained property for a highway right-of-way.

February 25, 1992

Blair Jones
Stillwater County Attorney
P.O. Box 179
Columbus MT 59019

Dear Mr. Jones:

You have requested my opinion on the following issue:

> May a county clerk and recorder require a survey and plat in order to record an instrument transferring title to a remainder that was created when the state of Montana obtained property for a highway right-of-way?

You have stated that this question arises from the acquisition of rights-of-way by the state of Montana for the construction of two large highway projects in Stillwater County. After a right-of-way is obtained from a landowner, the landowner is left with a remainder parcel which the landowner claims should be surveyed in order to accurately describe the parcel's acreage. The Department of Transportation maintains that the parcel's acreage is described with sufficient accuracy by simply subtracting the area of the right-of-way from the original description of the parcel. The Stillwater County Clerk and

Recorder has nonetheless required the remainders to be surveyed and platted as a condition of recordation.

As a general rule, a county clerk and recorder has a statutory duty to record all deeds, regardless of legal description, upon payment of proper fees. § 7-4-2613(1), MCA. Because section 7-4-2613(1), MCA, does not authorize a clerk to refuse to record a deed, such refusal is permissible only if specifically authorized by some other statute.

The Montana Subdivision and Platting Act ("the Act") has survey requirements for divisions of land. Tit. 76, ch. 3, pt. 4, MCA. Section 76-3-302, MCA, requires that a county clerk and recorder not record "any instrument which purports to transfer title to or possession of a parcel or tract of land which is required to be surveyed by this chapter" unless the required certificate of survey or plat is also recorded and the instrument describes the land by reference to the survey or plat. Because section 76-3-302, MCA, permits a clerk to refuse to record a deed only when the land is required to be surveyed under the Act and the appropriate documentation has not been filed, it is necessary to determine whether the Act mandates a survey of a remainder created by a highway right-of-way acquisition. If the land is not required to be surveyed under the Act, the clerk and recorder may not rely upon the exception in section 76-3-302(1), MCA, in refusing to file an instrument.

Section 76-3-209, MCA, exempts instruments of transfer of land acquired for state highways from the surveying and platting requirements of the Act. While this section does not address the recording requirements of the remainder parcel, section 76-3-201(1), MCA, provides:

> Unless the method of disposition is adopted for the purpose of evading this chapter, the requirements of this chapter shall not apply to any division of land which:
>
> (1) is created by order of any court of record in this state or by operation of law or which, in the absence of agreement between the parties to the sale, could be created by an order of any court in this state pursuant to the law of eminent domain (Title 70, chapter 30)[.]

There has been no indication here of any purpose to evade the requirements of the Act. Clearly, the division could have been created by an order of a state court pursuant to the law of eminent domain. See §§ 70-30-101, 70-30-102, MCA. Thus, by its plain language, section 76-3-201(1), MCA, excludes the remainder from the surveying and platting requirements.

You have also inquired about the need for a survey prior to any future sale or transfer of the remainder parcel. A previous

Attorney General's Opinion held that sections 76-3-401 and 76-3-402, MCA, require surveys only when there is a "division of land" or "subdivision of land." See 37 Op. Att'y Gen. No. 88 at 368, 369 (1977). A "division of land" or "subdivision of land" necessarily involves the segregation of one or more parcels of land from a larger tract. See SS 76-3-103(3), (15), MCA. I conclude that a sale or transfer of the entire remainder property does not involve a division or subdivision of land and therefore there is no requirement that the remainder be surveyed prior to the recording of the instrument of sale or transfer.

Previous Attorney General's Opinions have made it clear that exemptions from survey and platting requirements arise when the land is divided and the exemption claimed. See 42 Op. Att'y Gen. No. 101 at 388 (1988) (subsequent sale of undivided parcel of land segregated from another parcel to provide security for construction lien not subject to the Act); 42 Op. Att'y Gen. No. 121 at 476 (1988) (section 76-3-401, MCA, requires survey only when transfer of title involves division of land). Here, the division occurred when the state took the land for highway purposes and, as mentioned above, sections 76-3-209 and 76-3-201(1), MCA, expressly exempt this division from the requirements of the Act. Any subsequent transfer or sale of the entire remainder would not involve a division of land and thus there would be no requirement for survey or platting prior to recording the instrument of sale or transfer.

THEREFORE, IT IS MY OPINION:

> A county clerk and recorder may not require a survey or plat for the recordation of an instrument transferring title to a remainder that was created when the state of Montana obtained property for a highway right-of-way.

Sincerely,

Marc Racicot

MARC RACICOT
Attorney General

VOLUME NO. 44 OPINION NO. 26

SCHOOL DISTRICTS - Authority of school district to make compensatory advances to employees;
MONTANA CODE ANNOTATED - Title 39, chapter 3, part 2; sections 20-3-324, 20-4-201, 20-9-213, 39-31-303;
OPINIONS OF THE ATTORNEY GENERAL - 41 Op. Att'y Gen. No. 30 (1985), 37 Op. Att'y Gen. No. 113 (1978).

HELD: A school district may advance the annual premium for a tax-sheltered annuity on behalf of its participating employees and then recover the amount advanced by means of salary withholding.

February 27, 1992

Keith D. Haker
Custer County Attorney
1010 Main Street
Miles City MT 59301

Dear Mr. Haker:

You have requested my opinion on a question concerning the authority of a school district to make compensatory advances for its employees. I have rephrased the question as follows:

> May a school district advance the annual premium for a tax-sheltered annuity on behalf of its participating employees and then recover the the amount advanced by means of salary withholding?

The school district sponsors a tax-sheltered annuity program which is made available to its teachers and other employees. The school district advances the annual premium for the annuity contract on behalf of the participating employees and then withholds the premium from the employees' checks over the course of the year. Your question concerns the authority of the district to make such advances of salary for the benefit of its employees.

Initially, I note that the underlying question of whether a school district may offer tax-sheltered annuities to its employees requires an interpretation of federal tax law and thus does not lend itself to an opinion by a state attorney general. This opinion does not address the issue of whether the district's program qualifies under federal law as an exempt "governmental plan." Nor does the opinion address the practical problems associated with recovery of premium advances on behalf of employees who terminate their employment during the course of the year. The opinion is limited to the question of the school district's authority to make what amounts to a

compensatory advance on behalf of employees who participate in a district-sponsored annuity program.

Generally, the trustees of a school district may exercise only those powers conferred upon them by statute and such as are necessarily implied in the exercise of those expressly conferred; the statute granting the power must be regarded as both a grant and a limitation upon the powers of the board. See 41 Op. Att'y Gen. No. 30 at 110, 115 (1985), citing McNair v. School District No. 1, 87 Mont. 423, 288 P. 188 (1930); Sibert v. Community College of Flathead County, 179 Mont. 188, 587 P.2d 26 (1978).

Subsections (1) and (2) of section 20-3-324, MCA, authorize the trustees of a school district to "employ" teachers, principals, administrative personnel, and other employees as the trustees consider necessary, in their discretion, to carry out the various services of the district. Section 20-4-201, MCA, gives the trustees express authority to employ teachers and specialists by contract and under certain conditions. Section 20-9-213, MCA, provides that the trustees "shall have the sole power and authority to transact all fiscal business and execute all contracts in the name of the district." However, none of these statutes addresses the specific question of compensatory advances or prescribes any particular form of compensation for district employees.

Despite the restrictive language in such cases as McNair and Sibert, the Montana Supreme Court has consistently recognized the broad managerial powers conferred upon a school district by statutes such as section 20-3-324, MCA, and section 39-31-303, MCA, which concern management rights of public employers with respect to collective bargaining. Savage Education Association v. Trustees of Richland County, 214 Mont. 289, 692 P.2d 1237 (1984). Wide discretion is reposed in the board of trustees. Yanzick v. School District No. 23, 196 Mont. 375, 641 P.2d 431 (1982). A school district has general authority over a teacher's employment in matters such as severance pay. Booth v. Argenbright, 225 Mont. 272, 731 P.2d 1318 (1987). The Court has accorded school districts considerable authority and discretion with respect to the fiscal business of the district and the expenditure of school funds for teachers and employees as part of their salaries and compensation. See Sorlie v. School District No. 2, 205 Mont. 22, 667 P.2d 400 (1983); Knox v. School District No. 1, 171 Mont. 521, 559 P.2d 1179 (1977); Duffy v. Butte Teacher's Union, 168 Mont. 246, 541 P.2d 1199 (1975).

In 37 Op. Att'y Gen. No. 113 at 486 (1978), the legality of severance pay provisions in collective bargaining agreements between school districts and their employees was examined and upheld. That opinion noted that the amount and specific form of compensation which districts may pay teachers and other district employees are not mandated by statute. Relying upon

the general rule which permits any reasonable mode and manner of exercising a duty or power given to a political subdivision where the mode and manner of execution are not expressly prescribed, the opinion concluded that a provision for the payment of severance pay is a reasonable form and manner of compensation.

I find no significant basis for distinguishing the severance pay provision at issue in 37 Op. Att'y Gen. No. 113 and the compensatory advance at issue here. Both concern the manner (in particular, the timing) of compensating district employees, a matter which is left largely to the discretion of the trustees. While the payment of wages may be subject to certain statutory restrictions (see Title 39, chapter 3, part 2, MCA), I have found no statutory prohibition concerning the kind of compensatory advance involved in the district's payment of an annuity premium at the beginning of a school year. Although your inquiry does not indicate what advantages -- financial, administrative, or otherwise -- the district obtains as a result of the payment of the annuity premium in such a manner, I conclude that compensatory advances for this purpose are a reasonable form and manner of compensation.

THEREFORE, IT IS MY OPINION:

> A school district may advance the annual premium for a tax-sheltered annuity on behalf of its participating employees and then recover the amount advanced by means of salary withholding.

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 December 31, 1991. This table includes those rules adopted during the period January 1, 1992 through March 31, 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 December 31, 1991, 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 1991 and 1992 Montana Administrative Registers.

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2.21.6607 and other rules - Record Keeping, p. 2516
(Public Employees' Retirement Board)
I-III Annual Retirement Benefit Adjustments for Montana Residents, p. 1888, 2402
2.43.404 and other rules - Purchasing Service Credits - Election of Coverage Under New PERS Disability Retirement Provisions - Calculation of Payment of Supplemental Retirement Benefits for Retired Municipal Police Officers, p. 1604, 2216, 35
(Teachers' Retirement Board)
I-II Eligibility and Calculation of Annual Benefit Adjustments, p. 2238, 129
2.44.306 and other rules - Crediting Military Service - Payment of Benefits at Death - Payment of Child's Benefit - Bonuses as Compensation - Correcting Errors on Wages Not Reported, p. 1770, 2596
(State Compensation Mutual Insurance Fund)
I and other rules - Construction Industry Premium Credit Program - Classifications and Establishment of Premium Rates, p. 257
I-XVII Organization of the State Fund - Public Participation - Board Meetings - Establishment of Premium Rates, p. 2521, 300
I-XVII Emergency Adoption - Organization of the State Fund - Public Participation - Board Meetings - Establishment of Premium Rates, p. 2403, 2598

2.55.301 and other rules - Medical Deductible Plan - Assignment of Classifications - Premium Ratesetting, p. 1967

AGRICULTURE, Department of, Title 4

I Notice to Sellers of Financial Risk, p. 1370, 1828
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