

MONTANA ADMINISTRATIVE REGISTER

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MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 10

The Montana Administrative Register (MAR or Register), a twice-monthly publication, has three sections. The Proposal Notice Section contains state agencies' proposed new, amended, or repealed rules; the rationale for the change; date and address of public hearing; and where written comments may be submitted.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 Adoption Section contains final rule notices which show any changes made since the proposal stage. All rule actions are effective the day after publication of the adoption notice unless otherwise specified in the final notice. The Interpretation Section contains the Attorney General's opinions and state declaratory rulings. Special notices and tables are found at the end of each Register.

Inquiries regarding the rulemaking process, including material found in the Montana Administrative Register and the Administrative Rules of Montana, may be made by calling the Secretary of State's Office, Administrative Rules Services, at (406) 438-6122.

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[Editor's Note: The interim committee objection to rulemaking letter, the agency response to the letter of objection, and the original copy of the adoption notice for Notice No. 37-1044 are being published pursuant to 2-4-406(3), MCA.]

BEFORE THE OFFICE OF PUBLIC INSTRUCTION
OF THE STATE OF MONTANA

In the matter of the adoption of NEW) NOTICE OF PUBLIC HEARING ON
RULE I pertaining to Education) PROPOSED ADOPTION
Savings Accounts)

TO: All Concerned Persons

1. On June 17, 2024, at 10:00 a.m., the Office of Public Instruction (OPI) will hold an in-person public hearing at the OPI building at 1300 11th Avenue, Helena, Montana, to consider the proposed adoption of the above-stated rule. Details about remote participation via the ZOOM meeting platform will be available prior to the hearing at <https://opi.mt.gov/Families-Students/Parent-Resources/Education-Savings-Account>.

2. OPI will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact OPI no later than 5:00 p.m. on June 10, 2024, to advise us of the nature of the accommodation that you need. Please contact Brian O'Leary, Office of Public Instruction, 1300 11th Ave, Helena, Montana, 59601; telephone (406) 444-3559; fax (406) 444-2893; or e-mail brian.o'leary@mt.gov.

3. The rule proposed to be adopted is as follows:

NEW RULE I EDUCATION SAVINGS ACCOUNTS (ESA) (1) Application process:

(a) Two time periods each year are established during which a student's parent, as defined in 20-7-1703, MCA, may notify the superintendent of public instruction of their intent for their student to participate in the program through the ESA application process. Those two time periods are established as May 1 through June 1 and November 1 through December 1.

(2) Student Eligibility:

(a) Eligibility under the qualified student requirements will be determined through the secure application process located on the Office of Public Instruction (OPI) website. A parent must provide all necessary documentation required in the application process and meet the disability, age, and enrollment requirements of 20-7-1703, MCA, and 20-7-1706, MCA; and

(b) OPI will notify the parent within 30 days of the close of the application window of their student's eligibility for the program.

(3) ESA Contract:

(a) Once OPI determines that the student is qualified and eligible for the ESA program, OPI will send a contract to that student's parent for the parent to execute and return to OPI; and

(b) prior to the parent requesting any reimbursement, the ESA contract must be completed by all parties. Contracts must be executed and returned to OPI no

later than July 15 and January 15, or the applicant must re-apply during the next application period.

(4) The ESA student amount will be calculated per the formula established in 20-7-1703(2), MCA. The amount is calculated as the sum of:

- (a) Data-for-achievement payment under 20-9-306, MCA;
- (b) Indian Education For All payment under 20-9-306, MCA;
- (c) per-ANB amounts of the instructional and related services block grants under 20-9- 321, MCA; and
- (d) per-ANB entitlement amount under 20-9-306, MCA, multiplied by the ratio of school district adopted budget to district maximum general fund budget in the prior year in the district in which the student is included in for the ANB purposes under the program.

(5) Notification:

(a) OPI will provide ESA calculations related to participating students to each affected resident school district before the August and January school base aid payments are made. If OPI terminates a student from the ESA program in accordance with 20-7-1706(3), MCA, OPI will notify the affected resident district within 20 days of the termination date.

(6) Accounting guidance:

(a) The school districts must remit the funds to OPI based on the allocation calculation related to the prior month BASE aid distribution received by the school district. School districts shall remit to the OPI the amount calculated for each participating student by no later than the tenth of the month following each BASE aid distribution. OPI will provide guidance to the affected resident school districts on the method for remitting the required funds to OPI.

(7) Trust account:

(a) 95% of the money is to be deposited in the ESA trust fund account for each student and 5% of the money is to be deposited in the ESA administration state special revenue account; and

(b) Any trust interest that is earned will be accounted for individually for each education savings account.

(8) Reimbursement procedure:

(a) OPI will provide each participating student's parent with both electronic and paper processes to reimburse the parent for the purchase of allowable educational resources from a student's trust account. Payments may not be made that exceed the available balance in each student account. Reimbursement requests that exceed the current available balance may be distributed as partial reimbursements over multiple months as funds are deposited into the account following each BASE aid remittance as set forth in (6)(a).

AUTH: 20-7-1706, MCA

IMP: 20-7-1704, 20-7-1706, MCA

REASON: The proposed rule would implement 20-7-1706, MCA, which requires the Superintendent of Public Instruction to establish such rules as may be necessary for administering the Students With Special Needs Equal Opportunity Education Savings Account program. This rule is intended to provide clear timelines and

procedures to the parent(s) of children with special needs who wish to participate in the program.

4. Concerned persons 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 Brian O'Leary, Office of Public Instruction, 1300 11th Avenue, Helena, Montana, 59601; telephone (406) 444-3559; fax (406) 444-2893; or e-mail brian.o'leary@mt.gov, and must be received no later than 5:00 p.m., June 21, 2024.

5. Richard E. Wootton, staff attorney at the Office of Public Instruction, has been designated to preside over and conduct this hearing.

6. OPI maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list must make a written request that includes the name, email, and mailing address of the person to receive notices and specifies for which program the person wishes to receive notices. Notices will be sent by email unless a mailing preference is noted in the request. Such written request may be mailed or delivered to the contact person in paragraph 4 or may be made by completing a request form at any rules hearing held by OPI.

7. An electronic copy of this proposal notice is available through the Secretary of State's website at <http://sosmt.gov/ARM/Register>.

8. The bill sponsor contact requirements of 2-4-302, MCA, apply and have been fulfilled. The primary bill sponsor was contacted by email on May 14, 2024.

9. With regard to the requirements of 2-4-111, MCA, OPI has determined that the adoption of the above-referenced rule will not significantly and directly impact small businesses.

/s/ Robert Stutz

Robert Stutz
Rule Reviewer

/s/ Elsie Arntzen

Elsie Arntzen
Superintendent of Public Instruction
Office of Public Instruction

Certified to the Secretary of State May 14, 2024.

BEFORE THE MONTANA HISTORICAL SOCIETY
OF THE STATE OF MONTANA

In the matter of the amendment of	)	NOTICE OF PUBLIC HEARING ON
ARM 10.121.501 and 10.121.701 and	)	PROPOSED AMENDMENT AND
the repeal of ARM 10.121.502,	)	REPEAL
10.121.503, 10.121.504, 10.121.702,)	
10.121.703, 10.121.801, 10.121.803,)	
and 10.121.804 pertaining to)	
collection acquisition and select)	
collection loans)	

TO: All Concerned Persons

1. On June 14, 2024, at 9:00 a.m., the Montana Historical Society will hold a public hearing on Zoom to consider the proposed amendment and repeal of the above-stated rules. Interested parties may access the Zoom meeting in the following way: <https://mt-gov.zoom.us/j/81556058995?pwd=eGJFSTFZanpHU3hYVjNoQlpNVVRrZz09>

Meeting ID: 815 5605 8995

Password: 078161

Dial by Telephone

+1 646 558 8656

Meeting ID: 815 5605 8995

Password: 078161

Find your local number: <https://mt-gov.zoom.us/j/81556058995?pwd=eGJFSTFZanpHU3hYVjNoQlpNVVRrZz09>

2. The Montana Historical Society will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the Montana Historical Society no later than 5:00 p.m. on June 12, 2024, to advise us of the nature of the accommodation that you need. Please contact Jenni Carr, Montana Historical Society, 225 N. Roberts St., Helena, Montana 59620; telephone (406) 444-1799; or email jenni.carr@mt.gov.

3. The rules as proposed to be amended provide as follows, new matter underlined, deleted matter interlined:

10.121.501 GENERAL GUIDELINES (1) The acquisition of ~~materials~~ collections shall be the responsibility of the Board of Trustees and staff of the Montana Historical Society. The ~~collection society's collections~~ shall be systematically expanded and shall interpret be illustrative of the heritage history of the Montana region for the benefit of the citizens of Montana and visitors to the state Montana in particular and generally of the Pacific Northwest, Northern Rocky Mountains, and Northern Great Plains regions and of the United States of America when pertinent to Montana history.

~~(2) Sole and final~~ Final decisions on the acquisition of materials collections shall be made by the director in conjunction with the ~~supervisor program manager of the department program~~ where the acquisition is made items will be maintained. A list and ~~detailed explanation~~ of major acquisitions shall be submitted to the Board of Trustees ~~quarterly or as required~~ as requested, but no less than annually.

~~(3) If the origin, ownership or authenticity of an item should be in question, the director shall consult widely within the Montana historical society with available legal counsel and the board of trustees. If the item is deemed unacceptable, the director shall immediately contact the donor and proper authorities and remove the item from the collections.~~

~~(4) It shall be policy to acquire material of high and exceptional quality and reject the temptation to acquire items of secondary or tertiary significance. Items acquired shall not be limited to what is necessary for exhibit and display, they may also be acquired for study and conservation purposes.~~

~~(5)~~ (3) Items that may duplicate existing collections, ~~or~~ items of secondary importance, or items unrelated to the heritage of Montana and the region may be accepted provided that the donor fully understands and accepts in writing that the items may be disposed of to the best advantage of the society.

~~(6) All unrestricted monetary donations to the Montana Historical Society shall be restricted in use to the education program and for special projects approved by the board of trustees.~~

~~(7) An accession statement (deed of gift) outlining all details on the material acquired shall be signed by the donor and by the director and/or department head.~~

~~(8)~~ (4) Donations may be tax deductible; however, the Montana Historical Society assumes no responsibility for providing an evaluation or appraisal of the material as provided under state and federal law. All Any appraisals of the materials for donation to items to be acquired by the society should shall be conducted by a disinterested third party expert an independent qualified appraiser in the field. The donor shall bear all costs incurred in seeking appraisals. ~~Potential donors are advised to consult their attorney or tax accountant for a determination to claim a deduction.~~

~~(9) The documentary value of a museum, library and archival collection is the principal criteria of excellence. Accession records shall be of the highest order of accuracy and completeness. Items in the collections shall have a provenance as completely documented as possible. Said provenance shall be a matter of public record.~~

~~(10) A permanent donor's register is maintained and available for public inspection.~~

(5) Accession records shall be maintained as required for accreditation by the American Alliance of Museums.

AUTH: 22-3-107, MCA
IMP: 22-3-107, MCA

REASON: These amendments are proposed to clarify standards for acquiring collections. Deleted sections are in society policy.

10.121.701 MUSEUM AND GALLERIES LOANS TO SELECT

GOVERNMENT OFFICES ~~(1) Request for loans of inventoried items will be considered only when made by qualified organizations and institutions as defined in section 1(b) and only when the society has a clear deed of gift to the requested item. No loan will be considered where the donor has otherwise stipulated. Items on loan to the society shall not be available for loan. It shall be the policy of the society to carefully control, limit and restrict the loan of gifted items, subject to the following exceptions:~~

~~(a) C.M. Russell original art works. There shall be no loan or exchange of the above to any person, corporation, museum, gallery or state department within or without the state of Montana except as approved by a two-thirds majority of the board of trustees.~~

~~(b) Inventoried items other than those of C.M. Russell. Subject to compliance with regulations concerning formal requests, transportation, insurance, display, security and return of items, said inventoried items may be loaned to qualified museums, galleries, historical societies and bona fide organizations and corporations, subject to the approval of a majority of the board of trustees or a majority of its executive committee. A qualified institution is an institution that can provide evidence of its ability to care for loaned collections in compliance with generally accepted professional museum standards as defined by the American Association of Museums.~~

~~(2) The conditions of loan of any inventoried item shall be intended to protect the item and provide for its safe return. Such conditions shall include but not be restricted to the following information and terms.~~

~~(a) Complete information concerning the person, corporation, or department requesting the loan, specify the beginning and end of the loan period, describing the method of transportation, security precaution, place of display, occasion of display, expenses of transportation to and from the society, the title and authority of the person making the request and a complete description of the item(s) loaned including catalog number.~~

~~(b) The item(s) loaned must be identified as being loaned through the courtesy of the Montana historical society.~~

~~(c) Loan periods may not exceed one year. Extension of any loan period must be duly authorized and approved. Loaned items may be subject to recall by the society and may not be loaned to any other person, organization or agency.~~

~~(d) Provision shall be made and agreed to by both parties that an officer or employee of the society may retrieve an unreturned item at the expense of the agency delaying the return.~~

~~(e) The loan agreement shall be made in duplicate, be numbered, dated and duly signed and authorized, the original copy will be kept in the society files.~~

~~(3) (1) No The Montana Historical Society may loan works of art may be loaned to select offices within the state capitol complex ~~without~~ with the approval of a majority of the Board of Trustees. Loans of works of art ~~will be confined~~ are limited to the following locations:~~

~~(a) Governor's Office;~~

~~(b) Governor's Mansion Official Residence;~~

~~(c) Lieutenant Governor's Office;~~

- (d) Office of the Speaker of the House; ~~when the legislature is in session.~~
- (e) Office of the President of the Senate; ~~when the legislature is in session.~~
- (f) Secretary of State's Office.

(2) The following conditions shall apply to works of art loaned to the ~~above~~ offices in (1):

(a) Pieces may be chosen from ~~our~~ a loan collection as established by the museum ~~curator~~ program manager.

(b) A maximum of five pieces may be borrowed by each of the ~~above~~ offices in (1).

(c) Works may be borrowed for ~~only one year~~ the term of office of the elected official and may be recalled at any time. ~~Extensions beyond one year may be granted upon examination, curatorial recommendations and board approval~~ The society may review the pieces on loan to assess their condition and confirm their location.

(d) ~~All fluorescent fixtures illuminating the artwork must have an ultraviolet shield over the tubes. Cost and installation of shields to be paid for by the borrower. The borrowing office will exercise care in the preservation of borrowed pieces. The borrowed pieces may not be moved, altered, or treated in any way and may not leave the custody of the borrower without permission in writing from the director of the society.~~

(e) ~~If oil paintings are loaned, smoking will not be allowed in areas where they are hung~~ No loaned pieces may be reproduced for publication without the written consent of the director of the society.

(f) ~~All insurance premiums must be paid by the borrower on values established by the society. The society must receive a copy of the letter verifying coverage from the insurance and legal division, department of administration~~ The society will retrieve the loaned pieces upon expiration of the loan period.

(4) An example of the loan agreement follows:

~~OUTGOING LOAN AGREEMENT~~

~~Montana Historical Society~~

~~225 N. Roberts Street~~

~~Helena, Montana 59620~~

~~(406) 449-2694~~

~~Date~~

~~Borrowing Institution~~

~~Address~~

~~Contact Person _____ Title~~

~~Telephone~~

~~Purpose of Loan~~

~~Period of Loan from _____ to~~

~~(Period not to exceed one year without written consent)~~

~~Insurance Company~~

~~Type of Coverage~~

~~Amount of Coverage~~

~~Credit line to read~~

~~For borrowing institution _____ Title~~

~~For Montana Historical Society _____ Head Curator~~

Registrar
Director

Date of Board Authorization

Accession No. _____ Item _____ Condition _____ Value _____

~~(5) The borrower will exercise a high degree of care in the preservation and handling of borrowed items. It is understood and agreed that said materials shall not be changed, altered, or treated in any way whatsoever and shall not leave the custody of the borrower without permission in writing from the Montana historical society.~~

~~(6) Loan periods may not exceed one year. Any extension of a loan period must be duly negotiated and authorized. If deemed necessary, the Montana historical society may require the return of the loaned items before expiration period.~~

~~(7) No loaned materials or any part thereof may be reproduced for publication without the written consent of the Montana historical society. Proper credit must be given to the Montana historical society on any reproduction rights granted or exhibitions to the public of the materials loaned.~~

~~(8) Retrieval – 15 days before the expiration of the loan period, the Montana historical society shall be advised of the date, insurance provisions, and means of transportation for the return of the loaned items. If the items loaned are not returned by the date specified in this agreement, the Montana historical society may send an employee or officer to retrieve the loaned items. All costs to the agency holding the items shall be immediately paid upon receipt of the itemized billing.~~

AUTH: 22-3-107, MCA
IMP: 22-3-107, MCA

REASON: These amendments are proposed to clarify standards for loaning art to select government offices. Deleted sections are in society policy.

4. The Historical Society proposes to repeal the following rules:

10.121.502 MUSEUM AND GALLERIES ACQUISITIONS

AUTH: 22-3-107, MCA
IMP: 22-3-107, MCA

REASON: This information is in society policy.

10.121.503 LIBRARY ACQUISITIONS

AUTH: 22-3-107, MCA

IMP: 22-3-107, MCA

REASON: This information is in society policy.

10.121.504 ARCHIVES ACQUISITIONS

AUTH: 22-3-107, MCA

IMP: 22-3-107, MCA

REASON: This information is in society policy.

10.121.702 LIBRARY LOANS

AUTH: 22-3-107, MCA

IMP: 22-3-107, MCA

REASON: This information is in society policy.

10.121.703 ARCHIVES LOANS

AUTH: 22-3-107, MCA

IMP: 22-3-107, MCA

REASON: This information is in society policy.

10.121.801 GRANT PROPOSALS

AUTH: 22-3-107, MCA; H.B. 871, 47th Legislature

IMP: 22-3-112, MCA

REASON: Cultural and aesthetic grants are administered by the Montana Arts Council per Title 22, chapter 2, MCA.

10.121.803 GRANT CONDITIONS

AUTH: 22-3-107, MCA; H.B. 871, 47th Legislature

IMP: 22-3-112, MCA; H.B. 871, 47th Legislature

REASON: Cultural and aesthetic grants are administered by the Montana Arts Council per Title 22, chapter 2, MCA.

10.121.804 DISBURSEMENT OF GRANT FUNDS

AUTH: 22-3-107, MCA; H.B. 871, 47th Legislature

IMP: 22-3-112, MCA; H.B. 871, 47th Legislature

REASON: Cultural and aesthetic grants are administered by the Montana Arts Council per Title 22, chapter 2, MCA.

5. Concerned persons 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: Jenni Carr, Montana Historical Society, 225 N. Roberts St., Helena, Montana 59620; telephone (406) 444-1799; or email jenni.carr@mt.gov, and must be received no later than 5:00 p.m., June 25, 2024.

6. Molly Kruckenberg, director of the Montana Historical Society, has been designated to preside over and conduct this hearing.

7. The society maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by the society. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies for which program the person wishes to receive notices. Notices will be sent by e-mail unless a mailing preference is noted in the request. Written requests may be mailed or delivered to the contact person in paragraph 5 or may be made by completing a request form at any rules hearing held by the department.

8. An electronic copy of this proposal notice is available through the Secretary of State's web site at <http://sosmt.gov/ARM/Register>.

9. The bill sponsor contact requirements of 2-4-302, MCA, do not apply.

10. With regard to the requirements of 2-4-111, MCA, the society has determined that the amendment and repeal of the above-referenced rules will not significantly and directly impact small businesses.

/s/ Molly Kruckenberg
Molly Kruckenberg
Rule Reviewer

/s/ Jude Sheppard
Jude Sheppard
Board of Trustees President
Montana Historical Society

Certified to the Secretary of State May 14, 2024.

BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY
OF THE STATE OF MONTANA

In the matter of the amendment of	)	NOTICE OF PUBLIC HEARING ON
ARM 17.56.101, 17.56.306,	)	PROPOSED AMENDMENT AND
17.56.1303, 17.56.1304, 17.56.1402,	)	REPEAL
17.56.1403, 17.56.1404, 17.56.1406,)	
and 17.56.1407 and the repeal of	)	(UNDERGROUND STORAGE
ARM 17.56.1308, 17.56.1309, and	)	TANKS)
17.56.1409 pertaining to the Montana)	
Underground Storage Tank Installer)	
and Inspector Licensing and)	
Permitting Act)	

TO: All Concerned Persons

1. On June 13, 2024, at 10:00 a.m., the Department of Environmental Quality (department) will hold an in-person public hearing in Room 111 of the Metcalf Building, at 1520 E. Sixth Avenue, Helena, Montana, to consider the proposed amendment and repeal of the above-stated rules. Interested parties may also attend the hearing electronically in the following ways:

<https://mt-gov.zoom.us/j/86965924740?pwd=UG1ZaGhIOEdhSFUwSS9iL1dwNE1JUT09>
Passcode: 275105

Or One tap mobile :

+12063379723,,86965924740#,,,,*275105# US (Seattle)
+12133388477,,86965924740#,,,,*275105# US (Los Angeles)

Or Telephone:

Dial (for higher quality, dial a number based on your current location):
+1 206 337 9723 US (Seattle)
+1 213 338 8477 US (Los Angeles)
+1 646 558 8656 US (New York)

Webinar ID: 869 6592 4740

Passcode: 275105

International numbers available: <https://mt-gov.zoom.us/j/86965924740?pwd=UG1ZaGhIOEdhSFUwSS9iL1dwNE1JUT09>

Or an H.323/SIP room system:

H.323: 162.255.37.11 (US West) or 162.255.36.11 (US East)

Meeting ID: 869 6592 4740

Passcode: 275105

SIP: 86965924740@zoomcrc.com

Passcode: 275105

2. The department will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the department no later than 5:00 p.m. on June 3, 2024, to advise us of the nature of the

accommodation that you need. Please contact the Department of Environmental Quality at P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-1388; fax (406) 444-4386; or e-mail DEQMAR17-446@mt.gov.

3. The rules as proposed to be amended provide as follows, new matter underlined, deleted matter interlined:

17.56.101 DEFINITIONS For the purposes of this chapter and unless otherwise provided, the following terms have the meanings given to them in this rule and must be used in conjunction with those definitions in 75-11-203, 75-11-302, and 75-11-503, MCA.

(1) through (32) remain the same.

~~(33) "Implementing agency" means an office or program of a local governmental unit, designated by the department pursuant to ARM 17.56.1003, in which the PST or UST system is located. Only one local governmental unit may act as an implementing agency for any given PST or UST system.~~

(34) through (82) remain the same, but are renumbered (33) through (81).

AUTH: 75-11-204, 75-11-319, 75-11-505, MCA

IMP: 75-11-203, 75-11-302, 75-11-319, 75-11-505, MCA

REASON: The department proposes the repeal of (33) "Implementing agency" as the referenced source ARM 17.56.1004 was repealed in 2016 rendering its continued use unnecessary.

17.56.306 PERIODIC TESTING OF SPILL PREVENTION EQUIPMENT AND CONTAINMENT SUMPS USED FOR INTERSTITIAL MONITORING OF PIPING AND PERIODIC INSPECTION OF OVERFILL PREVENTION EQUIPMENT

(1) remains the same.

(2) Testing conducted pursuant to (1) must be accomplished by a licensed installer, or licensed compliance inspector, licensed junior installer, or licensed compliance tester.

(3) through (7) remain the same.

AUTH: 75-11-505, 75-11-509, MCA

IMP: 75-11-505, 75-11-509, MCA

REASON: The department proposes to add "licensed compliance tester" and "licensed junior installer" to the list of licensees who are authorized to conduct tests pursuant to ARM 17.56.306(1). This amendment is necessary because of the proposed changes to ARM 17.56.1403(1)(f), which would add these two licenses to the list of license categories. The new license categories will allow individuals who wish to complete testing and installations specific to the requirements of ARM 17.56.306(1) and 17.56.401(2) to obtain a license without the necessary experience required for a full tank installer license or a full third-party compliance inspection license. In addition, this amendment is necessary because of the proposed changes to ARM 17.56.1403(1)(g) which would add "licensed junior installer" to the list of

license categories. The addition of this new license category will allow companies to train employees and utilize their skills for limited testing and repairs before they are ready to become a full installer or inspector. "Licensed junior installers" will be allowed to complete testing and installations specific to the requirements of ARM 17.56.401(2).

17.56.1303 INSTALLATION AND CLOSURE PERMIT REQUIREMENT--APPLICATION (1) through (3) remain the same.

(4) The department shall notify an applicant if it determines that an application is deficient. The department shall notify the applicant what information is required for the application to be considered complete. The department shall hold deficient applications pending the receipt of the required information. The department shall issue the permit within ~~30~~ 15 days of the department's issuance of the final environmental review as required by Title 75, chapter 1, parts 1 and 2, MCA ~~receipt of the complete permit application~~. If the applicant fails to submit the required information within six months of receiving the department's deficiency notice, the deficient permit application expires.

(5) and (6) remain the same.

AUTH: 75-11-204, MCA

IMP: 75-11-204, 75-11-209, 75-11-212, MCA

REASON: This proposal allows the department to approve a permit after it has completed the required environmental review pursuant to the Montana Environmental Policy Act (MEPA). Specifically, 75-1-208(4), MCA, states that unless time limits for review are established elsewhere, MEPA's statutory time limits for completion of the environmental review process apply. In such a case, an agency has 90 to 180 days from the date the agency receives a complete application to then complete an environmental review depending on which is required under 75-1-208(4)(a), MCA. This proposal provides the department with the time needed to perform that required review prior to issuing a decision on the underlying permit.

17.56.1304 PERMIT APPLICATION REVIEW FEES (1) and (2) remain the same.

(3) Subject to the limitation in (4), for the installation or closure of an underground storage tank system, the permit applicant shall pay the following permit application review fees:

(a) any application, or group of applications, proposing work at a facility that includes the installation or closure of an underground storage tank ~~\$100~~ \$161/permit plus \$0.02/gallon of tank capacity;

(b) any application solely for a minor installation ~~\$50~~ \$80;

(c) any application solely for piping installation and/or closure:

(i) greater than 50 feet ~~\$100~~ \$161;

(ii) 50 feet or less ~~\$50~~ \$80; and

(d) any combination of applications in (3)(b) and (c), or any other permit application ~~\$100~~ \$161.

- (4) remains the same.
- (5) Permit application review fees for installations, closures, or both, at one facility or location must not exceed ~~\$750~~ \$1208 per permit issued by the department.
- (6) remains the same.

AUTH: 75-11-204, MCA

IMP: 75-11-204, 75-11-209, 75-11-212, MCA

REASON: The department has determined that reasonable necessity exists to generally amend the fee rules to establish sufficient fees to enable the department to effectively operate and implement the federal and state regulatory obligations. The current fee structure was last updated in 2005. This fee proposal is intended to simplify the existing fee structure, apply the fees equitably across the regulated community, provide predictability, be commensurate with costs, and generate sufficient revenue to meet department mandated tasks such as inspections of facilities, reporting requirements to the Environmental Protection Agency (EPA) to maintain state delegation for federal rules, and electronic record management regarding tank sites and individuals licensed in underground storage tank (UST)-related occupations. On average, over the past six years, UST expenditures are greater than the revenues coming in, especially with database development, and fiscal reserves cannot fully support the department program without adjusting fees. Approximately half of the UST program funding comes from federal grant awards. In 2023 and 2024, the department compensated for this funding deficiency by relying on general use EPA grant funding to operate the UST program. It is uncertain how long the general use EPA grant funding will be available for use by the UST program. For the department to carry out UST regulatory functions, as required by statute and rule, license and permit fees must, at a minimum, keep up with inflation. The department proposes the change to fees according to Bureau of Labor and Statistics data, which shows an inflationary rise since 2005 on a \$100 annual fee now places that cost at \$161. For fiscal year 2023, the UST program issued 312 UST construction permits (141 minors at \$50 each, 127 majors at \$100 each, and 44 majors with fees greater than \$100 each). UST construction permit fees invoiced for fiscal year 2023 were \$38,913. The proposed changes would increase this number by \$25,500 going forward under the assumption that similar permit applications are received.

17.56.1402 ELIGIBILITY FOR LICENSE (1) A person may not be granted ~~an installer, or remover~~ a license specified in ARM 17.56.1403(1) by the department unless that person:

- (a) through (4) remain the same.

AUTH: 75-11-204, MCA

IMP: 75-11-204, 75-11-210, 75-11-211, 75-11-214, 75-11-505, 75-11-509, MCA

REASON: The department proposes to strike specific license names and instead reference ARM 17.56.1403 "License Categories" where they are individually listed already. Listing individual license disciplines in ARM 17.56.1402 is redundant.

17.56.1403 LICENSE CATEGORIES (1) There are ~~five~~ eight license categories:

(a) through (c) remain the same.

(d) compliance inspectors, which includes those licensees who inspect operating underground storage tank facilities for compliance with underground storage tank regulations; ~~and~~

(e) oversight inspectors, which includes those licensees who conduct oversight inspections to verify accuracy of inspection reports submitted by compliance inspectors-;

(f) compliance testers, which includes, but is not limited to, those licensees who conduct triennial testing in accordance with ARM 17.56.306(1), and testing in accordance with ARM 17.56.401(2);

(g) junior installers, which includes those licensees who may install, replace, repair, or modify spill prevention equipment; containment sumps used for interstitial monitoring of piping; and overfill prevention equipment. Licensees must obtain construction permits for any permitted work before performing installations, repairs, or modifications of the spill prevention equipment, containment sumps, and overfill prevention equipment; and

(h) corrosion protection installers, which includes those licensees who can only install corrosion protection on UST systems.

(2) through (8) remain the same.

AUTH: 75-11-204, MCA

IMP: 75-11-204, 75-11-210, 75-11-509, MCA

REASON: The "(f) compliance tester" and "(g) junior installer" were added as license categories to increase the number of licensed personnel who can do minor repairs or tests on underground storage tank systems in accordance with ARM 17.56.306 and 17.56.401(2). ARM 17.56.306 requires testing of spill prevention equipment, containment sumps used for piping interstitial monitoring, and overfill prevention devices to be completed by a licensed installer or compliance inspector. Owners have a difficult time getting licensees out to their locations to make minor repairs and perform required testing. This delay can result in violations or even releases where funding eligibility may be denied due to repairs not being done. The addition of these two categories allows for companies to train employees and utilize their skills for limited testing and repairs before they are ready to become a full installer or inspector. The new license categories allow individuals who wish to complete testing and installations specific to the requirements of ARM 17.56.401(2) to obtain a license without the necessary experience required for a full tank installer license or a full third-party compliance inspection license. Some individuals prefer to focus their work on testing and repairs specific to this type of equipment, rather than license as third-party UST compliance inspectors or full UST installers. The amount of work required throughout the state of Montana has increased significantly in testing of spill containment devices, containment sumps, and overfill devices since 2018 when the additional testing mandates were added to the UST regulations.

The addition of "(h) corrosion protection installer" is proposed for unique situations of UST repair work where a corrosion protection specialist is essential to complete a project. Current regulations require a full installer license to perform specialty corrosion protection work; however, this work is often outside the capabilities of a normal UST installer as it requires the specialized skills of a corrosion protection professional.

17.56.1404 LICENSE FEES (1) remains the same.

(2) Licensing fees are as follows:

(a) license application and examination fee ~~\$100~~ \$483

(b) annual license renewal fee ~~\$100~~ \$483

~~(c) duplicate license fee \$10~~

(3) and (4) remain the same.

AUTH: 75-11-204, MCA

IMP: 75-11-204, 75-11-210, 75-11-211, 75-11-509, MCA

REASON: The department has determined that reasonable necessity exists to generally amend the fee rules to establish sufficient fees to enable the department to effectively operate and implement the federal and state regulatory obligations. The current fee structure was last updated in 2005. This fee proposal is intended to simplify the existing fee structure, apply the fees equitably across the regulated community, provide predictability, be commensurate with costs, and generate sufficient revenue to meet department mandated tasks such as inspections of facilities, reporting requirements to EPA to maintain state delegation for federal rules, and electronic record management regarding tank sites and individuals licensed in UST-related occupations. On average, over the past six years, UST expenditures are greater than the revenues coming in, especially with database development, and fiscal reserves cannot fully support the department program without adjusting fees. Approximately half of the UST Program funding comes from federal grant awards. In 2023 and 2024, the department compensated for this funding deficiency by relying on general use EPA grant funding to operate the UST program. It is uncertain how long the general use EPA grant funding will be available for use by the UST program. For the department to carry out UST regulatory functions, as required by statute and rule, license and permit fees must, at a minimum, keep up with inflation. The department proposes the change to fees according to Bureau of Labor and Statistics data, which shows an inflationary rise since 2005 on a \$100 annual fee now places that cost at \$161.

The department also proposes to extend the licensing period from one year to three years under ARM 17.56.1406(2). This proposal will assist in maintaining lower fees, reduce resource expenditure by the department by minimizing the frequency of applicant processing, decrease the paperwork burden on applicants, and provide more consistent results on currently licensed individuals when searched by the public.

The department receives few requests for duplicate licenses and proposes to repeal the fee in (2)(c) as duplication of information from the department database and can be efficiently extracted, with the cost absorbed by initial licensing fees.

17.56.1406 LICENSE ISSUANCE, TERM, RESTRICTIONS (1) remains the same.

(2) A license issued under this subchapter is valid for ~~one~~ three calendar ~~year~~ years beginning on March 1 of the year the license is issued and ending on the last day of February ~~of the following year of the third year~~. A license under this subchapter expires at the end of the ~~annual~~ triennial period, ~~unless annual registration fees are paid within the annual period~~. In addition, the licensee must earn the required department-approved continuing education units within the triennial period.

(3) through (5) remain the same.

AUTH: 75-11-204, MCA

IMP: 75-11-204, 75-11-210, 75-11-211, 75-11-509, MCA

REASON: The department proposes to extend the licensing period from one year to three years under ARM 17.56.1406(2). This proposal will assist in maintaining lower fees, reduce resource expenditure by the department by minimizing the frequency of applicant processing, decrease the paperwork burden on applicants, and provide more consistent results on currently licensed individuals when searched by the public.

17.56.1407 LICENSE RENEWAL (1) A licensee who does not request a change from the category of license currently held may renew the license within the ~~annual~~ triennial period if the licensee completes a renewal application form provided by the department, pays the license renewal application fee required by ARM 17.56.1404, and, before the conclusion of each triennial period, provide sufficient proof that the continuing education requirements have been satisfactorily completed as required by (3) or (4).

(2) remains the same.

(3) Licensed removers must complete at least one refresher training course ~~administered~~ approved by the department for a total of four credit hours of continuing education within the triennial period.

(4) All licensees not subject to (3) must complete at least two department-approved continuing education courses for a total of 16 credit hours of continuing education within the triennial period. ~~One course must be a department-administered refresher training course.~~

(5) remains the same.

(6) A licensee, whose license has expired or who wants to change license categories, is subject to the same licensing requirements as a new applicant, including payment of the license application and examination fees and the satisfactory completion of the ~~written~~ licensing examination.

AUTH: 75-11-204, MCA

IMP: 75-11-204, 75-11-210, 75-11-211, 75-11-509, MCA

REASON: The department proposes under (1) to amend language in consideration of the proposed change to ARM 17.56.1406(2) in extending the licensing period from one year to three years. This proposal will assist in maintaining lower fees, reduce resource expenditure by the department by minimizing the frequency of applicant processing, decrease the paperwork burden on applicants, and provide more consistent results on currently licensed individuals when searched by the public.

The department proposes to remove the word "administered" in (3) and replace it with "approved" as there are many training courses available online that are not administered by the department but are "approved" pursuant to ARM 17.56.1408 that meet training requirements for licensing. Similarly, the requirement that one course must be a "department-administered" refresher training for licensees' continuing education has been removed in (4), reducing department resource expenditure and offering more options and flexibility to licensees.

The department proposes to remove the word "written" in (6) as the term is not clearly defined, and the administration of the licensing examination may take alternate forms such as an electronic format.

4. The department proposes to repeal the following rules:

17.56.1308 INSPECTION IN LIEU OF LICENSED INSTALLER

AUTH: 75-11-204, MCA

IMP: 75-11-204, 75-11-209, 75-11-212, 75-11-213, MCA

REASON: The department proposes to repeal ARM 17.56.1308 as this service is more appropriately provided by a private sector licensed installer. The department also performs and prioritizes activities based on staffing availability and can contribute a broader range of services to a greater number of stakeholders by eliminating this department function.

17.56.1309 INSTALLATION AND CLOSURE INSPECTION FEES

AUTH: 75-11-204, MCA

IMP: 75-11-204, 75-11-209, 75-11-212, 75-11-213, MCA

REASON: The department proposes to repeal ARM 17.56.1309 as the proposed removal of ARM 17.56.1308 eliminates its necessity and renders it obsolete.

17.56.1409 DUPLICATE LICENSES

AUTH: 75-11-204, MCA

IMP: 75-11-204, 75-11-210, 75-11-509, MCA

REASON: The department proposes the repeal of ARM 17.56.1409 as the department receives few requests for duplicate licenses and has subsequently proposed to repeal the fee for them in ARM 17.56.1404. Duplication of licenses can

be efficiently extracted from the department database by employees in a short period of time, and the fiscal impact of this effort is absorbed by initial licensing fees.

5. Concerned persons may submit their data, views, or arguments concerning the proposed action in writing to the Department of Environmental Quality, at 1520 E. Sixth Avenue, P.O. Box 200901, Helena, Montana 59620-0901; telephone (406) 444-1388; fax (406) 444-4386; or e-mail DEQMAR17-446@mt.gov, and must be received no later than 5:00 p.m., June 21, 2024.

6. Paul Nicol, staff attorney for the department, has been designated to preside over and conduct this hearing.

7. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies for which program the person wishes to receive notices. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to the contact person in paragraph 5 above or may be made by completing a request form at any rules hearing held by the department.

8. An electronic copy of this proposal notice is available through the Secretary of State's web site at <http://sosmt.gov/ARM/Register>.

9. The bill sponsor contact requirements of 2-4-302, MCA, do not apply.

10. With regard to the requirements of 2-4-111, MCA, the department has determined that the amendment and repeal of the above-referenced rules will not significantly and directly impact small businesses.

/s/ Sarah Christopherson
SARAH CHRISTOPHERSON
Rule Reviewer

/s/ Christopher Dorrington
CHRISTOPHER DORRINGTON
Director
Department of Environmental Quality

Certified to the Secretary of State May 14, 2024.

BEFORE THE DEPARTMENT OF TRANSPORTATION
OF THE STATE OF MONTANA

In the matter of the amendment of	)	NOTICE OF PROPOSED
ARM 18.15.101, 18.15.504,	)	AMENDMENT
18.15.801, 18.15.802, 18.15.803, and)	
18.15.805 pertaining to Alternative	)	NO PUBLIC HEARING
Fuels	)	CONTEMPLATED

TO: All Concerned Persons

1. On June 24, 2024, the Department of Transportation (department) proposes to amend the above-stated rules.

2. The department will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require accommodation, contact the department no later than 5:00 p.m. on June 14, 2024, to advise us of the nature of the accommodation that you need. Please contact Aliselina Strong, Department of Transportation, P.O. Box 201001, Helena, Montana, 59620; telephone (406) 444-0806; fax (406) 444-9415; TTY Service (800) 335-7592 or through the Montana Relay Service at 711; or e-mail astrong@mt.gov.

3. The rules as proposed to be amended provide as follows, new matter underlined, deleted matter interlined:

18.15.101 DEFINITIONS The following definitions apply in this chapter:

(1) remains the same

(2) "Alternative fuel" means a gas, liquid, or other fuel as defined in 15-70-701, MCA.

(3) "Alternative fuel dealer" means a person who is licensed or required to be licensed under 15-70-702, MCA, who delivers alternative fuel into the fuel supply tank or tanks of a motor vehicle.

(2) through (22) remain the same but are renumbered (4) through (24).

AUTH: 15-70-104, 15-70-115, 15-70-522, MCA

IMP: 15-70-403, 15-70-419, 15-70-426, 15-70-430, 15-70-455, 15-70-501, 15-70-502, 15-70-503, 15-70-511, 15-70-512, 15-70-513, 15-70-514, 15-70-521, 15-70-522, 15-70-523, 15-70-527, MCA

REASON: The proposed amendment is necessary to reflect the changes to Montana alternative fuel tax law as directed by 15-70-701, MCA, which was revised in 2023 to reflect emerging technologies and alternative fuel types being used to propel motor vehicle engines.

18.15.504 DYED SPECIAL FUEL (1) through (3) remain the same.

- (4) Use of high sulphur dyed special fuel on public roads is prohibited by the federal environmental protection agency (EPA), ~~as set forth in 40 CFR 80.29.~~
(5) through (7) remain the same.

AUTH: 15-70-104, 15-70-441, ~~60-2-201~~, MCA
IMP: 15-70-443, ~~60-2-111~~, MCA

REASON: The amendment to ARM 18.15.504 is necessary as 40 CFR 80.29 is no longer applicable.

18.15.801 ALTERNATIVE FUEL CNG AND LPG DEALER LICENSE (1) A person may not act as ~~an alternative fuel dealer a compressed natural gas (CNG) or liquefied petroleum gas (LPG) dealer~~ in this state unless the person is a holder of a valid alternative fuel dealer's license issued by the department of Transportation.

(2) Every alternative fuel dealer must apply for and obtain an alternative fuel ~~a CNG or LPG dealer license~~ prior to distributing alternative fuel CNG or LPG directly into the supply tank of a motor vehicle for highway use in this state. Application for the alternative fuel CNG or LPG dealer's license must be made on forms provided by the department and must contain information the department deems necessary. Upon receipt and approval of the application, the alternative fuel dealer license will be issued, ~~and must be conspicuously displayed at the dealer's principal place of business at which the fuel is to be distributed in this state.~~

(3) Every alternative fuel CNG or LPG dealer who distributes fuel at more than one location ~~needs only~~ shall obtain one alternative fuel dealer license for all locations and file a consolidated return. The alternative fuel dealer license must be obtained prior to distributing fuel at any location. ~~The original license or copy of the original must be conspicuously displayed at each location which distributes CNG or LPG fuel.~~

(4) Upon cancellation or revocation of the alternative fuel dealer license or discontinuance of distributing alternative fuel, CNG or LPG, ~~the dealer must return the license to the department. The name and address of the person or firm retaining records for audit purposes and the disposition of all fuel inventories must be provided to the department when the license is returned.~~

AUTH: 15-70-104, MCA
IMP: 15-70-702, 15-70-703, 15-70-705, 15-70-706, 15-70-712, 15-70-713, MCA

REASON: The proposed amendment is necessary to reflect the changes to Montana alternative fuel tax law as directed by 15-70-701, MCA, which was revised in 2023 to reflect emerging technologies and alternative fuel types being used to propel motor vehicle engines.

18.15.802 QUARTERLY TAX RETURNS (1) Every alternative fuel dealer must submit the quarterly tax return regardless of whether ~~he~~ the alternative fuel dealer has distributed alternative fuel during the immediately preceding calendar quarter. Failure to file the tax return will be considered sufficient cause for

revocation of the alternative fuel dealer's license, and the alternative fuel dealer license may be revoked as of that date.

(2) remains the same

(3) The department of ~~Transportation~~ may accept alternative fuel CNG and LPG dealer tax returns without requiring a listing of all individual sales made by those dealers.

AUTH: 15-70-104, MCA

IMP: 15-70-706, 15-70-713, 15-70-714, MCA

REASON: The proposed amendment is necessary to reflect the changes to Montana alternative fuel tax law as directed by 15-70-701, MCA, which was revised in 2023 to reflect emerging technologies and alternative fuel types being used to propel motor vehicle engines.

18.15.803 ALTERNATIVE FUEL DEALER RECORDS--AUDIT (1) Every alternative fuel dealer shall maintain all records necessary to support their alternative fuel CNG or LPG tax returns. The records must ~~account for all changes to CNG or LPG and must~~ include:

(a) a record of alternative fuel receipts together with invoices, bills of lading, and other documents relative to the acquisition of alternative fuel; and

(b) a record of alternative fuel disbursements together with the invoices, as well as bills of lading, and other documents relative to the disbursements of alternative fuel.

AUTH: 15-70-104, MCA

IMP: 15-70-712, 15-70-713, MCA

REASON: The proposed amendment is necessary to reflect the changes to Montana alternative fuel tax law as directed by 15-70-701, MCA, which was revised in 2023 to reflect emerging technologies and alternative fuel types being used to propel motor vehicle engines.

18.15.805 ALTERNATIVE FUEL CNG OR LPG DEALER'S BOND (1) ~~If an~~ alternative fuel CNG or LPG dealers ~~fails to file timely reports, they may will~~ be required to furnish the department of ~~Transportation~~ a corporate surety bond or other collateral security or indemnity equivalent to twice the alternative fuel dealer's estimated quarterly alternative fuel CNG or LPG tax ~~if the dealer fails to file timely reports~~. Failure to timely file as used in 15-70-704, MCA, means:

(a) an alternative fuel dealer has failed to file for more than one reporting period;

(b) an alternative fuel dealer has given the ~~state~~ department a non-sufficient fund check or whose non-sufficient fund check was returned as a result of a bank error more than twice; or

(c) and (2) remain the same.

AUTH: 15-70-104, MCA

IMP: 15-70-704, MCA

REASON: The proposed amendment is necessary to reflect the changes to Montana alternative fuel tax law as directed by 15-70-701, MCA, which was revised in 2023 to reflect emerging technologies and alternative fuel types being used to propel motor vehicle engines.

4. Concerned persons may submit their data, views, or arguments concerning the proposed actions in writing to: Aliselina Strong, Department of Transportation, P.O. Box 201001, Helena, Montana, 59620; telephone (406) 444-9415; fax (406) 444-5411; or e-mail astrong@mt.gov, and must be received no later than 5:00 p.m., June 21, 2024.
5. If persons who are directly affected by the proposed actions wish 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 to Aliselina Strong at the above address no later than 5:00 p.m., June 21, 2024.
6. If the agency receives requests for a public hearing on the proposed action from either 10 percent or 25, whichever is less, of the persons directly affected by the proposed action; from the appropriate administrative rule review 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 directly affected has been determined to be five persons based on a total of 49 alternative fuel dealers.
7. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies for which program the person wishes to receive notices. Notices will be sent by e-mail unless a mailing preference is noted in the request. Written requests may be mailed or delivered to the contact person in paragraph 4 above or may be made by completing a request form at any rules hearing held by the department.
8. An electronic copy of this proposal notice is available through the Secretary of State's web site at <http://sosmt.gov/ARM/Register>.
9. The bill sponsor contact requirements of 2-4-302, MCA, apply and have been fulfilled. The primary bill sponsors were contacted by email on March 15, 2024.
10. The special notice requirements of 2-4-303, MCA, have been fulfilled. On May 8, 2024, written contact with Transportation Interim Committee staff members was made by email.

11. With regard to the requirements of 2-4-111, MCA, the department has determined that the amendment of the above-referenced rules will not significantly and directly impact small businesses.

12. With regard to the requirements of 2-15-142, MCA, the department has determined the amendment of the above-referenced rules will not have direct tribal implications.

/s/ Valerie A. Balukas
Valerie A. Balukas
Rule Reviewer

/s/ Lawrence Flynn
Lawrence Flynn
Deputy Director
Department of Transportation

Certified to the Secretary of State May 14, 2024.

BEFORE THE DEPARTMENT OF CORRECTIONS
OF THE STATE OF MONTANA

In the matter of the adoption of NEW) NOTICE OF PUBLIC HEARING ON
RULES I through VI pertaining to pre-) PROPOSED ADOPTION
parole screening)

TO: All Concerned Persons

1. On June 14, 2024, at 10:00 a.m., the Department of Corrections will hold a public hearing via remote conferencing to consider the proposed adoption of the above-stated rules. Interested parties may access the remote conferencing platform in the following ways:

(a) Join via Microsoft Teams:

Meeting ID: 247 546 205 131
Passcode: cpPtXU

(b) Telephone:

(406)-318-5487
Passcode: 518113974#

(c) Join on a video conferencing device:

Tenant key: 291818717@t.plcm.vc
Video ID: 112 079 745 2

2. The Department of Corrections will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the Department of Corrections no later than June 7, 2024, to advise us of the nature of the accommodation that you need. Please contact Pamela Lammey, Department of Corrections, 5 South Last Chance Gulch, Helena, Montana, 59601; telephone (406) 444-9819; or e-mail Pamela.Lammey@mt.gov.

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

NEW RULE I INSTITUTIONAL SCREENING (1) The Department of Corrections (department) will screen eligible inmates for potential placement in a treatment or prelease facility prior to their parole eligibility.

(2) Potential placement in a treatment or prerelease facility prior to parole eligibility is a privilege, not a right.

AUTH: 53-1-203, MCA
IMP: 53-1-203, MCA

NEW RULE II INITIAL ELIGIBILITY CRITERIA (1) To be considered an eligible inmate, the inmate must meet all of the following criteria:

- (a) be under physical custody of the department as a secure placement inmate;
- (b) be within up to 14 months of parole eligibility;
- (c) not have any active detainers or warrants;
- (d) have 120 days of clear conduct prior to review;
- (e) have not refused placement within the last 180 days prior to review;
- (f) have not refused recommended treatment or other recommended programming within the last 180 days prior to review; and
- (g) have not been removed from recommended treatment or other recommended programming for disciplinary reasons within 180 days prior to review.

AUTH: 53-1-203, MCA

IMP: 53-1-203, MCA

NEW RULE III SCREENING FACTORS (1) In making its decision regarding eligibility for potential placement, the department will weigh and consider the following factors:

- (a) time until parole eligibility;
- (b) current risk assessment of the eligible inmate;
- (c) eligible inmate's compliance with recommended treatment or other recommended programming;
- (d) the type of crime for which the sentence is being served;
- (e) whether the eligible inmate is required to register as a sexual or a violent offender upon release;
- (f) whether the eligible inmate's sentence contains any parole restrictions;
- (g) victim input;
- (h) eligible inmate's overall conduct while in secure custody;
- (i) eligible inmate's expressed interest in placement in a treatment or a prerelease facility; and
- (j) any other factor that may be relevant based on the individual circumstances of the eligible inmate being considered.

(2) The department may, in its sole discretion, interview the eligible inmate being considered as part of its decision process.

(3) Any one factor may be sufficient to deny an eligible inmate's potential placement outside of the secure facility prior to the individual's parole eligibility.

AUTH: 53-1-203, MCA

IMP: 53-1-203, MCA

NEW RULE IV DECISION IN WRITING (1) The department will provide the eligible inmate being considered for potential placement with its decision in writing.

(2) If the department decides that placement outside of the secure facility is not appropriate prior to the eligible inmate's parole eligibility, the department must state the reason for its decision in the written decision.

(3) If the department decides that placement outside of the secure facility is appropriate prior to the eligible inmate's parole eligibility, that determination does not guarantee the inmate will be placed in any specific facility or placed at all.

AUTH: 53-1-203, MCA

IMP: 53-1-203, MCA

NEW RULE V FINAL DECISION (1) The decision of the department is final and is not subject to appeal or grievance.

AUTH: 53-1-203, MCA

IMP: 53-1-203, MCA

NEW RULE VI ONE-TIME CONSIDERATION (1) An eligible individual may be considered by the department only one time for any one particular sentence.

AUTH: 53-1-203, MCA

IMP: 53-1-203, MCA

REASON: House Bill 426 (2023) clarified the department's authority to place inmates within 14 months of parole eligibility or discharge in prerelease and treatment centers. These rules set forth the criteria the department will use to screen eligible inmates for potential placement in community programs. They articulate threshold criteria, factors to be considered, and provide for a notification process.

4. Concerned persons 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: Pamela Lammey, Department of Corrections, 5 South Last Chance Gulch, Helena, Montana, 59601; telephone (406) 444-3930; or e-mail Pamela.Lammey@mt.gov, and must be received no later than 5:00 p.m., June 21, 2024.

5. The Legal Unit of the department has been designated to preside over and conduct this hearing.

6. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies for which program the person wishes to receive notices. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to the contact person in 4 above or may be made by completing a request form at any rules hearing held by the department.

7. An electronic copy of this proposal notice is available through the Secretary of State's website at <http://sosmt.gov/ARM/Register>.

8. The bill sponsor contact requirements of 2-4-302, MCA, apply and have been fulfilled. The primary bill sponsor was contacted by e-mail and telephone on February 1, 2024, and April 25, 2024, respectively.

9. With regard to the requirements of 2-4-111, MCA, the department has determined that the adoption of the above-referenced rules will not significantly and directly impact small businesses.

/s/ Andres Haladay
Andres Haladay
Rule Reviewer

/s/ Brian Gootkin
Brian Gootkin
Director
Department of Corrections

Certified to the Secretary of State May 14, 2024.

BEFORE THE DEPARTMENT OF PUBLIC
HEALTH AND HUMAN SERVICES
OF THE STATE OF MONTANA

In the matter of the amendment of	)	NOTICE OF PUBLIC HEARING ON
ARM 37.41.101, 37.41.102,	)	PROPOSED AMENDMENT AND
37.41.107, 37.41.108, 37.41.109,	)	REPEAL
37.41.110, 37.41.116, 37.41.117,)	
37.41.119, 37.41.120, 37.41.121,)	
37.41.122, 37.41.130, 37.41.131,)	
37.41.132, 37.41.202, 37.41.206,)	
37.41.301, 37.41.302, 37.41.306,)	
37.41.308, and 37.41.315 and the)	
repeal of ARM 37.41.118, 37.41.133,)	
and 37.41.207 pertaining to aging)	
services)	

TO: All Concerned Persons

1. On June 13, 2024, at 10:00 a.m., the Department of Public Health and Human Services will hold a public hearing via remote conferencing to consider the proposed amendment and repeal of the above-stated rules. Interested parties may access the remote conferencing platform in the following ways:

(a) Join Zoom Meeting at: <https://mt-gov.zoom.us/j/82566942612?pwd=YXhIL0FBOFhqQ2V3enhPdDRTWIRDdz09>, meeting ID: 825 6694 2612, and password: 191410; or

(b) Dial by telephone: +1 646 558 8656, meeting ID: 825 6694 2612, and password: 191410. Find your local number: <https://mt-gov.zoom.us/j/82566942612?pwd=YXhIL0FBOFhqQ2V3enhPdDRTWIRDdz09>.

2. The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the Department of Public Health and Human Services no later than 5:00 p.m. on May 30, 2024, to advise us of the nature of the accommodation that you need. Please contact Bailey Yuhas, Department of Public Health and Human Services, Office of Legal Affairs, P.O. Box 4210, Helena, Montana, 59604-4210; telephone (406) 444-4094; fax (406) 444-9744; or e-mail hhsadminrules@mt.gov.

3. The rules as proposed to be amended provides as follows, new matter underlined, deleted matter interlined:

37.41.101 PURPOSE (1) ~~The purpose of the aging bureau of the senior long term care division~~ department's State Unit on Aging within the Senior and Long Term Care Division is to develop and administer ~~the state plan; coordinate all activities in the state relating to the purposes of the act; serve as the advocate for all older persons in the state; direct area agencies and service providers in the~~

development of comprehensive and coordinated service delivery systems throughout the state. the State Plan on Aging in accordance with the requirements of the Older Americans Act, Pub. L. No. 89-73 (1965), as amended and codified at 42 U.S.C. § 3001 et seq. The State Plan on Aging encompasses a comprehensive and coordinated service delivery system addressing the needs of older adults in the state.

(2) The State Unit on Aging performs the following functions:

(a) serves as the central authority, coordinating services in the state related to the Older Americans Act, including the coordination and oversight of area agencies and service providers;

(b) acts as the primary advocate for older adults in the state, in an effort to ensure their rights, dignity, and quality of life;

(c) provides guidance and direction to area agencies and service providers in developing and implementing effective and efficient service delivery systems that meet the diverse needs of older adults throughout the state; and

(d) works collaboratively with federal, state, and local partners to ensure the successful implementation and administration of aging services, including the Senior Farmers' Market Nutrition Program and Nutrition Services.

AUTH: 53-5-606 52-3-406, MCA

IMP: 53-5-602 52-3-402, 53-5-604 52-3-404, MCA

37.41.102 DEFINITIONS For purposes of this subchapter, In addition to the definitions contained in 52-3-401, MCA, the following definitions apply to this subchapter:

(1) "Act" means the Older Americans Act of 1965, as amended.

(2)(1) "Administration on aging" "Administration for Community Living/Administration on Aging" means the agency established in the office of the secretary, department of health and human services within the U.S. Department of Health and Human Services, as part of the office of human development services which that is responsible for administering the provisions of the act Older Americans Act and whose address is North Building, 330 Independence Avenue, Southwest, Washington, D.C. 20201.

(3) "Federal department" means the department of health and human services.

(4) "Department" means the department of public health and human services.

(5) "Division" means the senior long term care division of the department of public health and human services.

(6) "Commissioner" means the commissioner on aging of the administration on aging.

(7)(2) "Area agency" means the agency designated by the division department in a planning and service area to develop and administer an area plan for a comprehensive and coordinated system of services for older persons adults.

(8)(4) "Community focal point" means a place or mobile unit in a community or neighborhood designated by an area agency for the collocation and coordination of services to older persons adults.

~~(9)~~(5) "Comprehensive and coordinated system" means a program of interrelated social and nutrition services designed to meet the needs of older persons in a planning and service area. system for providing necessary supportive services, including nutrition services, in a manner designed to:

(a) facilitate accessibility to, and utilization of, supportive and nutrition services provided within the geographic area served by such system by any public or private agency or organization;

(b) develop and make the most efficient use of supportive and nutrition services in meeting the needs of older adults;

(c) use available resources efficiently and without duplication; and

(d) encourage and support public and private entities in assisting older adults to meet their service needs on a voluntary basis.

~~(10)~~ "Indian tribal organization" means the recognized governing body of any Indian tribe, or any legally established organization of Indians which is controlled, sanctioned or chartered by the governing body.

~~(11)~~ "Indian tribe" means any tribe, band, nation or other organized group or community of Indians which is recognized as eligible for the special programs and services provided by the federal government to Indians because of their status as Indians.

~~(12)~~ "Manual" means the state manual of policy and procedures for operations of programs under the Older Americans Act for the division.

~~(13)~~ "Multipurpose senior center" means a community or neighborhood facility for the organization and provision of facilities for recreational and group activities for older persons and services including, but not limited to, health, social, nutritional, and educational services.

~~(14)~~ "Planning and service area" means the geographic area served by an area agency.

~~(15)~~ "Nonprofit organization" means a corporation organized under Title 35, chapter 2, MCA, in which no part of its income or profit is distributable to its members, directors, or officers.

~~(16)~~(7) "Older person adult" means any person 60 years old or older of age or older.

~~(17)~~(8) "Service provider" means an individual, agency, or organization awarded a subgrant or contract from the ~~division~~department or an area agency to provide services under the state plan or an area plan.

~~(18)~~ "Federal fiscal year" means the period beginning October 1 of one year and ending September 30 of the next year.

~~(19)~~ "State fiscal year" means the period beginning July 1 of one year and ending June 30 of the next year.

~~(20)~~ "State plan" means the document submitted by the division to the administration on aging in order to receive grants from the state's allotments under the act.

~~(21)~~ "Units of general purpose local government" include, but are not limited to, counties and incorporated cities and towns and other government units as may be established by law pursuant to Title 7, chapters 1, 2, and 3, MCA.

(22)(3) "Area plan" means the document submitted by an area agency to the ~~division~~ department in order to receive subgrants or contracts from the ~~division's grants funds allocated~~ under the act Older Americans Act.

(23)(9) "Supportive services" means:

(a) ~~access~~ services such as:

(i)(a) transporting older ~~persons~~ adults to and from community facilities and resources;

(ii)(b) escorting older ~~persons~~ adults unable to use conventional means of transportation;

(iii)(c) outreach to identify hard-to-reach older ~~persons~~ adults and assist them in obtaining services; and

(iv)(d) informing older ~~persons~~ adults of the opportunities and services available and referring them to the proper service provider;

(b)(e) community services ~~such as including~~ education, information and referral, health, legal, advocacy, program development, counseling, health screening, residential repair and renovation, recreation ~~and alteration, renovation, and~~ acquisition and construction of multipurpose senior centers;

(c)(f) home services such as home health, homemaker, and home chore; and

(d)(g) services in care-providing facilities such as placement, counseling, complaint, and grievance resolution.

(24)(6) "Nutrition services" means congregate and home-delivered meals, nutrition education, ~~and shopping assistance~~ nutrition counseling.

(25) "Entity" means an individual, person or organization.

(26) "MCA" means the Montana Code Annotated.

(27) "District" means one of the multi-county districts established by Executive Order 2-71 and Executive Order 7-73.

AUTH: 53-5-606 52-3-406, MCA

IMP: 53-5-604 52-3-401, MCA

37.41.107 DESIGNATION OF PLANNING AND SERVICE AREAS (1) The ~~division~~ department may designate as a planning and service area:

(a) any unit of general-purpose local government; or

(b) any district or combination of districts; ~~or~~

(c) ~~any Indian reservation.~~

(2) The ~~designation~~ department shall designate and fix the number of planning and service areas ~~by the division will be governed by the following criteria:~~ in accordance with applicable federal and state law, including 52-3-405, MCA.

(a) ~~Planning and service areas will be designated every 4 years beginning October 1, 1987.~~

(b) ~~There will be no more than 12 planning and service areas designated in each 4 year period.~~

(c) ~~There will be no less than 7 planning and service areas designated in each 4 year period.~~

(d) ~~The 11 or 12 planning and service areas that were designated prior to October 1, 1983 will continue to be designated as planning and service areas until October 1, 1987.~~

~~(e) The division will accept requests from planning and service areas that the area will be divided into two new planning and service areas.~~

~~(f) Before October 1, 1983, only one request will be approved by the division creating two planning and service areas out of one.~~

AUTH: ~~53-5-606~~ 52-3-406, MCA

IMP: ~~53-5-603, 53-5-605,~~ 52-3-405, MCA

37.41.108 DESIGNATION OF AREA AGENCIES (1) ~~The division may designate as an area agency in a planning and service area an entity which demonstrates its ability to~~ In accordance with applicable provisions of section 305 of the Older Americans Act, 42 U.S.C. § 3025, the department may designate an entity as an area agency in a planning and service area after considering the following factors:

~~(a) develop and administer an area plan for a comprehensive and coordinated system of services; and~~ geographical distribution of older adults in Montana;

~~(b) serve as the advocate and focal point for older persons in the planning and service area.~~ incidence of need for supportive services, nutrition services, multipurpose senior centers, and legal assistance;

~~(c) distribution of older adults residing in such areas who have the greatest social or economic need, with particular attention to low-income older adults, including older low-income minority adults, older adults with limited English proficiency, and older adults residing in rural areas;~~

~~(d) distribution of Native American elders residing in such areas;~~

~~(e) distribution of resources available to provide such services or centers;~~

~~(f) boundaries of existing areas within the state drawn for the planning or administration of supportive-services programs; and~~

~~(g) location of units of general-purpose local government.~~

~~(2) Entity includes but is not limited to:~~

~~(a) an established office on aging which operates within the planning and service area;~~

~~(b) any office or agency of a unit of general purpose local government;~~

~~(c) any combination of offices or units of general purpose local governments;~~

~~or~~

~~(d) any other public or private nonprofit agency, except any regional or local agency of the state.~~

AUTH: ~~53-5-606~~ 52-3-406, MCA

IMP: ~~53-5-602~~ 52-3-402, ~~53-5-604~~ 52-3-404, MCA

37.41.109 DIVISION DEPARTMENT AGING SERVICES HEARING PROCEDURES (1) A designated area agency is entitled to a hearing if it is aggrieved by an adverse action of the department ~~determination which:~~

~~(a) disapproves~~ disapproving a plan or plan amendment submitted by the agency;

(b) ~~disapproves~~ disapproving an area plan for failure to comply substantially non-compliance with the requirements of the act or manual Older Americans Act; or

(c) ~~withdraws~~ withdrawing the agency's designation.

(2) A unit of general-purpose local government, district, or combination of districts is entitled to a hearing if it is aggrieved by ~~an adverse~~ a department action denying designation as a planning and service area.

(3) ~~The hearing will be conducted according to the applicable provisions of ARM 37.5.304, 37.5.305, 37.5.307, 37.5.310, 37.5.311, 37.5.313, 37.5.316, 37.5.318, 37.5.322, 37.5.325, 37.5.328, 37.5.331, 37.5.334 and 37.5.337. Hearings will be conducted in accordance with ARM 37.5.117.~~

AUTH: ~~53-5-606~~ 52-3-406, MCA

IMP: ~~53-5-602~~ 52-3-402, ~~53-5-604~~ 52-3-404, MCA

37.41.110 FUNCTIONS OF AREA AGENCY (1) Pursuant to the applicable provisions of section 306 of the Older Americans Act, 42 U.S.C. § 3026, each designated ~~An~~ area agency shall:

(1)(a) ~~develop and administer an~~ a four-year area plan for a comprehensive and coordinated delivery system ~~in~~ within a planning and service area;

(2)(b) ~~assess the kinds and levels of services needed by older persons in the planning and service area~~ agency's incidence of need for supportive services, nutrition services, multipurpose senior centers, and legal assistance for older adults with the greatest social and/or economic need in the area, with particular attention to those who are low-income, including minority individuals, those with limited English proficiency, and those residing in rural areas;

(3)(c) ~~enter into subgrants or contracts to provide all services under the~~ area plan, except as provided under ARM 37.41.121;

(4)(d) ~~provide technical assistance, monitor, and quarterly evaluate the performance of all service providers under the plan; monitor and conduct quarterly performance evaluations of all service providers under the plan, and provide them with technical assistance as needed;~~

(5)(e) ~~coordinate the administration of its plan with other federal, state, and local resources;~~

(6)(f) ~~establish an advisory council as required by~~ pursuant to ARM 37.41.116;

(7) ~~assure that older persons in the planning and service area have access to information and referral services;~~

(8) ~~divide the entire planning and service area into community service areas and designate community focal points;~~

(9) ~~provide outreach efforts to identify older persons and inform them of the availability of services under the plan; and~~

(g) conduct targeted outreach efforts to identify and inform older adults about services available under the area plan;

(h) ensure that older adults in the planning and service area have access to information and referral services available under the area plan;

(i) divide the entire planning and service area into community service areas, and designate community focal points; and

(40)(j) develop and publish a manual of methods it ~~uses~~ used to establish priorities for services, and provide a copy of the manual to each service provider in the planning and service area.

AUTH: ~~53-5-606~~ 52-3-406, MCA

IMP: ~~53-5-602~~ 52-3-402, ~~53-5-604~~ 52-3-404, MCA

37.41.116 AREA AGENCY ADVISORY COUNCIL (1) ~~An area agency shall establish an advisory council to advise the agency in:~~ Pursuant to applicable provisions of section 306 of the Older Americans Act, 42 U.S.C. § 3026, each area agency shall establish an advisory council to provide guidance and advice to the agency in the following areas:

(a) ~~development and administration of the area plan; developing and administering the area plan~~ and operations conducted under the plan;

(b) ~~conducting public hearings; or focus groups when needed, to gather input on aging services from older adults and community members;~~

(c) ~~representing the interests of older persons~~ adults in the planning and service area; and

(d) ~~reviewing and commenting~~ providing comment on all community policies and programs which affect older persons. affecting older adults.

(2) ~~The composition of the advisory council shall be made up of:~~ meet the requirements of 45 CFR § 1321.63(b). The department adopts and incorporates by reference 45 CFR § 1321.63(b), as amended February 14, 2023, which sets forth the composition requirements for advisory councils under the Older Americans Act. A copy of this regulation may be obtained at <https://www.ecfr.gov/> or by contacting the Department of Public Health and Human Service, Senior and Long Term Care Division, P.O. Box 4210, Helena, MT 59604-4210.

(a) ~~interested citizens, more than 50 percent of whom are older persons; and~~

(b) ~~local elected officials.~~

(3) ~~The agency may use the advisory council to advise it in carrying out any of its functions.~~ The advisory council shall meet, at a minimum, twice each year.

(4) ~~The area agency shall provide staff and assistance to the advisory council.~~ To promote transparency and community involvement, the area agency shall provide public notice of advisory council meetings at least three days prior to the meeting date. Notices shall be posted at local senior centers or congregate meal sites within the planning and service area.

(5) The area agency shall provide necessary staff and assistance to support the advisory council in fulfilling its responsibilities effectively.

AUTH: ~~53-5-606~~ 52-3-406, MCA

IMP: ~~53-5-602~~ 52-3-402, ~~53-5-604~~ 52-3-404, MCA

37.41.117 AREA PLAN CONTENT (1) ~~An area plan shall provide for a comprehensive and coordinated delivery system.;~~

(a) demonstrate how the area agency will meet functions required by ARM 37.41.110; and

(b) provide the services set forth in ARM 37.41.121.

(2) ~~An area plan shall demonstrate how the area agency will meet functions required by ARM 37.41.110. Area agency plans must meet the applicable requirements of section 306 of the Older Americans Act, 42 U.S.C. § 3026.~~

(3) ~~An area plan shall provide that: The area agency shall:~~

(a) ~~services are provided as provided in ARM 37.41.120; hold a public hearing or focus group meetings on the area plan and any amendments proposed to the area plan;~~

(b) ~~any existing state and local licensure requirements for the provision of services are met. provide at least 14-days' notice to older adults, public officials, and other interested parties of the times, dates, and locations of the public hearings or focus group meetings; and~~

(c) ~~submit the area plan and amendments to the area advisory council for review and comment and to the department for approval.~~

(4) ~~An area plan shall provide that an adequate amount of the area agency's allotment for supportive services shall be spent for access services, in-home services, and legal services, excluding amounts for administration.~~

(5) ~~An area plan shall specify:~~

(a) ~~program objectives to implement all requirements regarding delivery of services;~~

(b) ~~objectives established by the division;~~

(c) ~~a resource allocation plan indicating the proposed use of all funds directly administered by the area agency;~~

(d) ~~an inventory of programs operated by other agencies in the planning and service area for services to older persons;~~

(e) ~~a description of community services areas and an identification of community focal points; and~~

(f) ~~methods the area agency uses to set services priorities.~~

AUTH: ~~53-5-606~~ 52-3-406, MCA

IMP: ~~53-5-602~~ 52-3-402, ~~53-5-604~~ 52-3-404, MCA

37.41.119 AREA PLAN, APPROVAL/DISAPPROVAL (1) ~~The division shall approve an area plan or amendments which meet the requirements of the act. The department will approve an area plan and amendments meeting the requirements of this subchapter and the Older Americans Act.~~

(2) ~~The division shall~~ The department will follow the procedures in ARM 37.41.109 to terminate an area plan or area agency designation if the ~~division~~ department finds:

(a) ~~finds that an area plan is unapprovable~~ an area plan has not been timely submitted;

(b) ~~proposes to terminate the designation of an area agency; or~~ an area plan is not approved; or

(c) ~~finds that the provisions or administration or provisions of an approved area plan no longer substantially comply with the requirements of the act~~ Older Americans Act.

AUTH: ~~53-5-606~~ 52-3-406, MCA

IMP: 53-5-602 52-3-402, 53-5-604 52-3-404, MCA

37.41.120 AREA PLAN, AMENDMENT/DEVELOPMENT (1) An area agency shall: ~~(1)~~ amend the area plan if:

(a) ~~a newly enacted or amended state or federal statute or regulation law requires necessitates revision in order to comply with the law a new provision or conflicts with any existing plan provision; or~~

(b) local law, organization, policy, or agency operations changes and is are no longer accurately reflected in the area plan; ;

~~(c) the area agency proposes to add, change, or delete any area plan provisions; or,~~

~~(d) the division requires further annual amendments;~~

~~(2) receive subgrants or contracts only under an approved area plan; and~~

~~(3)~~(2) The area agency may use its Older Americans Act-funded subgrants ~~or and~~ contracts only for activities under an the approved area plan.

AUTH: 53-5-606 52-3-406, MCA

IMP: 53-5-602 52-3-402, 53-5-604 52-3-404, MCA

37.41.121 DIRECT PROVISION OF SERVICES BY AN AREA AGENCY

(1) The area agency shall primarily use subgrants or contracts with service providers to provide all services under the ~~act~~ Older Americans Act unless the ~~division decides that~~ department determines the area agency's direct provision of a service by the area agency is necessary to ensure assure an adequate supply of the service, or no other agency is able or available to provide the service.

(2) The area agency may directly provide information and referral, outreach, advocacy, program development, coordination, individual needs assessment, and case management services if the ~~division decides that~~ department determines the area agency can perform the services more effectively and efficiently than any other agency in the planning and service area.

~~(3) For all other services funded under the act, the division may allow the area agency to directly provide services in the planning and service area if no other agency can and will provide the service.~~

~~(4)~~(3) The area agency may plan, coordinate, and provide services funded under other programs if:

(a) it does not use funds under the ~~act~~ Older Americans Act for those services; and

(b) it continues to meet all its area agency responsibilities.

AUTH: 53-5-606 52-3-406, MCA

IMP: 53-5-602 52-3-402, 53-5-604 52-3-404, MCA

37.41.122 WITHHOLDING OF AREA AGENCY; FUNDS TERMINATION

(1) The ~~division shall~~ department may withhold ~~further~~ payments to an area agency ~~when the division, after notice and opportunity for a hearing required in ARM 37.41.109, finds that~~ if it finds the area agency has failed to:

(a) substantially comply with federal or state law;

- (b) submit required reports with the department; or
- (c) follow policy or procedures in a manner that results in decreased services.
- ~~(1) the area agency does not meet the requirements of the act;~~
- ~~(2) the area plan or plan amendment is not approvable; or, Prior to making a final determination to withhold funds, the department will provide the agency with:~~
 - (a) written notice of the action to withhold funds;
 - (b) documentation of the need for such action; and
 - (c) the opportunity for a public hearing on the action.
- ~~(3) there is failure in the provisions or administration of an approved area plan to comply with any provision of the act.~~

AUTH: 53-5-606 52-3-406, MCA

IMP: 53-5-602 52-3-402, 53-5-604 52-3-404, MCA

37.41.130 SERVICE CONTINUATION BY DIVISION DEPARTMENT (1) If the ~~division terminates~~ department withholds funding under ARM 37.41.122, it shall: notify the area agency and the Administration for Community Living/Administration on Aging about the action to withhold funds.

- ~~(a) notify the administration on aging;~~
- ~~(b) provide a plan for the continuity of services in the planning and service area; and~~
- ~~(c) designate a new area agency in the planning and service area.~~
- ~~(2) The division may, for a period up to 180 days after its final notice to withdraw designation of an area agency: The department may use the withheld funds to directly administer services within the service area served by the area agency for a period not to exceed 180 days. If the department determines the area agency has not taken corrective action, or if the department does not approve of the corrective action, the department may extend the time period to directly administer services by up to 90 days.~~
 - ~~(a) perform the responsibilities of the area agency; and~~
 - ~~(b) assign the responsibilities of the area agency to another agency in the planning and service area.~~

AUTH: 53-5-606 52-3-406, MCA

IMP: 53-5-602 52-3-402, 53-5-604 52-3-404, MCA

37.41.131 CONTRIBUTIONS FOR SERVICES (1) The area agency shall require each service provider under the area plan to:

- ~~(a) give each older person who receives a service information about the cost of the service; give information about the cost of services to each older adult receiving services;~~
- ~~(b) give each older person adult an opportunity to contribute to part or all of the cost of the service;~~
- ~~(c) inform each older person adult that he they may decide freely whether and how much to contribute to the cost of the service or not to contribute and how much;~~

(d) protect the privacy and confidentiality of each older person adult with respect to ~~his~~ the contribution or non-contribution;

(e) have appropriate procedures to safeguard and account for all contributions;

(f) use all contributions to expand the services ~~of the provider under the act for which payment was given; and~~

(g) use all contributions for nutrition services to increase the number of meals served;

(h) not consider assets, savings, or other property owned by an older adult in determining whether cost-sharing is permitted;

(i) not deny any service for older adults based on their income or failure to make a cost-sharing payment when allowed, when funds are received under the Older Americans Act;

(j) determine eligibility of older adults to cost-share solely based on a confidential declaration of income, without requiring verification; and

(k) distribute written materials created by the department.

(2) ~~The area agency shall permit each service provider to develop a contribution schedule for services based on:~~ The area agency may not allow any service provider to invoice for voluntary contributions.

~~(a) the income ranges of older persons in the community; and~~

~~(b) the provider's other sources of income.~~

~~(3) The area agency may not allow any service provider to deny an older person a service because the older person would not contribute for the service.~~

AUTH: ~~53-5-606~~ 52-3-406, MCA

IMP: ~~53-5-602~~ 52-3-402, ~~53-5-604~~ 52-3-404, MCA

37.41.132 PROVISION OF CONGREGATE NUTRITION SERVICES (1) An area agency may award nutrition services funds only to a nutrition services provider which that:

(a) remains the same.

(b) provides home-delivered nutrition services directly or by contract;

(c) and (d) remain the same.

(2) An area agency shall award funds to a nutrition services provider ~~which~~ that has carried out its nutrition services activities with demonstrated effectiveness.

AUTH: ~~53-2-205, 53-5-205~~ 52-3-406, MCA

IMP: ~~53-2-205, 53-5-203~~ 52-3-101, 52-3-504, MCA

37.41.202 SENIOR FARMERS' MARKET NUTRITION PROGRAM (SFMNP): DEFINITIONS ~~Unless otherwise indicated, In addition to the definitions contained in 52-3-502, MCA, the following definitions apply throughout to this chapter subchapter:~~

(1) "Adverse action" means an action ~~taken by~~ of the department ~~in the administration of the SFMNP having a negative impact on a farmer, participant, or local agency that has an agreement;~~

(a) denying an application or agreement;

(b) terminating an agreement or application for failure to comply with program requirements; or

(c) imposing corrective action.

(2) remains the same.

(3) "Application" means a written request submitted on a form provided by the department or local agencies indicating interest in participating in SFMNP ~~either as a senior as defined in (14) or a farmer as defined in (9).~~

(4) and (5) remain the same.

~~(6) "Department" means the department of Public Health and Human Services, Aging Services Bureau.~~

(7) through (14) remain the same but are renumbered (6) through (13).

~~(15)~~(14) "Senior Farmers' Market Nutrition Program (SFMNP)" means the Senior Farmers' Market Nutrition Program authorized by 7 U.S.C. § 3007; and regulations in provided in 7 CFR Part 249.

~~(16) ""SFMNP state plan" means the annual state plan for SFMNP that describes the manner in which the department intends to implement all aspects of program administration within its jurisdiction in accordance with 7 CFR 249.~~

(17) remains the same but is renumbered (15).

~~(18)~~(16) "Violation" means an activity that is prohibited by participant, farmer, or local agency SFMNP agreement ~~and, 7 CFR Part 249, or this subchapter.~~

AUTH: 52-1-103, 52-3-504, MCA

IMP: 52-3-102, 52-3-505, MCA

37.41.206 SENIOR FARMERS' MARKET NUTRITION PROGRAM
(SFMNP): FARMER ELIGIBILITY, AND PARTICIPATION, AND VIOLATIONS

(1) through (3) remain the same.

(4) An authorized farmer must comply with SFMNP requirements contained in the terms and conditions of the farmer agreement and in applicable provisions of 7 CFR § 249.10.

(5) A farmer is in violation of the SFMNP if the farmer fails to:

(a) comply with the SFMNP and terms and conditions of the farmer agreement; or

(b) participate in the initial and annual training on SFMNP provided by the department.

AUTH: 52-1-103, 52-3-504, MCA

IMP: 52-3-102, 52-3-505, MCA

37.41.301 NUTRITION SERVICES, ELIGIBILITY (1) Eligibility for congregate Congregate nutrition services will be determined as follows: may be made available to:

~~(a) a person will be considered for eligibility if a member of one of the following categories:~~

~~(i)(a) a person aged 60 years or older an older adult;~~

~~(ii)(b) the spouse of an older adult person 60 years of age or older regardless of that spouse's age;~~

~~(iii)(c) a handicapped or disabled non-elderly person residing in a housing facility occupied primarily by elderly persons and at which congregate nutrition services are provided~~ persons with disabilities who live in housing facilities in which mainly older adults live and which also provide congregate nutrition services; or and

~~(iv)(d) a person~~ persons providing volunteer services to a congregate nutrition service provider during meal hours.

~~(b)(2) a nutrition~~ Nutrition provider, providers must determine eligibility for nutrition services in accordance with the criteria in ~~(a) (1) and standard written procedures adopted by the provider to govern enrollment in the services, will determine who will be recipients of that provider's services~~ has adopted.

AUTH: 53-2-201, ~~53-6-402~~, MCA

IMP: 52-3-504, 53-2-201, ~~53-6-402~~, MCA

37.41.302 NUTRITION SERVICES, DEFINITIONS In addition to the definitions contained in 52-3-502, MCA, the following definitions apply to this subchapter:

~~(1) "Congregate meals" means those meals served in a group setting at a selected site that has the seating and dining furniture necessary for service of meals family style, restaurant style or cafeteria style.~~

~~(2)(1) "Home-delivered meals" means those meals transported from a preparation site to persons in their residences and~~ includes ~~is inclusive of those programs commonly known as Meals on Wheels.~~

~~(3)(2) "Nutrition service provider" means a non-profit corporation or public agency providing, on a regular basis, congregate or home-delivered meals to elderly or other adult persons who, due to age, handicaps or disabilities, etc., are unable to provide themselves with regular meals.~~

(3) "Older adult" means any person 60 years of age or older.

AUTH: 53-2-201, ~~53-6-402~~, MCA

IMP: 52-3-504, 53-2-201, ~~53-6-402~~, MCA

37.41.306 NUTRITION SERVICES, FOOD REQUIREMENTS (1) The nutrition service provider shall ensure that:

(a) ~~the use of procedures are used which that~~ preserve nutritional value and food safety in the purchase and preparation of food and delivery of meals;

(b) ~~the use of appropriate food containers and necessary utensils are used for blind and handicapped persons~~ individuals who are blind or who have a disability;

~~(c) no food prepared or canned in the home way may be used in meals provided by providers. Only commercially processed, canned food may be used~~ providers only offer commercially processed, canned food that has not been prepared or canned in a home;

(d) hot transported food be at 140° F or above from time of final food preparation to completion of ~~serving~~ delivery;

(e) cold food be maintained at ~~45~~ 40° F or below from time of initial service to completion of delivery service; and

(f) all food transported to sites is considered "leftover₁"; except unopened pre-packaged food, and food remaining at the meal site or main food preparation center ~~be is~~ thrown away.

(2) Vitamins ~~and/or~~ mineral supplements shall not be provided by the nutrition service provider.

(3) Each meal served by the service provider shall contain at least one-third of the current recommended dietary allowance as established by the ~~food and nutrition board of the national academy of sciences, national research council~~ Food and Nutrition Board of the National Academies of Sciences, Engineering, and Medicine.

AUTH: 53-2-201, ~~53-6-402~~, MCA

IMP: 52-3-504, 53-2-201, ~~53-6-402~~ MCA

37.41.308 CONGREGATE NUTRITION SERVICES, PROVIDER REQUIREMENTS (1) The nutrition service provider shall ~~provide~~:

(a) provide a hot or other appropriate meal in a congregate setting at least once a day, ~~5~~ five or more days a week, except in a rural area where such frequency is not feasible and is approved by the department;

(b) provide services as close as possible in physical proximity to the majority of eligible older persons adults within the service area;

(c) give preference to community facilities when locating a congregate site;

(d) ~~to provide supervision of~~ all staff working in the preparation of food, ~~supervision by a person who will ensure the application of~~ ensuring adherence to proper hygiene techniques and practices in food handling preparation and service;

(e) provide training by qualified personnel in sanitation, food preparation, and portion control for all paid and volunteer staff who prepare, handle, and serve food;

(f) ~~at least semi-annual review of the menus used and when the menus are completely changed by a registered dietician, to assure that compliance with ARM 37.41.306(3) is met. It is recommended that a cycle menu be used to assure such compliance;~~ conduct menu reviews at least semi-annually, ensuring compliance with ARM 37.47.306(3) when a registered dietician changes the menus;

(g) ~~that development and analysis of menus be the responsibility of a~~ use a qualified dietician/ or nutritionist to conduct menu analyses; and

(h) ~~that maintain menus and menu analyses be maintained for audit purposes on file for 3 years~~ for three years for auditing purposes;

(i) provide nutrition education and other nutrition services, as appropriate, based on the needs of meal recipients;

(j) plan meal availability for older adults during weather-related emergencies and natural disasters, including public health emergencies; and

(k) conduct an annual intake and nutrition risk assessment of each participant.

AUTH: 53-2-201, ~~53-6-402~~, MCA

IMP: 52-3-504, 53-2-201, ~~53-6-402~~ MCA

37.41.315 HOME-DELIVERED NUTRITION SERVICES, PROVIDER REQUIREMENTS (1) ~~Nutrition~~ Pursuant to section 336 of the Older Americans Act, 42 U.S.C. § 3030f, nutrition service providers who provide home-delivered meals shall:

(a) ~~provide for home delivered meals at least once a day, 5 or more days a week;~~ provide, on five or more days a week, except in a rural area where such frequency is not feasible and the department approves less frequency, at least one home-delivered meal, which may consist of hot, cold, frozen, dried, canned, or fresh foods, and, as appropriate, supplemental foods and any additional meals the provider elects to deliver;

(b) remains the same.

(c) ~~with the consent of the older person, or his representative, bring to the attention of appropriate officials for follow-up, conditions or circumstances which place the older person or the household in imminent danger;~~ provide nutrition education, nutrition counseling, and other nutrition services, as appropriate, based on the needs of meal recipients;

(d) ~~where feasible and appropriate, make arrangements for the availability of meals to older persons in weather-related emergencies; and~~ notify appropriate officials for follow-up on any conditions or circumstances placing the older adult or the household in imminent danger;

(e) ~~make at least an annual written evaluation of each recipient in order to re-evaluate the need for the continuation of home delivered meals. plan for availability of meals to older adults during weather-related emergencies and natural disasters, including public health emergencies; and~~

(f) complete at least annually an intake application for each recipient for re-evaluating the need to continue home-delivered meals.

AUTH: 53-2-201, ~~53-6-402~~, MCA

IMP: ~~52-3-504~~, 53-2-201, ~~53-6-402~~, MCA

4. The department proposes to repeal the following rules:

37.41.118 AREA PLAN REVIEW

AUTH: 53-5-606, MCA

IMP: 53-5-602, 53-5-604, MCA

37.41.133 FOOD DISTRIBUTION RATIOS

AUTH: 53-2-201, 53-6-402, MCA

IMP: 53-2-201, 53-6-402, MCA

37.41.207 SENIOR FARMERS' MARKET NUTRITION PROGRAM (SFMNP): FARMER PARTICIPATION REQUIREMENTS AND VIOLATIONS

AUTH: 52-1-103, 52-3-504, MCA

IMP: 52-3-102, 52-3-505, MCA

5. STATEMENT OF REASONABLE NECESSITY

The Department of Public Health and Human Services (department) proposes this rulemaking to update, consolidate, simplify, and make more user friendly the administrative rules governing aging services. Many of these rules have not been updated since 1987.

The department has reviewed and applied the regulatory reform initiative criteria to the rules by assessing if each rule serves a legitimate purpose, is not redundant, creates the lowest burden possible to meet the identified need, and is clear in language and intent.

The department is also proposing rule amendments to align with the requirements of Senate Bill (SB) 45, which was passed and enacted into law during the 2023 Montana Legislative Session. SB 45 revised laws related to aging services by updating criteria for the designation of planning and service areas and modernizing terminology used within the aging services statutes.

Technical, stylistic, and nonsubstantive updates are also proposed to make the rules clearer and more user friendly.

ARM 37.41.101

The department proposes to amend this rule so that the current functions of the State Unit on Aging are more clearly specified within rule. The proposed amendments are necessary to ensure the rule aligns with the current functions of the State Unit on Aging.

ARM 37.41.102

The department proposes to amend this rule to clarify the meaning of terms used throughout the area agency rules and to provide for a better understanding of these rules. Definitions of terms defined in statute have been removed from this rule. The department has also updated the rule to use terminology that is consistent with current law.

ARM 37.41.107

The department proposes to amend this rule to remove outdated language and to update the rule to align with enactment of SB 45.

ARM 37.41.108

The department proposes to amend this rule to remove outdated language and more clearly specify the criteria governing the designation of area agencies.

ARM 37.41.109

The department proposes to amend this rule to clarify the procedures governing aging services hearings in cases in which a designated area agency is aggrieved by

certain adverse actions of the department. The proposed changes align with requirements of the Older Americans Act, codified at 42 U.S.C. 3001 et seq.

ARM 37.41.110

The department proposes to amend this rule to remove outdated language and more clearly specify the functions of area agencies in accordance with requirements of the Older Americans Act.

ARM 37.41.116

The department proposes to amend this rule to update and clarify the required functions and composition of area agency advisory councils. The proposed changes align with requirements of the Older Americans Act.

ARM 37.41.117

The department proposes to amend this rule to update and clarify the required content of area plans that must be maintained by area agencies. The proposed changes align with requirements of the Older Americans Act.

ARM 37.41.119

The department proposes to amend this rule to clarify the criteria and process governing the department's approval of area plans.

ARM 37.41.120

The department proposes to amend this rule to update and clarify when area plan amendments are required.

ARM 37.41.121

The department is proposing technical and stylistic amendments to clarify this rule governing the direct provision of services by area agencies.

ARM 37.41.122 and 37.41.130

The department proposes to amend these rules to update and clarify criteria under which funds may be withheld from an area agency and the process for ensuring continuity of services for older adults in the event funds are withheld. The proposed changes align with requirements of the Older Americans Act.

ARM 37.41.131

The department proposes to amend this rule to update and clarify contributions for services by older adults in accordance with requirements of the Older Americans Act.

ARM 37.41.132

The department proposes technical and stylistic changes to improve the clarity of this rule governing the provision of congregate nutrition services.

ARM 37.41.202

The department proposes to amend this rule to clarify the meaning of terms used within the senior farmers' market nutrition rules and to provide for a better understanding of these rules.

ARM 37.41.206

The department proposes to amend this rule to incorporate rule language contained within ARM 37.41.207. The purpose of the proposed amendment is to consolidate farmer eligibility and participation requirements into a single rule.

ARM 37.40.301

The department proposes to amend this rule to update terminology and clarify requirements concerning who is eligible to receive nutrition services in accordance with requirements of the Older Americans Act.

ARM 37.41.302

The department proposes to amend this rule to clarify the meaning of terms used within the nutrition services rules and to provide for a better understanding of these rules.

ARM 37.41.306

The department proposes technical and stylistic changes to improve the clarity of this rule governing nutrition service provider requirements.

ARM 37.41.308

The department proposes to amend this rule to update and clarify congregate nutrition service provider requirements in accordance with requirements of the Older Americans Act.

ARM 37.41.315

The department proposes to amend this rule to update and clarify home-delivered nutrition service provider requirements in accordance with requirements of the Older Americans Act.

Rules Proposed for Repeal

The department proposes the repeal of ARM 37.41.118, 37.41.133, and 37.41.207 because each of these rules has either been consolidated with other rules or is repetitive of existing requirements under federal law.

Fiscal Impact

There is no anticipated fiscal impact associated with this rulemaking.

6. Concerned persons 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: Bailey Yuhas, Department of Public Health and Human Services, Office of Legal Affairs, P.O. Box 4210, Helena, Montana, 59604-4210; fax (406) 444-

9744; or e-mail hhsadminrules@mt.gov, and must be received no later than 5:00 p.m., June 21, 2024.

7. The Office of Legal Affairs, Department of Public Health and Human Services, has been designated to preside over and conduct this hearing.

8. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies for which program the person wishes to receive notices. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to the contact person in 6 above.

9. An electronic copy of this notice is available on the department's web site at <https://dphhs.mt.gov/LegalResources/administrativerules>, or through the Secretary of State's web site at <http://sosmt.gov/ARM/register>.

10. The bill sponsor contact requirements of 2-4-302, MCA, apply and have been fulfilled. The primary bill sponsor was notified by mail on August 25, 2023.

11. With regard to the requirements of 2-4-111, MCA, the department has determined that the amendment and repeal of the above-referenced rules will not significantly and directly impact small businesses.

/s/ Robert Lishman
Robert Lishman
Rule Reviewer

/s/ Charles T. Brereton
Charles T. Brereton, Director
Department of Public Health and Human
Services

Certified to the Secretary of State May 14, 2024.

BEFORE THE DEPARTMENT OF PUBLIC
HEALTH AND HUMAN SERVICES
OF THE STATE OF MONTANA

In the matter of the amendment of) NOTICE OF PUBLIC HEARING ON
ARM 37.40.307, 37.40.315,) PROPOSED AMENDMENT
37.85.104, 37.85.105, 37.85.106,)
37.85.212, 37.86.1006, 37.86.2002,)
37.86.2102, 37.86.2105, and)
37.86.3607 pertaining to updating)
Medicaid and non-Medicaid provider)
rates, fee schedules, and effective)
dates)

TO: All Concerned Persons

1. On June 17, 2024, at 11:00 a.m., the Department of Public Health and Human Services will hold a public hearing via remote conferencing to consider the proposed amendment of the above-stated rules. Interested parties may access the remote conferencing platform in the following ways:

(a) Join Zoom Meeting at: <https://mt-gov.zoom.us/j/84197741181?pwd=dlhoM1dpTHFONjBLdjd6OTNmUVorZz09>, meeting ID: 841 9774 1181, and password: 077061; or

(b) Dial by telephone: +1 646 558 8656, meeting ID: 841 9774 1181, and password: 077061. Find your local number: <https://mt-gov.zoom.us/u/kdMq5Kp1OK>.

2. The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the Department of Public Health and Human Services no later than 5:00 p.m. on June 3, 2024, to advise us of the nature of the accommodation that you need. Please contact Bailey Yuhas, Department of Public Health and Human Services, Office of Legal Affairs, P.O. Box 4210, Helena, Montana, 59604-4210; telephone (406) 444-4094; fax (406) 444-9744; or e-mail hhsadminrules@mt.gov.

3. The rules as proposed to be amended provide as follows, new matter underlined, deleted matter interlined:

37.40.307 NURSING FACILITY REIMBURSEMENT (1) For nursing facility services, ~~other than ICF/IID services,~~ provided by nursing facilities located within the state of Montana, the Montana Medicaid program will pay a provider, for each Medicaid patient day, a per-diem rate determined in accordance with this rule, minus the amount of the Medicaid recipient's patient contribution.

(2) Effective July 1, 2020, and in subsequent rate years, the reimbursement rate for each nursing facility will be determined using the flat-rate component specified in (2)(a) and the quality component specified in (2)(b).

(a) The flat-rate component is the same per-diem rate for each nursing facility and will be determined each year through a public process. Factors that could be considered in the establishment of this flat-rate component include the cost of providing nursing facility services and Medicaid recipient access to nursing facility services. The flat-rate component for state fiscal year (SFY) 2024 2025 is \$257.54 \$278.75.

(b) The quality component of each nursing facility's rate is based on the 5 five-star rating system for nursing facility services, calculated by the Centers for Medicare ~~and~~ Medicaid Services (CMS). It is set for each facility based on its ~~their~~ average 5 five-star ratings for staffing and for quality. Facilities with an average rating of 3 three to 5 five stars will receive a quality-component payment. The funding for the quality-component payment will be divided by the total estimated Medicaid bed days to determine the quality component per Medicaid bed day. The quality component per bed day is then adjusted based on each facility's 5 five-star average of staffing and quality-component scores. A facility with a 5 five-star average of staffing and quality component scores will receive 100% of the quality-component payment, a 4 four-star average will receive 75%, a 3 three-star average will receive 50%, and 1 one- and 2 two-star average facilities will receive 0%, ~~of the quality component payment~~. Funds unused by the first allocation round will be reallocated based on the facility's percentage of unused allocation against the available funds.

(c) The total payment rate available for the period ~~July 1, 2023~~ July 1, 2024, through ~~June 30, 2024~~ June 30, 2025, will be the rate as computed in (2), plus any additional amount computed in ARM 37.40.311 and 37.40.361. Copies of the department's current nursing facility Medicaid reimbursement rates per facility are posted at <https://medicaidprovider.mt.gov/26#1875810544>, or may be obtained from the Department of Public Health and Human Services, Senior & and Long-Term Care Division, P.O. Box 4210, Helena, MT 59604-4210.

(3) Providers who, as of July 1 of the rate year, have not filed with the department a cost report covering a period of at least six months' participation in the Medicaid program in a newly constructed facility will have a rate set at the flat-rate component as computed on July 1, ~~2023~~ 2024. Following a change in provider as defined in ARM 37.40.325, the per diem rate for the new provider will be set at the previous provider's rate, as if no change in provider had occurred.

~~(4) For ICF/IID services provided by nursing facilities located within the state of Montana, the Montana Medicaid program will pay a provider as provided in ARM 37.40.336.~~

~~(5) In addition to the per diem rate provided under (2) or the reimbursement allowed to an ICF/IID provider under (4), the Montana Medicaid program will pay providers located within the state of Montana for separately billable items, in accordance with ARM 37.40.330.~~

~~(6)~~(4) For nursing facility services, ~~including ICF/IID services~~, provided by nursing facilities located outside the state of Montana, the Montana Medicaid program will pay a provider only as provided in ARM 37.40.337.

(7) and (8) remain the same but are renumbered (5) and (6).

(a) for dually eligible Medicaid and Medicare individuals, reimbursement is limited to the per-diem rate, as determined under (1) or ARM 37.40.336, or the

Medicare co-insurance rate, whichever is lower, minus the Medicaid recipient's patient contribution; and

(b) for individuals whose Medicare buy-in premium is being paid under the qualified Medicare beneficiary (QMB) program under ARM 37.83.201, but are not otherwise Medicaid eligible, payment will be made only under the QMB program at the Medicare coinsurance rate.

~~(9)(7)~~ The department will not make any nursing facility per-diem or other reimbursement payments for any patient day for which a resident is not admitted to a facility bed ~~which~~ that is licensed and certified as provided in ARM 37.40.306 as a nursing facility or skilled nursing facility bed.

(10) through (12) remain the same but are renumbered (8) through (10).

AUTH: 53-2-201, 53-6-113, MCA

IMP: 53-6-101, 53-6-111, 53-6-113, MCA

37.40.315 STAFFING AND REPORTING REQUIREMENTS (1) Providers must provide ~~staffing at levels which are adequate to meet federal law, regulations, and requirements;~~

(a) staffing at levels that are adequate to meet federal law, regulations, and requirements; and

(b) staffing, quality, and performance information on the online Monthly Nursing Facility Report, which includes information on occupancy, staffing, demand for services, employee training, and employee longevity.

~~(a)(2)~~ Each provider must submit to the department within ~~ten~~ 15 days following the end of each calendar month a complete and accurate ~~DPHHS-SLTC-015, "Monthly Nursing Home Staffing Report"~~ Monthly Nursing Facility Report, prepared in accordance with all applicable department rules and instructions.

~~(b)(a)~~ If a complete and accurate DPHHS-SLTC-015 is not received by the department does not receive complete and accurate reports within ~~ten~~ 15 days following the end of each calendar month, the department may withhold all payments for nursing facility services until the provider complies with the reporting requirements in ~~(1)(a)(2)~~.

(b) If the provider excludes the quality and performance data from their Monthly Nursing Facility Report submission, they forfeit the provider-rate increase for the fiscal year ending June 30, 2025, until such time the quality and performance data is received.

(3) Each provider must submit a summary of the annual resident/family satisfaction survey by January 15, for the previous year. If the summary of annual resident/family satisfaction survey is not received by January 15, the department may reduce the per-diem to the prior year's base rate until it is submitted.

AUTH: 53-6-113, MCA

IMP: 53-2-201, 53-6-101, 53-6-108, 53-6-111, 53-6-113, MCA

37.85.104 EFFECTIVE DATES OF PROVIDER FEE SCHEDULES FOR MONTANA NON-MEDICAID SERVICES (1) remains the same.

- (a) Mental health crisis services, as provided in ARM 37.88.101, is effective July 1, 2023 (fee schedule version 2), and July 1, 2024.
- (b) Goal 189, as provided in ARM 37.89.201, is effective ~~October 1, 2022~~ July 1, 2023.
- (c) Youth respite care services, as provided in ARM 37.87.2203, is effective ~~July 1, 2023~~ July 1, 2024.
- (d) Substance use disorder services provider reimbursement, as provided in ARM 37.27.905, is effective ~~October 1, 2022~~ July 1, 2023, and July 1, 2024.
- (2) remains the same.

AUTH: 53-2-201, 53-6-101, 53-6-113, MCA
IMP: 53-2-201, 53-6-101, 53-6-111, MCA

37.85.105 EFFECTIVE DATES, CONVERSION FACTORS, POLICY ADJUSTERS, AND COST-TO-CHARGE RATIOS OF MONTANA MEDICAID PROVIDER FEE SCHEDULES (1) and (2) remain the same.

(a) Resource-based relative value scale (RBRVS) means the version of the Medicare resource-based relative value scale contained in the Medicare Physician Fee Schedule adopted by the Centers for Medicare & Medicaid Services (CMS) of the U.S. Department of Health and Human Services and published at ~~87 Federal Register 69404 (Nov. 18, 2022), effective January 1, 2023~~ 88 Federal Register 78818 (Nov. 16, 2023), effective January 1, 2024, which is adopted and incorporated by reference. Procedure codes created after ~~January 1, 2023~~ January 1, 2024 will be reimbursed using the relative value units from the Medicare Physician Fee Schedule in place at the time the procedure code is created.

(b) Fee schedules are effective ~~July 1, 2023~~ January 1, 2024, and July 1, 2024. When two dates are specified, the earlier fee schedule ceases to be effective with respect to services provided on and after the effective date of the later fee schedule. ~~The conversion factor for physician services is \$44.32. The conversion factor for allied services is \$26.13. The conversion factor for mental health services is \$22.67. The conversion factor for anesthesia services is \$32.04.~~

(i) Effective July 1, 2023, the conversion factor for physician services is \$44.32. The conversion factor for allied services is \$26.13. The conversion factor for mental health services is \$22.67. The conversion factor for anesthesia services is \$32.04.

(ii) Effective July 1, 2024, the conversion factor for physician services is \$43.96. The conversion factor for allied services is \$27.24. The conversion factor for mental health services is \$22.47. The conversion factor for anesthesia services is \$31.78.

(c) and (d) remain the same.

(e) The payment-to-charge ratio is effective ~~July 1, 2023~~ July 1, 2024, and is ~~46.8%~~ 48.02% of the provider's usual and customary charges.

(f) through (h) remain the same.

(i) Optometric services receive a ~~44.50%~~ provider rate of reimbursement adjustment to the reimbursement for allied services, as provided in ARM 37.85.105(2), ~~effective July 1, 2023~~.

(i) Effective July 1, 2023, the optometric services provider rate of reimbursement is 115.50%.

(ii) Effective July 1, 2024, the optometric services provider rate of reimbursement is 114.45%.

(j) through (3)(a) remain the same.

(i) the APR-DRG fee schedule for inpatient hospitals, as provided in ARM 37.86.2907, effective ~~October 1, 2023~~ July 1, 2024; and

(ii) the Montana Medicaid APR-DRG relative weight values, average national length of stay (ALOS), outlier thresholds, and APR grouper version ~~40.0~~ 41.0, contained in the APR-DRG Table of Weights and Thresholds, effective ~~October 1, 2023~~ July 1, 2024. The department adopts and incorporates by reference the APR-DRG Table of Weights and Thresholds effective ~~October 1, 2023~~ July 1, 2024.

(b) remains the same.

(i) the Outpatient Prospective Payment System (OPPS) fee schedule as published by the CMS in ~~87 Federal Register 71748 (Nov. 23, 2022)~~, effective ~~January 1, 2023~~ 89 Federal Register 9002 (Feb. 9, 2024), effective January 1, 2024, and reviewed annually by CMS, as required in 42 CFR 419.50 and as updated by the department;

(ii) the conversion factor for outpatient services on or after ~~July 1, 2023~~ July 1, 2024 is ~~\$58.39~~ \$60.72;

(iii) the Medicaid statewide average outpatient cost-to-charge ratio is ~~48.95~~ 48.59%; and

(iv) the bundled composite rate of ~~\$271.02~~ \$281.86 for services provided in an outpatient maintenance dialysis clinic effective on or after ~~July 1, 2023~~ July 1, 2024.

(c) The hearing aid services fee schedule, as provided in ARM 37.86.805, is effective ~~July 1, 2023~~ January 1, 2024, and July 1, 2024.

(d) The Relative Values for Dentists, as provided in ARM 37.86.1004, reference published in ~~2023~~ 2024 resulting in a dental conversion factor of ~~\$36.90~~ \$38.37 and fee schedule is effective ~~July 1, 2023~~ July 1, 2024.

(e) The Dental and Denturist Program Provider Manual, as provided in ARM 37.86.1006, is effective ~~July 1, 2023~~ July 1, 2024.

(f) The outpatient drugs reimbursement dispensing fees range as provided in ARM 37.86.1105(3)(b) is effective ~~July 1, 2023~~ July 1, 2024:

(i) for pharmacies with prescription volume between 0 and 39,999, the minimum is ~~\$5.14~~ \$5.28 and the maximum is ~~\$16.36~~ \$17.01;

(ii) for pharmacies with prescription volume between 40,000 and 69,999, the minimum is ~~\$5.14~~ \$5.28 and the maximum is ~~\$14.16~~ \$14.73; or

(iii) for pharmacies with prescription volume greater than or equal to 70,000, the minimum is ~~\$5.14~~ \$5.28 and the maximum is ~~\$11.98~~ \$12.46.

(g) remains the same.

(h) The outpatient drugs reimbursement vaccine administration fee, as provided in ARM 37.86.1105(6), will be \$21.32 for the first vaccine and ~~\$18.65~~ \$15.53 for each additional vaccine administered on the same date of service, effective ~~July 1, 2023~~ July 1, 2024.

(i) remains the same.

(j) The home infusion therapy services fee schedule, as provided in ARM 37.86.1506, is effective ~~July 1, 2023~~ July 1, 2024.

(k) Montana Medicaid adopts and incorporates by reference the Region D Supplier Manual, ~~effective October 1, 2023~~, which outlines the Medicare coverage criteria for Medicare covered durable medical equipment, local coverage determinations (LCDs), and national coverage determinations (NCDs), as provided in ARM 37.86.1802, effective ~~October 1, 2023~~ January 1, 2024, and July 1, 2024. The prosthetic devices, durable medical equipment, and medical supplies fee schedule, as provided in ARM 37.86.1807, is effective ~~October 1, 2023~~ January 1, 2024, and July 1, 2024.

(l) The nutrition services fee schedule, as provided in ARM 37.86.2207(2), is effective ~~July 1, 2023~~ July 1, 2024.

(m) remains the same.

(n) The orientation and mobility specialist services fee schedule, as provide in ARM 37.86.2207(2), is effective ~~July 1, 2023~~ July 1, 2024.

(o) The transportation and per diem fee schedule, as provided in ARM 37.86.2405, is effective ~~July 1, 2023~~ July 1, 2024.

(p) The specialized nonemergency medical transportation fee schedule, as provided in ARM 37.86.2505, is effective ~~July 1, 2023~~ July 1, 2024.

(q) The ambulance services fee schedule, as provided in ARM 37.86.2605, is effective ~~July 1, 2023~~ January 1, 2024, and July 1, 2024.

(r) The audiology fee schedule, as provided in ARM 37.86.705, is effective ~~July 1, 2023~~ January 1, 2024, and July 1, 2024.

(s) The therapy fee schedules for occupational therapists, physical therapists, and speech therapists, as provided in ARM 37.86.610, are effective ~~July 1, 2023~~ January 1, 2024, and July 1, 2024.

(t) The optometric services fee schedule, as provided in ARM 37.86.2005, is effective ~~July 1, 2023~~ January 1, 2024, and July 1, 2024.

(u) The chiropractic fee schedule, as provided in ARM 37.85.212(2), is effective ~~July 1, 2023~~ July 1, 2024.

(v) The lab and imaging services fee schedule, as provided in ARM 37.85.212(2) and 37.86.3007, is effective ~~July 1, 2023~~ January 1, 2024, and July 1, 2024.

(w) The Targeted Case Management for Children and Youth with Special Health Care Needs fee schedule, as provided in ARM 37.86.3910, is effective ~~July 1, 2023~~ July 1, 2024.

(x) The Targeted Case Management for High-Risk Pregnant Women fee schedule, as provided in ARM 37.86.3415, is effective ~~July 1, 2023~~ July 1, 2024.

(y) The mobile imaging services fee schedule, as provided in ARM 37.85.212, is effective ~~July 1, 2023~~ January 1, 2024, and July 1, 2024.

(z) The licensed direct-entry midwife fee schedule, as provided in ARM 37.85.212, is effective ~~July 1, 2023~~ January 1, 2024, and July 1, 2024.

(aa) The private duty nursing services fee schedule, as provided in ARM 37.86.2207(2), is effective ~~July 1, 2023~~ July 1, 2024.

(4) remains the same.

(a) The Big Sky Waiver home and community-based services for elderly and physically disabled persons fee schedule, as provided in ARM 37.40.1421, is effective ~~July 1, 2023~~ July 1, 2024.

(b) The home health services fee schedule, as provided in ARM 37.40.705, is effective ~~July 1, 2023~~ July 1, 2024.

(c) The personal assistance services fee schedule, as provided in ARM 37.40.1135, is effective ~~July 1, 2023~~ July 1, 2024.

(d) The self-directed personal assistance services fee schedule, as provided in ARM 37.40.1135, is effective ~~July 1, 2023~~ July 1, 2024.

(e) The community first choice services fee schedule, as provided in ARM 37.40.1026, is effective ~~July 1, 2023~~ July 1, 2024.

(5) remains the same.

(a) The mental health center services for adults fee schedule, as provided in ARM 37.88.907, is effective July 1, 2023 (fee schedule version 2) and July 1, 2024.

(b) The home and community-based services for adults with severe disabling mental illness fee schedule, as provided in ARM 37.90.408, is effective ~~July 1, 2023~~ July 1, 2024.

(c) The substance use disorder services fee schedule, as provided in ARM 37.27.905, is effective ~~July 1, 2023~~ July 1, 2024.

(6) For the Behavioral Health and Developmental Disabilities Division, the department adopts and incorporates by reference the Medicaid youth mental health services fee schedule, as provided in ARM 37.87.901, effective July 1, 2023 (fee schedule version 2) and July 1, 2024.

AUTH: 53-2-201, 53-6-113, MCA

IMP: 53-2-201, 53-6-101, 53-6-125, 53-6-402, MCA

37.85.106 MEDICAID BEHAVIORAL HEALTH TARGETED CASE MANAGEMENT FEE SCHEDULE (1) remains the same.

(2) The Department of Public Health and Human Services (department) adopts and incorporates by reference the Medicaid Behavioral Health Targeted Case Management Fee Schedule effective ~~July 1, 2023~~ July 1, 2024, for the following programs within the Behavioral Health and Developmental Disabilities Division:

(a) through (c) remain the same.

(3) Copies of the department's current fee schedules are posted at <https://medicaidprovider.mt.gov>.

AUTH: 53-2-201, 53-6-113, MCA

IMP: 53-2-201, 53-6-101, 53-6-113, MCA

37.85.212 RESOURCE BASED RELATIVE VALUE SCALE (RBRVS) REIMBURSEMENT FOR SPECIFIED PROVIDER TYPES (1) through (1)(h) remain the same.

(i) "Resource-based relative value scale (RBRVS)" means the Medicare resource-based relative value scale contained in the Medicare Physician Fee Schedule adopted by the Centers for Medicare and & Medicaid Services (CMS) of

the U.S. Department of Health and Human Services. The effective date and citation for the RBRVS is adopted at ARM 37.85.105(2).

(2) through (2)(u) remain the same.

(v) EPSDT orientation and mobility specialists; ~~and~~

(w) mobile imaging/portable x-ray providers; ~~and~~

(x) BCBA/BCBA-D.

(3) through (10) remain the same.

AUTH: 53-2-201, 53-6-113, MCA

IMP: 53-2-201, 53-6-101, 53-6-111, 53-6-113, 53-6-125, MCA

37.86.1006 DENTAL SERVICES, COVERED PROCEDURES (1) For purposes of specifying coverage of dental services through the Medicaid program, the department adopts and incorporates by reference the Dental and Denturist Program Provider Manual as provided in ARM 37.85.105(3). The Dental and Denturist Program Provider Manual informs the providers of the requirements applicable to the delivery of services. Copies of the manual are available on the Montana Medicaid provider web site at <https://medicaidprovider.mt.gov> and from the Department of Public Health and Human Services, Health Resources Division, 1400 Broadway, P.O. Box 202951, Helena, MT 59620-2951.

(2) through (5)(d) remain the same.

(e) porcelain fused to base metal crowns, and porcelain/ceramic crowns are limited to two per person per year, total. ~~For second molars, base metal crowns only.~~

(6) through (18) remain the same.

AUTH: 53-2-201, 53-6-113, MCA

IMP: 53-6-101, 53-6-113, MCA

37.86.2002 OPTOMETRIC SERVICES, REQUIREMENTS (1) and (2) remain the same.

(3) ~~Members are A Medicaid member under 21 years of age is limited to one eye examination for determination of refractive state per 365-day period. A Medicaid member 21 years of age or older is limited to one eye examination for determination of refractive state per 730-day period unless one of the following circumstances exist:~~

(a) and (b) remain the same.

AUTH: 53-6-113, MCA

IMP: 53-6-101, 53-6-141, MCA

37.86.2102 EYEGLASSES, SERVICES, AND REQUIREMENTS AND RESTRICTIONS (1) through (3) remain the same.

(4) ~~A member under 21 years of age is~~ Members are limited to one pair of eyeglasses per 365-day period ~~and a member 21 years of age or older is limited to one pair of eyeglasses every 730-day period.~~

(5) through (7) remain the same.

~~(8) If a member is unable to wear bifocals because of a diagnosed medical condition and a provider requests an exception:~~

~~(a) a member under 21 years of age may be allowed two pairs of single vision eyeglasses every 365-day period; and~~

~~(b) a member 21 years of age and older may be allowed two pairs of single vision eyeglasses every 730-day period.~~

(8) A member is allowed two pairs of single vision eyeglasses in the place of bifocals when medically necessary, per 365-day period.

(9) and (9)(a) remain the same.

~~(b) The dispensing provider must receive prior authorization from the department for contact lenses and dispensing fee.~~

AUTH: 53-6-113, MCA

IMP: 53-6-101, 53-6-141, MCA

37.86.2105 EYEGLASSES, REIMBURSEMENT (1) and (2) remain the same.

(3) The department adopts and incorporates by reference the department's Eyeglasses Fee Schedule effective ~~December 2016~~ May 1, 2024. A copy of the department's fee schedule is posted at the Montana Medicaid provider web site at <https://medicaidprovider.mt.gov>. A copy of the department's fee schedule may also be obtained from Department of Public Health and Human Services, Health Resources Division, 1400 Broadway, P.O. Box 202951, Helena, MT 59620-2951.

AUTH: 53-6-113, MCA

IMP: 53-6-101, 53-6-113, 53-6-141, MCA

37.86.3607 CASE MANAGEMENT SERVICES FOR PERSONS WITH DEVELOPMENTAL DISABILITIES, REIMBURSEMENT (1) Reimbursement for the delivery by provider entities of Medicaid funded targeted case management services to persons with developmental disabilities is provided as specified in the Montana Developmental Disabilities Program Manual of Service Reimbursement Rates and Procedures for Targeted Case Management Services for Individuals with Developmental Disabilities Enrolled in the 1915(c) 0208 Home and Community Based (HCBS) Comprehensive Waiver or Eligible Individuals Age 16 and Over, dated ~~July 1, 2023~~ July 1, 2024.

(2) The department adopts and incorporates by this reference the Montana Developmental Disabilities Program Manual of Service Reimbursement Rates and Procedures for Targeted Case Management Services for Individuals with Developmental Disabilities Enrolled in the 1915(c) 0208 Home and Community Based (HCBS) Comprehensive Waiver or Eligible Individuals Age 16 and Over, dated ~~July 1, 2023~~ July 1, 2024. The manual is posted at <https://dphhs.mt.gov/bhdd/disabilityservices/developmentaldisabilities/ddpratesinf>.

AUTH: 53-6-113, MCA

IMP: 53-6-101, MCA

4. STATEMENT OF REASONABLE NECESSITY

The Department of Public Health and Human Services (department) is proposing to amend ARM 37.40.307, 37.40.315, 37.85.104, 37.85.105, 37.85.106, 37.85.212, 37.86.1006, 37.86.2002, 37.86.2102, 37.86.2105, and 37.86.3607 pertaining to updating Medicaid and non-Medicaid provider rates, fee schedules, and effective dates. The department administers the Montana Medicaid and non-Medicaid program to provide health care to Montana's qualified low income, elderly, and disabled residents. Medicaid is a public assistance program paid for with state and federal funds appropriated to pay health care providers for the covered medical services they deliver to Medicaid members.

The reasonable necessity for proposing these rule changes is to establish rates of reimbursement in conformity with appropriations passed by the 2023 Montana Legislature. Pursuant to 53-6-113, MCA, the Montana Legislature has directed the department to use the administrative rulemaking process to establish rates of reimbursement for covered medical services provided to Medicaid members by Medicaid providers. The department proposes these rule amendments to establish Medicaid rates of reimbursement. In establishing the proposed rates, the department considered as primary factors the availability of funds appropriated by the Montana Legislature during the 2023 regular legislative session, the actual cost of services, and the availability of services.

Proposed changes to provider rates that are the subject of this rulemaking notice, including rates in fee schedules and rates in provider manuals, can be found at <https://medicaidprovider.mt.gov/proposedfs>.

Proposed Increases for Four Categories of Rates Studied by Guidehouse

In 2021, the Montana Legislature directed the department to contract with an independent health care consulting firm to conduct a comprehensive rate review of services provided through the Adult Behavioral Health, Children's Mental Health, Developmental Disabilities, and Senior and Long Term Care programs. The department contracted with Guidehouse consulting firm to conduct the multifaceted study of Medicaid rates within the four programs and make recommendations for rate increases. Through this rule notice, the department proposes to apply funding appropriated by the 2023 legislature across all studied rates using the methodology recommended by Guidehouse. The following fee schedules have proposed rates that were recommended by the Guidehouse study: Medicaid Youth Mental Health Fee Schedule, Medicaid Behavioral Health Targeted Case Management Fee Schedule, Targeted Case Management Services for Individuals with Developmental Disabilities Enrolled in the 1915 (c) 0208 Home and Community Based (HCBS) Comprehensive Waiver, Medicaid Mental Health Center Services for Adults, Medicaid Substance Use Disorder Services, Home and Community-Based Services for Adults with Severe Disabling Mental Illness, Non-Medicaid Mental Health Crisis Services, Non-Medicaid Substance Use Disorder Services, Nursing Facility Reimbursement, and Nursing Facility Staffing and Reporting Requirements.

Proposed Increase For Provider Rates Not Studied by Guidehouse

The 2023 legislature appropriated funds for a provider rate increase of 4.0% for the state fiscal year 2025 for provider rates that were not part of the Guidehouse study. The department considered all factors in proposing these rates, and the proposed rates represent a weighted average rate increase of 4.0%.

Combined Rule Filings

On average it takes two to three months from publication of a proposed rule amendment to its adoption. As the department is unable to file stacked proposed amendments, a rule filing must be fully adopted before new changes can be proposed. Therefore, any delay with the rule filing timeline has a cascading effect on subsequent rule amendments.

The department was unable to file the proposed July 1, 2023, changes until HB 2 was signed on June 14, 2023. The department filed the proposed July 1, 2023, rate changes on the earliest available filing date of June 27, 2023. MAR Notice No. 37-1037 was published on July 7, 2023, and adopted on September 8, 2023, two months after the effective date.

On December 12, 2023, the department filed MAR Notice No. 37-1061, pertaining to the October 1, 2023, inpatient hospital provider rate increases. MAR Notice No. 37-1061 was adopted on March 22, 2024, almost six months after the effective date.

With the delays in July and October 2023 rule adoptions, the department was unable to file proposed January 2024 changes until April 2, 2024. Subsequently, the proposed July 2024 changes could not be filed until the end of June, with an adoption date at the end of August.

Understanding the impact rate implementation delays have on providers and department resources, the department made the administrative decision to incorporate proposed January 2024 and July 2024 updates under one rule filing. This decision was necessary to limit the financial impact to providers and to decrease the quantity of provider claim adjustments. For some services, the proposed rule text has two dates, the first of which is intended to establish rates of reimbursement for services provided through the first date listed; and the second date is intended to establish rates of reimbursement for services provided from the second date listed.

The following sections explain proposed amendments to the following specific subsections: ARM 37.40.307, 37.40.315, 37.85.104, 37.85.105, 37.85.106, 37.85.212, 37.86.1006, 37.86.2002, 37.86.2102, 37.86.2105, 37.86.3607, 37.88.101, and 37.89.201.

ARM 37.40.307 Nursing Facility Reimbursement

The proposed amendment to (2)(a) updates the flat-rate component for SFY 2024 to reflect a proposed 8.24% increase for SFY 2025. The department is proposing to set the flat-rate component for state fiscal year (SFY) 2025 at \$278.75, which is an

8.24% increase from SFY 2024. The rate change will align with the FY 2024 rate proposed in the Guidehouse rate study completed in 2022.

The proposed amendment to (2)(c) updates the SFY reference from July 1, 2023, through June 30, 2024, to July 1, 2024, through June 30, 2025. This change is necessary for the department to provide notice of the current period for funding of Medicaid nursing facility provider rates.

The proposed amendment to (3) updates the 2023 reference to 2024. This change is necessary for the department to provide notice to newly constructed facilities that have not participated in the Medicaid program for at least six months.

The department proposes to remove all references to ICF/IID services, as the department no longer provides any of these types of services.

The department is also proposing to clean up grammar and style formatting issues.

ARM 37.40.315 Staffing and Reporting Requirements

The proposed amendment will expand the current reporting requirements and further define the information that needs to be provided. The proposed amendment will also extend the timeframe required for submitting the information. Language in HB 2 relating to the nursing home rate increase stated that the FY 2025 rate increases are conditional on facility participation in Department of Public Health and Human Services' efforts to collect quality and performance data.

The proposed amendment will list the staffing and quality and performance information that will be collected on the online Monthly Nursing Facility Report. This includes information on occupancy, staffing, demand for service, employee training, employee longevity, and annual resident/family satisfaction survey.

The department is also proposing to clean up grammar and style formatting issues.

ARM 37.85.104

(1)(a), (b), and (d) Behavioral Health and Developmental Disabilities Division Fee Schedules – July 1, 2023

The department is proposing to revise the July 1, 2023, non-Medicaid mental health crisis services fee schedule to align nomenclature for Mobile Crisis Response Services with the proposed Mobile Crisis Response Services manual policy. This proposal will ensure uniform and consistent use of terminology, ensuring clarity for providers and the department. These updates will be reflected in non-Medicaid mental health crisis services fee schedule version 2.

Additionally, the department is proposing to revise the effective date for the non-Medicaid substance use disorder services fee schedule to July 1, 2023, to reflect rate increases from the provider rate study. This fee schedule was not updated in a previous rule notice due to an internal department oversight.

(1)(a), (c), and (d) Behavioral Health and Developmental Disabilities Division Fee Schedules – July 1, 2024

The department is proposing to adopt the July 1, 2024, updates, for the following non-Medicaid fee schedules: mental health crisis services for adults, youth respite care services, and substance use disorder services. This is necessary to update provider rates and mirror those rates found on the Medicaid fee schedules.

ARM 37.85.105

(2)(a) Resource-Based Relative Value Scale (RBRVS) Federal Register

The department is proposing to adopt the version of the RBRVS contained in the Medicare Physician Fee Schedule adopted by the Centers for Medicare & Medicaid Services (CMS) in the November 16, 2023, Federal Register (effective January 1, 2024) for the RBRVS reimbursement methodology. This adoption is necessary to incorporate the most up-to-date changes made by CMS.

(2)(b) RBRVS Fee Schedules

The department is proposing to adopt the January 1, 2024, and July 1, 2024, fee schedule updates. The January 1, 2024, fee schedules utilize the conversion factors listed in ARM 37.85.105(2)(b)(i) and the July 1, 2024, fee schedules utilize the conversion factors described in ARM 37.85.105(2)(b)(ii). This change is necessary to ensure the fee schedules incorporate new, deleted, and replacement codes, as well as revised rates.

(2)(b)(ii) RBRVS Conversion Factors (CF) – July 1, 2024

RBRVS rates are calculated by multiplying code-specific relative value units (RVU) by the applicable conversion factor. During the annual RBRVS reimbursement modeling process, the department considers all these factors in the aggregate using a weighted average based on utilization. The 2023 legislature appropriated funds for a provider rate increase of 4.0% for the state fiscal year 2025 for provider rates other than the rates studied by Guidehouse. Considering the pricing factors and the appropriated provider rate increase, effective July 1, 2024, the department proposes changes to the allied services and mental health services conversion factors. The proposed allied services conversion factor is \$27.24, and the proposed mental health services conversion factor is \$22.47. When the proposed conversion factor increases are applied against utilization and RVUs, the result is a weighted average rate increase of 4.0%.

For the physician services and anesthesia conversion factor, the department is directed by 53-6-125, MCA, to increase the conversion factor by the consumer price index for medical care for the previous year, which for this adjustment period is - 0.8%. Physician services are not included in the 2023 legislature-appropriated provider rate increase.

(2)(e) Payment to Charge Ratio – July 1, 2024

The payment-to-charge ratio, which is used to price some allowable procedures that do not have set reimbursement is proposed to be 48.02%, effective July 1, 2024. This ratio is updated annually as part of the department's annual RBRVS updates

and will change when there are changes in the average provider charges and/or changes to reimbursement.

(2)(i)(i) and (ii) Optometric Services Provider Rate of Reimbursement (PRR)

Due to the necessity to propose the January 2024 and July 2024 fee schedule changes under the same rule filing, the department proposes to clearly define the optometric services PRR that is effective from July 1, 2023 through June 30, 2024 and the proposed July 1, 2024 optometric services PRR.

Effective July 1, 2024, the department is proposing to change the optometric services PRR, which is a pricing factor, to 114.45% of the reimbursement for allied services. When this pricing factor is applied against utilization, relative value units, and proposed allied services conversion factor, optometrists and opticians will receive a weighted average provider rate increase of 4.0%, which is consistent with the weighted average rate increase for providers not included in the Guidehouse study.

(3)(a) Inpatient Hospital Services Rates – July 1, 2024

The House Bill (HB) 2 Narrative for the 2025 biennium provides for an increase appropriation from the 2023 biennium for Medicaid services provided by non-critical access hospitals in an amount equivalent to a 4.0% provider rate increase. The provider rate increase for inpatient non-critical access hospital services is contingent on the department's evaluation of the Upper Payment Limit methodology. The department has completed the Upper Payment Limit demonstration, which has been approved by the Centers for Medicare & Medicaid Services, and the demonstration confirms Montana Medicaid provider payments do not exceed the Upper Payment Limit.

The 2025 biennium inpatient hospital provider rate increase equates to an approximate 8.16% increase from the 2023 biennium. The State Fiscal Year 2024 increase for inpatient hospitals was implemented effective October 1, 2023. Since the rate increase was to be applied over 9 months, instead of 12, the department increased reimbursement by 5.3%. To ensure that hospital rates are not increased beyond the 2025 biennium appropriated increase, the department proposes to implement a 2.72% increase to inpatient hospital reimbursement. This increase results in an estimated 8.16% over the 2025 biennium.

Year	Provider Rate Increase
1 (12 Months)	4.0%
2 (12 Months)	4.0%
Total Increase	$= (1.04) \times (1.04) - 1 = 8.16\%$

Year	Provider Rate Increase
1 (9 Months)	5.3%
2 (12 Months)	2.72%
Total Increase	$= (1.053) \times (1.0272) - 1 = 8.16\%$

The department proposes to adopt Version 41.0 of the 3M APR-DRG grouper, effective July 1, 2024. This grouper update includes changes to DRG relative weights, average lengths of stays, and adds or deletes some DRGs.

(3)(b)(i) Outpatient Prospective Payment System (OPPS) Federal Register

Effective July 1, 2024, the department is proposing to adopt the Outpatient Prospective Payment System fee schedule published by CMS in the February 9, 2024, federal register (effective January 1, 2024) for the OPPS reimbursement methodology. This adoption is necessary to ensure outpatient hospital updates are aligned with CMS.

(3)(b)(ii) Outpatient Prospective Payment System (OPPS) Conversion Factor – July 1, 2024

The department is proposing to increase the OPPS conversion factor to \$60.72, effective July 1, 2024, to incorporate the provider rate increase approved by the Montana Legislature.

(3)(b)(iii) Medicaid Statewide Average Cost-to-Charge Ratio

The Medicaid statewide average cost-to-charge ratio is calculated utilizing submitted cost reports and is updated annually. The proposed updated cost-to-charge ratio is 48.59%. Individual hospital cost-to-charge ratios can fluctuate annually which can result in shifts to the Montana statewide average cost-to-charge ratio. This ratio is required to be updated annually to keep the ratio current.

(3)(b)(iv) Outpatient Maintenance Dialysis Clinic – July 1, 2024

The bundled composite rate for outpatient maintenance dialysis clinics is proposed to increase by 4.0% to \$281.86, effective July 1, 2024, to incorporate the provider rate increase approved by the Montana Legislature.

(3)(c), (q), (r), (s), (t), (v), (y), and (z) Fee Schedules - January 1, 2024

The department proposes to revise the effective date for the following fee schedules to January 1, 2024, to reflect updated Medicare procedures codes adopted by CMS for the following services: hearing aid services; ambulance services; audiology; occupational therapists; physical therapists, and speech therapists; optometric services; lab and imaging services; mobile imaging services; and licensed direct-entry midwives fee schedules.

(3)(c), (j), (l), (n), (o), (p), (q), (r), (s), (t), (u), (v), (y), (z), and (aa) Fee Schedules – July 1, 2024

The department is proposing the adoption of fee schedules effective July 1, 2024. The fee schedules incorporate changes due to the proposed amendments within this rule notice, including federal register changes, conversion factor updates, legislatively required provider rate increases. The above-listed subsections are for the following fee schedules: hearing aid services; home infusion therapy services; nutrition services; orientation and mobility specialist services; transportation and per diem fee schedule; specialized non-emergency medical transportation; ambulance

services; audiology services; occupational, physical, and speech therapy services; optometric services; Early and Periodic Screening, Diagnostic, and Treatment (EPSDT) chiropractic services; lab and imaging services; mobile imaging services; licensed direct-entry midwife; and private duty nursing.

(3)(d) Dental Reimbursement – July 1, 2024

The department proposes three changes to this subsection: 1) adoption of the Relative Values for Dentist reference published in 2024; 2) modification of the dental conversion factor to \$38.37; and 3) adoption of the July 1, 2024, Dental Services fee schedules. These proposed changes are necessary to incorporate the legislatively approved provider rate increase and to keep current with updated dental procedure codes.

(3)(e) Dental Provider Manual Update – July 1, 2024

The Dental Provider manual is proposed to be amended, effective July 1, 2024, to incorporate the information from provider notices published throughout the year and the changes proposed to ARM 37.86.1006. Provider notices are archived after a few years; therefore, pertinent information should be incorporated into the manual.

(3)(f) Outpatient Drugs Minimum Dispensing Fee – July 1, 2024

Annually the department surveys enrolled pharmacies to establish the state fiscal year minimum dispensing fee. The results from the annual survey provide the data necessary to calculate the minimum dispensing fee, which is proposed to be \$5.28.

(3)(f) Outpatient Drugs Maximum Dispensing Fees – July 1, 2024

Effective July 1, 2024, the department proposes to increase the maximum dispensing fee, for each volume range, to incorporate the legislatively approved provider rate increase.

(3)(h) Outpatient Drugs Reimbursement Vaccine Administration Fee – July 1, 2024

The department proposes to update the fee paid for each additional vaccine administered to \$15.53. This change is necessary to maintain a vaccine administration fee aligned with the physician services fee.

(3)(k) Prosthetic Devices, Durable Medical Equipment, and Medical Supplies – January 1, 2024

The department proposes to adopt and incorporate by reference the Medicare Region D Supplier Manual effective January 1, 2024. This proposal is necessary to ensure the department adopts newly added, revised, or deleted Medicare coverage criteria for Medicare covered durable medical equipment, local coverage determinations (LCDs), and national coverage determinations (NCDs).

Effective January 1, 2024, the department proposes to adopt the Calendar Year 2024 Medicare Durable Medical Equipment, Prosthetics, Orthotics, and Supplies (DMEPOS) fee schedule. This update is necessary to incorporate the calendar year 2024 Medicare fees, additions, deletions, and changes to procedure codes.

(3)(k) Prosthetic Devices, Durable Medical Equipment, and Medical Supplies – July 1, 2024

The department proposes to adopt and incorporate by reference the Medicare Region D Supplier Manual effective July 1, 2024. This proposal is necessary to ensure the department adopts newly added, revised, or deleted Medicare coverage criteria for Medicare covered durable medical equipment, local coverage determinations (LCDs), and national coverage determinations (NCDs).

Effective July 1, 2024, the fee schedule will incorporate the July 2024 Medicare DMEPOS fee schedule changes and updates to department-set fees. The department proposes a 4.0% increase to the department set fees on the DMEPOS fee schedule.

(3)(w) and (x) Targeted Case Management (TCM) for Children and Youth with Special Health Care Needs (CYSHCN) and TCM for High-Risk Pregnant Women Fee Schedules – July 1, 2024

Effective July 1, 2024, the department is proposing to align the TCM for CYSHCN and TCM High-Risk Pregnant Women fee schedule rates with the TCM youth behavioral health fee schedule rates. This change is necessary for rate parity.

(4) Senior and Long Term Care Division– July 1, 2024

The department proposes the adoption of updated fee schedules effective July 1, 2024. The updated fee schedules implement legislatively appropriated Medicaid provider-rate increases for Community First Choice, Personal Assistance Services (CFC/PAS), Big Sky Waiver, and Home Health programs.

(5)(a) Behavioral Health and Developmental Disabilities Division Mental Health Center Services Adult Fee Schedule– July 1, 2023

The department proposes to revise the July 1, 2023, Medicaid mental health center services for adults fee schedule to align Mobile Crisis Response Services with the proposed Mobile Crisis Response Services program updates. These updates will be reflected in Medicaid mental health crisis services fee schedule version 2.

(5)(a), (b), and (c) Behavioral Health and Developmental Disabilities Division Fee Schedules – July 1, 2024

The department is proposing to amend the effective date to July 1, 2024, for the following fee schedules: mental health center services for adults, home and community-based services for adults with severe disabling mental illness, and substance use disorder services. This is necessary to update provider rates in accordance with funding appropriated by the Montana Legislature during the 2023 regular session.

Updates to the mental health fee schedule include the addition of services including but not limited to repealing PACT, MACT, and establish a new MT-ACT Policy, and amending CMP policies which include service delivery, staffing requirements, and potential overhead costs. This will affect the cost of reimbursing a MT-ACT team.

(6) Behavioral Health and Developmental Disabilities Division Medicaid Youth Mental Health Services Fee Schedule- July 1, 2023

The department proposes to revise the July 1, 2023, Medicaid youth mental health services fee schedule to align Mobile Crisis Response Services with proposed Mobile Crisis Response Services program updates. These updates will be reflected in Medicaid youth mental health services fee schedule, version 2.

(6) Behavioral Health and Developmental Disabilities Division Medicaid Youth Mental Health Services Fee Schedule - July 1, 2024

The department proposes to revise the effective dates and reimbursements on the Medicaid youth mental health services fee schedule to July 1, 2024. This update incorporates the legislatively approved provider rate increase.

ARM 37.85.106

(2) Fee schedule- July 1, 2024

The department is proposing to amend ARM 37.85.106 to update the fee schedule date for the Medicaid Behavioral Health Targeted Case Management Fee Schedule to July 1, 2024. This is necessary to update provider rates in accordance with funding appropriated by the Montana Legislature during the 2023 regular session.

ARM 37.85.212

(2) Providers Reimbursed under the RBRVS Methodology

The department proposes to include BCBA and BCBA-D in the list of providers reimbursed under the RBRVS methodology.

ARM 37.86.1006

(5)(e) Adult Crown Limits – July 1, 2024

The department proposes to cover porcelain/ceramic crowns on second molars for members aged 21 and over. This change is necessary to ensure members have access to quality dental treatment. The provider community has expressed preference for porcelain/ceramic crowns over base metal crowns for second molars due to strength and resistance to fracture.

ARM 37.86.2002

(3) Adult Eye Examination Limits – July 1, 2024

The department proposes to allow one eye examination per year, to determine refractive state for members aged 21 and over. This change is necessary to ensure members have access to timely medically necessary eye examinations. This change does not impact members aged 20 and under.

ARM 37.86.2102

(4) and (8) Adult Eyeglass Limits – July 1, 2024

The department proposes to allow one pair of eyeglasses per 365 days for members aged 21 and over. When medically necessary, members may receive two pairs of single vision eyeglasses per 365 days, in lieu of bifocals. This change is necessary to ensure members have sufficient access to medically necessary vision hardware

and does not impact members aged 20 and under. In accordance with ARM 37.86.2102(9), this change also applies to contact lenses.

(9)(b) Contact Lens and Dispensing Fee Prior Authorizations – May 1, 2024

The department proposes to remove the prior authorization requirement for contact lenses and dispensing from rule. The department has determined a vast majority of the prior authorization requests processed have been medically necessary. The department will monitor program utilization to ensure the removal of prior authorization does not result in inappropriate utilization.

ARM 37.86.2105

(3) Fee Schedule – May 1, 2024

The department has completed the competitive bidding process for the single volume purchase eyeglasses contract that has a contract start date of May 1, 2024. The department propose to adopt a May 1, 2024, Eyeglasses Fee Schedule to incorporate the new contracted rates.

ARM 37.86.3607

(1) and (2) Reimbursement – July 1, 2024

The department is proposing to amend ARM 37.86.3607 pertaining to reimbursement rates in the Targeted Case Management Services for Individuals with Developmental Disabilities Enrolled in the 1915 (c) 0208 Home and Community Based (HCBS) Comprehensive Waiver or Eligible Individuals Age 16 and over.

The rule amendment would adopt and incorporate an updated version of the manual dated July 1, 2024, to incorporate the legislatively approved provider rate increase.

Fiscal Impact

Fiscal Impact - July 1, 2023 and January 1, 2024

The proposed July 1, 2023, and January 1, 2024, changes are anticipated to be budget neutral.

Fiscal Impact – May 1, 2024

The SFY 2024 and SFY 2025 fiscal impact for the proposed May 1, 2024, fee schedule changes for eyeglasses are provided below.

	Budget Impact (Federal Funds)	Budget Impact (State Funds)	Budget Impact (Total Funds)	Active Provider Count
SFY 2024	\$24,873	\$9,645	\$34,517	1
SFY 2025	\$211,473	\$77,556	\$289,029	1

Fiscal Impact – July 1, 2024

The following table displays the number of providers affected by the amended fee schedules, effective dates, conversion factors, and rates for services for SFY 2025 based on the July 1, 2024, proposed amendments.

Provider Type	SFY 2025 Budget Impact (Federal Funds)	SFY 2025 Budget Impact (State Funds)	SFY 2025 Budget Impact (Total Funds)	Active Provider Count
Ambulance	\$343,515	\$99,486	\$443,001	474
Audiologist	\$6,425	\$2,872	\$9,297	81
BCBA/BCBA-D	\$79,810	\$47,565	\$127,375	58
Case Management Services for Persons with Developmental Disabilities	\$4,927	\$3,286	\$8,213	1
Chemical Dependency Clinic	\$54,127	\$10,495	\$64,622	66
Commercial Transportation	\$114,017	\$47,594	\$161,611	15
Community First Choice	\$5,256,034	\$2,221,247	\$7,477,281	46
Crisis Services	\$97,411	\$10,823	\$108,234	11
CSCT Children's Mental Health	\$14,531	\$8,481	\$23,012	405
Dental	\$2,135,966	\$913,283	\$3,049,249	710
Denturist	\$95,241	\$28,502	\$123,743	21
Dialysis Clinic	\$99,549	\$42,465	\$142,014	25
Durable Medical Equipment	\$146,432	\$53,378	\$199,810	457
EPSDT - Chiropractic	\$20,778	\$11,646	\$32,424	156
Free Standing Birthing Center	\$3,476	\$1,250	\$4,726	2
Hearing Aid Dispenser	\$6,612	\$2,309	\$8,921	36
Home & Community Based Services - Big Sky Waiver	\$2,481,124	\$1,477,306	\$3,958,430	275

Home & Community Based Services - SDMI Waiver	\$1,092,005	\$649,846	\$1,741,851	234
Home Health Agency	\$23,380	\$7,881	\$31,261	26
Home Infusion Therapy	\$63,564	\$24,659	\$88,223	14
Hospital - Inpatient	\$3,336,844	\$1,082,648	\$4,419,492	523
Hospital - Outpatient	\$4,113,523	\$1,170,371	\$5,283,894	523
Independent Diagnostic Testing Facility	\$28,889	\$7,796	\$36,685	28
Laboratory	\$49,896	\$10,271	\$60,167	224
Licensed Clinical Social Worker	\$530,230	\$191,211	\$721,441	970
Licensed Professional Counselor	\$768,158	\$289,353	\$1,057,511	1,190
Licensed Marriage and Family Therapist	\$4,803	\$2,129	\$6,932	12
Mental Health Center	\$1,476,207	\$735,165	\$2,211,372	55
Mid-Level Practitioner	\$174,235	\$51,056	\$225,291	5,897
Mobile Imaging Service	\$3,935	\$1,469	\$5,404	2
Nursing Home	\$9,157,356	\$5,145,645	\$14,303,001	59
Nutritionist/Dietician	\$5,686	\$3,097	\$8,783	123
Occupational Therapist	\$148,325	\$82,089	\$230,414	384
Optician	\$3,543	\$1,319	\$4,862	21
Optometrist	\$230,547	\$81,925	\$312,472	258
Orientation and Mobility	\$0	\$0	\$0	2

Personal Care Agency	\$49,390	\$25,417	\$74,807	72
Personal Care Agency - Adult MH	\$1,325	\$502	\$1,827	37
Personal Care Agency - Child MH	\$650	\$388	\$1,038	13
Pharmacy Dispensing Fee	\$666,637	\$179,517	\$846,154	493
Physical Therapist	\$294,654	\$83,434	\$378,088	1,139
Physician	\$75,926	\$24,960	\$100,886	13,251
Podiatrist	\$673	\$182	\$855	83
Private Duty Nursing Agency	\$390,687	\$233,214	\$623,901	5
Psychiatric Res Treatment Facility	\$1,101,233	\$643,880	\$1,745,113	27
Psychiatrist	\$30,665	\$8,102	\$38,767	303
Psychologist	\$39,495	\$16,080	\$55,575	260
Public Health Clinic	\$12,719	\$4,222	\$16,941	42
School Based Services	\$137,297	\$80,888	\$218,185	79
Speech Pathologist	\$104,752	\$61,348	\$166,100	332
Targeted Case Management - Children and Youth with Special Health Care Needs	\$25,581	\$12,784	\$38,365	17
Targeted Case Management - High Risk Pregnant Women	\$1,664	\$832	\$2,496	17
Targeted Case Management - Mental Health	\$207,021	\$79,648	\$286,669	24
Therapeutic Family Care	\$496,490	\$293,141	\$789,631	14

Therapeutic Group Home	\$357,957	\$210,310	\$568,267	24
Specialized Transportation	\$673	\$324	\$997	10

5. The department intends to apply these proposed rule amendments retroactively to July 1, 2023, January 1, 2024, May 1, 2024, and July 1, 2024.

6. Concerned persons 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: Bailey Yuhas, Department of Public Health and Human Services, Office of Legal Affairs, P.O. Box 4210, Helena, Montana, 59604-4210; fax (406) 444-9744; or e-mail hhsadminrules@mt.gov, and must be received no later than 5:00 p.m., June 21, 2024.

7. The Office of Legal Affairs, Department of Public Health and Human Services, has been designated to preside over and conduct this hearing.

8. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies for which program the person wishes to receive notices. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to the contact person in 6 above.

9. An electronic copy of this notice is available on the department's web site at <https://dphhs.mt.gov/LegalResources/administrativerules>, or through the Secretary of State's web site at <http://sosmt.gov/ARM/register>.

10. The bill sponsor contact requirements of 2-4-302, MCA, do not apply.

11. With regard to the requirements of 2-4-111, MCA, the department has determined that the amendment of the above-referenced rules will not significantly and directly impact small businesses.

12. Section 53-6-196, MCA, requires that the department, when adopting by rule proposed changes in the delivery of services funded with Medicaid monies, make a determination of whether the principal reasons and rationale for the rule can be assessed by performance-based measures and, if the requirement is applicable, the method of such measurement. The statute provides that the requirement is not applicable if the rule is for the implementation of rate increases or of federal law.

The department has determined that the proposed program changes presented in this notice are not appropriate for performance-based measurement

and therefore are not subject to the performance-based measures requirement of 53-6-196, MCA.

/s/ Brenda K. Elias

Brenda K. Elias
Rule Reviewer

/s/ Charles T. Brereton

Charles T. Brereton, Director
Department of Public Health and Human
Services

Certified to the Secretary of State May 14, 2024.

BEFORE THE DEPARTMENT OF PUBLIC
HEALTH AND HUMAN SERVICES
OF THE STATE OF MONTANA

In the matter of the amendment of) NOTICE OF PUBLIC HEARING ON
ARM 37.40.702 pertaining to Home) PROPOSED AMENDMENT
Health Services)

TO: All Concerned Persons

1. On June 13, 2024, at 11:00 a.m., the Department of Public Health and Human Services will hold a public hearing via remote conferencing to consider the proposed amendment of the above-stated rule. Interested parties may access the remote conferencing platform in the following ways:

(a) Join Zoom Meeting at: <https://mt-gov.zoom.us/j/82538959166?pwd=YINNcmwrQ2ZjZXVuZGhuTUF3cDRiQT09>, meeting ID: 825 3895 9166, and password: 679822; or

(b) Dial by telephone: +1 646 558 8656, meeting ID: 825 3895 9166, and password: 679822. Find your local number: <https://mt-gov.zoom.us/u/kMytbYJaS>.

2. The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the Department of Public Health and Human Services no later than 5:00 p.m. on May 30, 2024, to advise us of the nature of the accommodation that you need. Please contact Bailey Yuhas, Department of Public Health and Human Services, Office of Legal Affairs, P.O. Box 4210, Helena, Montana, 59604-4210; telephone (406) 444-4094; fax (406) 444-9744; or e-mail hhsadminrules@mt.gov.

3. The rule as proposed to be amended provides as follows, new matter underlined, deleted matter interlined:

37.40.702 HOME HEALTH SERVICES, REQUIREMENTS (1) through (3) remain the same.

(4) Home health services must be provided in accordance with the requirements of 42 CFR 440.70. The department adopts and incorporates by reference 42 CFR 440.70, as amended May 8, 2020, which sets forth requirements for home health services. A copy of the regulation may be obtained from the Department of Public Health and Human Services, Senior and Long Term Care Division, 1100 N. Last Chance Gulch, P.O. Box 4210, Helena, MT 59604-4210 or by visiting <https://www.ecfr.gov/>.

~~(4) Home health services must be:~~

~~(a) ordered by the member's attending physician;~~

~~(b) part of a written plan of care; and~~

~~(c) reviewed and renewed by the member's attending physician at a minimum of 60 day intervals.~~

- ~~(5) A written plan of care must include:
 - ~~(a) how care is to be provided;~~
 - ~~(b) a summary of the member's condition;~~
 - ~~(c) documentation of the medical necessity;~~
 - ~~(d) rationale for the required skill level;~~
 - ~~(e) treatment plans;~~
 - ~~(f) discharge goals; and~~
 - ~~(g) certification by the member's physician.~~~~
- ~~(6) A member's need for medical supplies, equipment, and appliances must be reviewed annually by the member's attending physician.~~
- ~~(7) All member records related to the delivery of home health services must be current and available upon request of the department or its designated representative.~~
- ~~(8) For the initiation of home health services, the department requires an initial face-to-face encounter, which must be related to the primary reason the member requires home health services and must occur within 90 days before or within 30 days after the start of care.
 - ~~(a) The face-to-face encounter shall be conducted by the certifying physician, an authorized non-physician practitioner (NPP), or an attending or post-acute physician when the member is being admitted to home health services immediately following an acute or post-acute stay.~~
 - ~~(b) NPPs authorized to perform the face-to-face encounters for home health services are:
 - ~~(i) a nurse practitioner;~~
 - ~~(ii) a certified nurse midwife;~~
 - ~~(iii) a clinical nurse specialist working with a physician; or~~
 - ~~(iv) a physician assistant working under the supervision of a physician.~~~~
 - ~~(c) If a NPP performs the face-to-face encounter, findings must be communicated to the certifying physician and included in the member's record.~~~~
- ~~(9) For the initiation of medical supplies, equipment, and appliances, a face-to-face encounter related to the reason the member requires medical equipment is required and must occur within six months prior to the start of the services.
 - ~~(a) The face-to-face encounter for medical equipment shall be conducted by the certifying physician or an authorized NPP, with the exception of a certified nurse midwife.~~~~
- ~~(10) and (11) remain the same but are renumbered (5) and (6).~~

AUTH: 53-6-113, MCA
IMP: 53-6-101, 53-6-131, MCA

4. STATEMENT OF REASONABLE NECESSITY

The Department of Public Health and Human Services (department) proposes to amend ARM 37.40.402 to update requirements relating to home health services. The proposed rule change is necessary to align with federal requirements under 42 CFR 440.70 and a State Plan Amendment approved by the Centers for Medicare & Medicaid Services on August 28, 2023. A copy of the approved State Plan

Amendment is electronically accessible at:
<https://www.medicaid.gov/sites/default/files/2023-08/MT-23-0013.pdf>.

The department is proposing to adopt and incorporate by reference 42 CFR 440.70, as amended May 8, 2020, and to strike language within ARM 37.40.702 that is either repetitive or inconsistent with the requirements of the federal regulation. The proposed rule change expands the types of medical practitioners who are authorized to order home health services and perform face-to-face encounters. Under the current rule, only physicians are authorized to order home health services. The proposed rule change allows nurse practitioners, clinical nurse specialists, and physician assistants to order home health services. The proposed rule change also allows face-to-face encounters to take place through telehealth.

Fiscal Impact

The proposed rule amendment expands the types of medical practitioners who are authorized to order home health services. While the overall trend in home health service utilization is relatively low, there's potential for a modest increase in the total cost of services with expansion of the types of practitioners authorized to order the services. Based on historical data, the total reimbursed claims for home health services have shown slight variability:

- In Fiscal Year (FY) 2021, the total cost of services was \$491,695.24, with 310 members served, and 1,153 claims paid.
- In FY 2022, the total cost of services was \$472,205.03, with 285 members served, and 1,396 claims paid.
- In FY 2023, the total cost of services was \$419,390.46, with 262 members served, and 1,351 claims paid.

Projecting for FY 2024, the estimated total reimbursed claims could reach approximately \$423,784.00.

5. Concerned persons 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: Bailey Yuhas, Department of Public Health and Human Services, Office of Legal Affairs, P.O. Box 4210, Helena, Montana, 59604-4210; fax (406) 444-9744; or e-mail hhsadminrules@mt.gov, and must be received no later than 5:00 p.m., June 21, 2024.

6. The Office of Legal Affairs, Department of Public Health and Human Services, has been designated to preside over and conduct this hearing.

7. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies for which program the person wishes to receive notices. Notices will be sent by e-mail unless

a mailing preference is noted in the request. Such written request may be mailed or delivered to the contact person in 5 above.

8. An electronic copy of this notice is available on the department's web site at <https://dphhs.mt.gov/LegalResources/administrativerules>, or through the Secretary of State's web site at <http://sosmt.gov/ARM/register>.

9. The bill sponsor contact requirements of 2-4-302, MCA, do not apply.

10. With regard to the requirements of 2-4-111, MCA, the department has determined that the amendment of the above-referenced rule will not significantly and directly impact small businesses.

11. Section 53-6-196, MCA, requires that the department, when adopting by rule proposed changes in the delivery of services funded with Medicaid monies, make a determination of whether the principal reasons and rationale for the rule can be assessed by performance-based measures and, if the requirement is applicable, the method of such measurement. The statute provides that the requirement is not applicable if the rule is for the implementation of rate increases or of federal law.

The department has determined that the proposed program changes presented in this notice are not appropriate for performance-based measurement and therefore are not subject to the performance-based measures requirement of 53-6-196, MCA.

/s/ Robert Lishman
Robert Lishman
Rule Reviewer

/s/ Charles T. Brereton
Charles T. Brereton, Director
Department of Public Health and Human
Services

Certified to the Secretary of State May 14, 2024.

BEFORE THE DEPARTMENT OF PUBLIC
HEALTH AND HUMAN SERVICES
OF THE STATE OF MONTANA

In the matter of the adoption of NEW) NOTICE OF PUBLIC HEARING ON
RULES I through V and the) PROPOSED ADOPTION AND
amendment of ARM 37.106.138) AMENDMENT
pertaining to financial assistance and)
community benefit provided by)
certain types of hospitals and related)
certificate of need requirements)

TO: All Concerned Persons

1. On June 18, 2024, at 10:00 a.m., the Department of Public Health and Human Services will hold a public hearing via remote conferencing to consider the proposed adoption and amendment of the above-stated rules. Interested parties may access the remote conferencing platform in the following ways:

(a) Join Zoom Meeting at: <https://mt-gov.zoom.us/j/81061425192?pwd=K01sWUJraXB6REtiUWNTcXk2TGVQZz09>, meeting ID: 810 6142 5192, and password: 143230; or

(b) Dial by telephone: +1 646 558 8656, meeting ID: 810 6142 5192, and password: 143230. Find your local number: <https://mt-gov.zoom.us/j/81061425192?pwd=K01sWUJraXB6REtiUWNTcXk2TGVQZz09>.

2. The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the Department of Public Health and Human Services no later than 5:00 p.m. on June 14, 2024, to advise us of the nature of the accommodation that you need. Please contact Bailey Yuhas, Department of Public Health and Human Services, Office of Legal Affairs, P.O. Box 4210, Helena, Montana, 59604-4210; telephone (406) 444-4094; fax (406) 444-9744; or e-mail hhsadminrules@mt.gov.

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

NEW RULE I PURPOSE (1) Each hospital, critical access hospital, or rural emergency hospital that operates as a nonprofit health care facility under section 501(c)(3) of the Internal Revenue Code, 26 U.S.C. § 501(c)(3) (referred to in these rules as a nonprofit hospital, critical access hospital, or rural emergency hospital) is expected to provide community benefits and financial assistance by virtue of its nonprofit and tax exempt status.

(2) It is the purpose of this subchapter to clarify and set forth the duties and responsibilities of nonprofit hospitals, critical access hospitals, and rural emergency hospitals with respect to the provision of community benefits and financial assistance in the areas they serve.

(3) Community benefits do not include the cost to the hospital of paying any taxes or governmental assessments.

(4) Financial assistance and other community benefits are reported at cost, not charges.

AUTH: 50-5-106, 50-5-121, MCA

IMP: 50-5-106, 50-5-121, MCA

NEW RULE II DEFINITIONS For the purposes of this subchapter, the following definitions apply:

(1) "Community benefit" means initiatives and activities undertaken by a nonprofit hospital, critical access hospital, or rural emergency hospital to improve health in the communities it serves. These initiatives and activities should not be of the kind considered to be normal for the day-to-day operation of the hospital or as having benefits to the hospital not in line with recommended patient or population health improvement. Community benefits may include providing free or discounted care to uninsured and low-income patients (i.e., financial assistance), activities to promote and improve population health, prevention activities, programs to support children and families, programs to increase access to care, medical research likely to directly benefit the community in which the nonprofit hospital, critical access hospital, or rural emergency hospital is located, education and training for health care professionals, workforce development, and other activities and contributions associated with the initiatives being undertaken to benefit the community in which the nonprofit hospital, critical access hospital, or rural emergency hospital is located and reported on the annual IRS Form 990 Schedule H.

(2) "Financial assistance" means direct financial assistance to patients. It is commonly understood as the unrecovered costs written off by a provider that results from providing care to individuals who are uninsured or who are otherwise unable to pay for the health care services they receive. Financial assistance was formerly known as charity care.

(3) "Net patient revenue (NPR)" means the aggregate money generated from patient services collected from payors, including private insurance, Medicaid, and Medicare. The calculation for NPR is the total patient revenues minus patient discounts.

AUTH: 50-5-106, 50-5-121, MCA

IMP: 50-5-106, 50-5-121, MCA

NEW RULE III COMMUNITY BENEFIT AND FINANCIAL ASSISTANCE REQUIREMENTS (1) The duty of nonprofit hospitals, critical access hospitals, and rural emergency hospitals to provide community benefits and financial assistance is established in 50-5-121, MCA. To satisfy the requirements, a nonprofit hospital, critical access hospital, or rural emergency hospital shall comply with the standards and requirements set forth in this subchapter.

(2) Each nonprofit hospital, critical access hospital, or rural emergency hospital shall:

(a) have in writing a community benefits plan, a community benefits policy; and a financial assistance policy;

(b) adhere to its written community benefit policy and financial assistance policy; and

(c) make its written community benefit and financial assistance policies available to the public, including posting the policies in a prominent location on its website.

(3) With respect to nonprofit hospitals:

(a) the community benefits policy must be consistent with federal standards and the standards established in this subchapter; and

(b) the financial assistance policy must be consistent with federal standards and the standards established in this subchapter, applicable to the area the nonprofit hospital serves.

(4) To establish community benefit and financial assistance standards, the department will do the following:

(a) The department will collect baseline data for a two-year period and utilize existing 2023 data to formulate standards after baseline data is validated/aggregated and a three-year average determined.

(b) The department shall consider the following factors when developing the standards:

(i) hospital size;

(ii) community size and location;

(iii) net patient revenue;

(iv) patient care expenses;

(v) payor mix.

(c) The department may consider other factors when developing the standards, including:

(i) bad debt;

(ii) community health needs assessments; and

(iii) other factors to allow for a level which is reasonable in relation to community needs and the available resources of the hospital.

(d) The department shall consider whether to adopt numerical standards, narrative standards, or a combination of numerical and narrative standards, for community benefit and financial assistance.

(e) Under the standards, the community benefit requirement, including financial assistance, will be set at the beginning of the calendar year.

(5) A nonprofit hospital with operating losses in its fiscal year shall not be required to meet community benefit (including financial assistance) requirements established under the standards for that year.

AUTH: 50-5-106, 50-5-121, MCA

IMP: 50-5-106, 50-5-121, MCA

NEW RULE IV REPORTING REQUIREMENTS (1) Each nonprofit hospital, rural emergency hospital, or critical access hospital shall submit to the department, with the annual hospital financial report required in ARM 37.106.138, the following

documents within 30 days of its filing of the applicable forms with the Internal Revenue Service:

(a) a copy of Form 990 with Schedule H and associated worksheets. When no Schedule H is available, the methods used to determine community benefit and financial assistance spending and those amounts;

(b) a financial assistance policy and community benefit plan for the current calendar year.

(2) The report must include the following information:

(a) contact information for the hospital administrator and person filing the report should the department have any questions; and

(b) the beginning and end date of the reporting period for the nonprofit hospital, critical access hospital, or rural emergency hospital.

(3) The information and documentation required under (1) shall reflect inpatient and outpatient services, as well as any service provided by an urgent care or other facility operated by the nonprofit hospital, critical access hospital, or rural emergency hospital.

AUTH: 50-5-106, 50-5-121, MCA

IMP: 50-5-106, 50-5-121, MCA

NEW RULE V ENFORCEMENT AND PENALTIES FOR NONCOMPLIANCE WITH COMMUNITY BENEFIT AND FINANCIAL ASSISTANCE REQUIREMENTS OR REPORTING REQUIREMENTS

(1) When the department establishes community benefit and financial assistance standards, it will also establish the applicable penalties for noncompliance with such standards in the adoption of community benefit and financial assistance policies or for failure to adhere to such policies by nonprofit hospitals.

(2) If a nonprofit critical access hospital or rural emergency hospital fails to adhere to its community benefit policy or financial assistance policy, the department shall provide technical assistance and may require corrective action.

(3) On proof of noncompliance with its reporting requirements, the department shall impose a fine of \$1,000 and allow ten working days for the noncompliant nonprofit hospital, critical access hospital, or rural emergency hospital to take corrective action. If still not in compliance, a \$5,000 fine will be assessed in the month following discovery of noncompliance and the first of each month still not in compliance.

AUTH: 50-5-106, 50-5-121, MCA

IMP: 50-5-106, 50-5-121, MCA

4. The rule as proposed to be amended provides as follows, new matter underlined, deleted matter interlined:

37.106.138 ANNUAL FINANCIAL REPORTS BY HOSPITALS, RURAL EMERGENCY HOSPITALS, AND CRITICAL ACCESS HOSPITALS (1) Every hospital, rural emergency hospital, and critical access hospital shall submit on an annual basis a financial report for its previous fiscal year to the department on a form

provided by the department by the deadline specified on the form. The annual financial report must ~~be signed by~~ include contact information for the hospital administrator and must include the beginning and end date of the facility's reporting period and whichever of the following information is requested on the form:

- (a) hospital revenues for both acute and long-term care units, including:
 - (i) gross revenue from inpatient and outpatient service;
 - (ii) deductions for contractual adjustments, bad debts, charity, etc.;
 - (iii) other operating revenue;
 - (iv) nonoperating revenue (such as government appropriations, mill levies, contributions, grants, etc.);
- (b) hospital expenses for both acute and long-term care units, including:
 - (i) payroll expenses for all categories of personnel;
 - (ii) nonpayroll expenses, including employee benefits, professional fees, depreciation expense, interest expense, others;
- (c) detail of deductions for both acute and long-term care units, including:
 - (i) bad debts;
 - (ii) contractual adjustments (specifying Medicare, Medicaid, Blue Cross, or other);
 - (iii) charity/Hill-Burton (such as the amount and category of charity care/financial assistance provided, the number of individuals receiving financial assistance and average amount per person, which services are provided at no or reduced cost);
 - (iv) other;
- (d) Medicaid and Medicare program revenue for both acute and long-term care units;
- (e) unrestricted fund assets, including dollar amounts of:
 - (i) current cash and short-term investments;
 - (ii) current receivables and other current assets;
 - (iii) gross plant and equipment assets; deductions for accumulated depreciation;
 - (iv) long-term investments;
 - (v) other;
- (f) unrestricted fund liabilities, including dollar amounts of:
 - (i) current liabilities;
 - (ii) long-term debts;
 - (iii) other liabilities;
 - (iv) unrestricted fund balance;
- (g) restricted fund balances, with identification of specific purposes for which funds are reserved, including plant replacement and expansion, and endowment funds;
- (h) capital expenditures made during the reporting period, including expenditures, disposals and retirements for land, building and improvements, fixed and moveable equipment, and construction in progress;
- (i) whether a permanent change in bed complement or in the number of hospital services offered will result from any capital acquisition projects begun during the reporting period (specify);

(j) whether a certificate of need was received for any projects during the reporting period, and if so, the total capital authorization included in such approvals.

(2) For a hospital, rural emergency hospital, or critical access hospital operating as a nonprofit health care facility, the following are required, consistent with [NEW RULE IV]:

(a) a community benefit plan for the current calendar year;

(b) a financial assistance policy for the current calendar year; and

(c) a copy of Form 990 with Schedule H and associated worksheets.

~~(2)~~(3) Any facility failing to timely report such information to the department may be subject to corrective action.

(a) Any hospital, rural emergency hospital, or critical access hospital operating as a nonprofit health care facility shall be penalized according to [NEW RULE V] for noncompliance with (2) of this rule.

5. STATEMENT OF REASONABLE NECESSITY

Through this rulemaking, the Department of Public Health and Human Services (department) proposes to implement the amendments to 50-5-106 and 50-5-121, MCA, made by HB 45, enacted during the 2023 Legislative Session. (HB 45 also amended 50-5-245, MCA, which adds licensure requirements for specialty hospitals operating as nonprofit health care facilities or proposing a joint venture with such a nonprofit hospital; those amendments will be addressed in a separate rulemaking.)

There have been concerns that nonprofit hospitals, critical access hospitals, and rural emergency hospitals which are tax exempt may not be appropriately providing community benefit and financial assistance/charity care. In a 2020 audit report, the Legislative Audit Division faulted the department and indicated that the department needed to address the lack of reporting on and accountability concerning community benefit and charity care on the part of nonprofit hospitals and critical access hospitals. To address those concerns, HB 45 imposes certain requirements on nonprofit hospitals, critical access hospitals, and rural emergency hospitals on community benefits and financial assistance, and charges the department to issue regulations to implement these requirements. Specifically, HB 45:

- Requires nonprofit hospitals, critical access hospitals, and rural emergency hospitals to adopt written community benefit and financial assistance policies, to adhere to such policies, and to post them, as well as to provide the department with certain information concerning their community benefit and financial assistance plans/policies and activities.
- Requires nonprofit hospitals' community benefit and financial assistance policies to be consistent with federal and department standards.
- Authorizes and requires the department to adopt rules concerning community benefit and financial assistance requirements specific to the hospital and the area(s) it serves, including
 - Definitions of financial assistance and community benefit;
 - Standards for community benefit and financial assistance for nonprofit hospitals; and

- Penalties for noncompliance with the community benefit and financial assistance and reporting requirements.

In this rulemaking, the department proposes definitions of "financial assistance" and "community benefit," as well as certain financial assistance and community benefit requirements and reporting. Because it lacks the data necessary to establish financial assistance and community benefit standards and requirements specific to nonprofit hospitals and the area(s) they serve, the department proposes a process by which it will gather such data and adopt such standards and requirements. Finally, the department proposes penalties for noncompliance with the requirements established in this rulemaking, while proposing to adopt penalties for nonprofit hospital noncompliance with future standards at the time that it adopts those standards. The department anticipates that, as it analyzes the data and establishes standards, it will be able to provide more definitive guidance to nonprofit hospitals, critical access hospitals, and rural emergency hospitals.

The department also proposes certain revisions to its Certificate of Need (CON) rules to further implement HB 45.

NEW RULE I

The department proposes NEW RULE I to establish the purpose of these proposed rules, which the department anticipates being codified as a new subchapter in ARM Title 37, chapter 106. The department proposes to note the obligation of nonprofit hospitals, critical access hospitals, and rural emergency hospitals to provide community benefits and financial assistance, as well as to provide that community benefits do not include the cost of paying any taxes or governmental assessments and are reported at cost, not charges. These provisions are consistent with the Internal Revenue Service's (IRS) requirements and guidance on the provision of community benefits and financial assistance by nonprofit hospitals that are exempt from federal taxes under section 501(c)(3) of the Internal Revenue Code.

NEW RULE II

In NEW RULE II, the department proposes certain definitions, including:

Community Benefit: The department proposes to define "community benefit" as initiatives and activities undertaken by a nonprofit hospital, critical access hospital, or rural emergency hospital, to improve health in the communities it serves. This definition is based on the IRS's definition of "community benefit," as well as the definitions used by other states with community benefits laws, and guidance from sources including Congressional Research Service reports. Consistent with these sources, the department proposes to exclude from "community benefit" activities that are normal for the day-to-day operation of the hospital or as having benefits to the hospital not in line with recommended patient or population health improvement. The department proposes to include in the definition examples of the types of activities and initiatives that constitute community benefits. The department is considering whether to include the IRS's reportable categories in the definition, and asks for comment on this issue.

Financial Assistance: The department proposes to define "financial assistance" as direct financial assistance to patients. Consistent with the IRS's definition and guidance, the department would consider it to be the unrecovered costs written off by a hospital that results from providing care to individuals who are uninsured or who are otherwise unable to pay for the health care services they receive. As in the proposed definition of "community benefit," "financial assistance" would include both free and discounted/subsidized care.

Net Patient Revenue: Based on the IRS's definition, the department proposes to define "net patient revenue" as the aggregate money generated from patient services collected from payors, including private insurance, Medicaid, and Medicare. The calculation would be total patient revenues less patient discounts.

NEW RULE III

In NEW RULE III, the department proposes certain community benefit and financial assistance requirements, as well as a process for development of the community benefit and financial assistance standards for which it currently lacks the information needed to establish such standards.

The department proposes that each nonprofit hospital, critical access hospital, and rural emergency hospital have in writing:

- A community benefit plan. Section 50-5-106, MCA, requires the submission of a community benefit plan to the department. Consistent with this requirement, the department proposes to require such a written plan. The department understands that the IRS uses the term "community health improvement plan" or "community health implementation strategy," not "community benefit plan." While the department's current understanding is that the community health improvement plan or implementation strategy would meet the requirement for a community benefit plan, the department proposes to use "community benefit plan" because that is the term used in HB 45.
- A community benefit policy and a financial assistance policy. This proposal is based on 50-5-121(3)(a), MCA (community benefit and financial assistance policy requirements for nonprofit hospitals) and 50-5-121(3)(b), MCA (nonprofit hospitals, critical access hospitals and rural emergency hospitals required to adhere to written financial assistance and community benefit policies).¹

Based on 50-5-121(3)(b), MCA, the department proposes that such entities be required (1) to adhere to their community benefit and financial assistance policies,

¹ Some stakeholders suggested that the department propose to require a written Community Health Needs Assessment (CHNA) every three years. The department understands that the CHNAs form a basis for their community benefit plans, but does not propose such a requirement because HB 45 is silent on CHNAs.

and (2) to make them available to the public, including by website posting.² Based on 50-5-121(3)(a), MCA, the department proposes that the community benefit and financial assistance policies of nonprofit hospitals be consistent with both federal standards and the department-adopted standards.

Based on stakeholder input, the department proposes a two-year process, culminating in rulemaking, to develop the standards for community benefits and financial assistance, using validated/aggregated baseline data and three-year averages. The department proposes certain factors that it must consider, and other factors that it may consider, in developing these standards. Further, the department would consider whether to adopt numerical or narrative standards or a combination of numerical and narrative standards. Finally, the department proposes to not require compliance with such standards in any year in which a nonprofit hospital operates at a loss. These factors and considerations were identified based on stakeholder consultation.

NEW RULE IV

Consistent with 50-5-106, MCA, the department proposes reporting requirements in NEW RULE IV, to be provided within 30 days of filing of the applicable forms with the IRS: (1) a copy of the Form 990 with Schedule H and associated worksheets, (2) the financial assistance policy for the current year, and (3) the community benefit plan for the current year.

If no Schedule H is available, the department proposes to require submission of the methods used to determine community benefit and financial assistance spending and those amounts. This proposed requirement is designed to allow the department to obtain the same information as would be found on the Schedule H and the associated worksheets.

The report or submission to the department would also be required to include certain contact information and the reporting period.

Finally, to ensure that the department receives complete information, NEW RULE IV proposes that the information reflect inpatient and outpatient services as well as services provided by any urgent care or other facilities operated by the nonprofit hospital, critical access hospital, or rural emergency hospital.

² Certain stakeholders suggested that nonprofit hospitals, critical access hospitals, and rural emergency hospitals also be required to make their CHNAs and community benefit plans/community health improvement plan/community health implementation strategy publicly available and to post such documents on their websites. While the department supports and encourages such transparency, the department – consistent with the language of HB 45 – does not make such a proposal.

NEW RULE V

In NEW RULE V, the department proposes enforcement and penalties for noncompliance. Specifically, the department proposes:

- To develop penalties for noncompliance (by nonprofit hospitals) with the community benefit and financial assistance standards when it develops such standards.
- If a nonprofit critical access hospital or rural emergency hospital fails to comply with its community benefit and/or financial assistance policies, the department proposes to provide technical assistance and/or require corrective action. The department does not propose to impose financial penalties, recognizing their size, rural/frontier location, and financial and other vulnerabilities. The department asks for comment on whether there should be any financial penalty for a nonprofit critical access hospital's or nonprofit rural emergency hospital's persistent failure to adhere to its own community benefit or financial assistance policies – and whether, during the period prior to adoption of community benefit and financial assistance standards, nonprofit hospitals should be subject to penalties for noncompliance with their current community benefit and financial assistance policies and, if so, what such penalties should be.
- On proof of noncompliance with the reporting requirements, a fine of \$1,000, allowing ten working days for the nonprofit hospital, critical access hospital, or rural emergency hospital to take corrective action. If there is continued noncompliance, the department proposes assessment of monthly \$5,000 penalties. The department proposes these penalties because of (1) the importance to the program and the establishment and maintenance of the standards and requirements of the data that would be provided pursuant to the reporting requirements, and (2) the fact that the reporting requirements do not require the creation of any information or documents that the nonprofit hospital, critical access hospital, or rural emergency hospital is not otherwise required to create.

The department is considering whether, in addition to the proposed enforcement and penalties, it should post on its website information about the nonprofit hospitals, critical access hospitals, and rural emergency hospitals that fail to comply with the requirements of these statutes and the implementing regulations that the department adopts.

ARM 37.106.138 Annual Financial Reports by Hospitals and Critical Access Hospitals

Due to the enactment of HB 312, the department proposes to add rural emergency hospitals to the list of facilities required to report under this rule. In addition, the department proposes to clarify the reporting period, as well as to specify the charity care information to be reported under the existing requirement to provide information on deductions for charity/Hill-Burton. Finally, with the enactment of HB 45, the department proposes to add new reporting requirements, and related

noncompliance penalties, for nonprofit hospitals, critical access hospitals, and rural emergency hospitals, consistent with NEW RULES IV and V.

Fiscal Impact

The proposed rule amendments should have little effect on the department's administrative costs.

The proposed new rules implementing HB 45's requirements on community benefit and financial assistance would affect Montana's 15 hospitals and 48 critical access hospitals, although the current proposals should have a de minimis impact on them. The department anticipates that the community benefit and financial assistance standards may have a fiscal impact on Montana's nonprofit hospitals, but that impact would not be realized until such standards are developed and adopted through a subsequent rulemaking.

6. Concerned persons 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: Bailey Yuhas, Department of Public Health and Human Services, Office of Legal Affairs, P.O. Box 4210, Helena, Montana, 59604-4210; fax (406) 444-9744; or e-mail hhsadminrules@mt.gov, and must be received no later than 5:00 p.m., June 21, 2024.

7. The Office of Legal Affairs, Department of Public Health and Human Services, has been designated to preside over and conduct this hearing.

8. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies for which program the person wishes to receive notices. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to the contact person in 6 above.

9. An electronic copy of this notice is available on the department's web site at <https://dphhs.mt.gov/LegalResources/administrativerules>, or through the Secretary of State's web site at <http://sosmt.gov/ARM/register>.

10. The bill sponsor contact requirements of 2-4-302, MCA, apply and have been fulfilled. The primary bill sponsor was notified by email on January 17, 2024.

11. With regard to the requirements of 2-4-111, MCA, the department has determined that the adoption and amendment of the above-referenced rules will not significantly and directly impact small businesses.

/s/ Paula M. Stannard
Paula M. Stannard
Rule Reviewer

/s/ Charles T. Brereton
Charles T. Brereton, Director
Department of Public Health and Human
Services

Certified to the Secretary of State May 14, 2024.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

In the matter of the amendment of) NOTICE OF PUBLIC HEARING ON
ARM 42.39.601, 42.39.603,) PROPOSED AMENDMENT
42.39.610, and 42.39.614 pertaining)
to revised marijuana sampling)
protocols and quality assurance)
testing requirements)

TO: All Concerned Persons

1. On June 18, 2024, at 10:00 a.m., the Department of Revenue will hold a public hearing in the auditorium of the Department of Public Health and Human Services Building, 111 North Sanders, Helena, Montana to consider the proposed amendment of the above-stated rules. The auditorium is most readily accessed by entering through the north (basement) or the west (main) doors of the building.

2. The Department of Revenue will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, please advise the department of the nature of the accommodation needed, no later than 5 p.m. on May 31, 2024. Please contact Todd Olson, Department of Revenue, Director's Office, P.O. Box 7701, Helena, Montana 59604-7701; telephone (406) 444-7905; fax (406) 444-3696; or todd.olson@mt.gov.

3. GENERAL STATEMENT OF REASONABLE NECESSITY The department proposes to amend ARM 42.39.601, 42.39.603, 42.39.610, and 42.39.614 which is necessary to expand, improve, or clarify marijuana and marijuana product quality assurance sampling protocols and laboratory testing rules for the health and wellbeing of the Montana marijuana consumer based on the continually changing array of available marijuana products in Montana. Other amendments continue implementation of House Bill 128 (2023)(HB 128) (transfer of the cannabis laboratory program to the department) and initial implementation of House Bill 229 (2023)(HB 229) (statutory testing laboratory licensing criteria).

Proposed amendments include additions to definitions or terminology and updates to the Quality Assurance Sampling Protocol for Usable Marijuana, Marijuana Concentrates and Extracts, Marijuana-Infused Products, and Marijuana Pre-Rolls (SOP-001) to provide more comprehensive language for required quality assurance testing. The department also proposes to implement a Quality Assurance Testing Requirements Appendix (Appendix) which will be adopted and incorporated by reference in ARM 42.39.614, as permitted under 2-5-307, MCA. The purpose of the Appendix is to remove testing requirements found in the administrative rules tables and restate them in a publication which the department believes is clearer and more concise than the current tables and rule.

The proposed SOP-001 and Appendix are available for review at www.mtrevenue.gov/cannabis and are subject to the rulemaking process under the Montana Administrative Procedure Act.

The proposed rule amendments also seek to improve clarity for testing marijuana items that fall into gaps or cover more than one product type. Ultimately, as the marijuana industry in Montana evolves so must the rules concerning marijuana product safety testing.

The department proposes numerous amendments to the above-described rules, as a part of Governor Gianforte's Red Tape Relief Initiative, to improve rule text, employ beneficial cross-references, and simplify the rules.

While this general statement of reasonable necessity covers the basis for the proposed rule amendments, it is supplemented below to explain rule-specific proposals.

4. The rules as proposed to be amended provide as follows, new matter underlined, deleted matter interlined:

42.39.601 DEFINITIONS As used in this subchapter; the following definitions apply:

(1) remains the same.

(2) "Accredited college or university" means a college or university accredited by a regional or national accrediting agency that is an accreditor recognized by the ~~Secretary of the U.S. Department~~ Secretary of Education.

(3) and (4) remain the same.

(5) "Analytical batch" means a set of matrix-specific laboratory test samples that are prepared together over a 24-hour time period using the same set of reagents for the same analysis and includes ~~the required quality control samples~~ an LCS, MB, REP, and MS.

(6) "Appendix" means the department's Quality Assurance Testing Requirements Appendix adopted and incorporated by reference in ARM 42.39.614.

(6) remains the same but is renumbered (7).

(8) "As received" means the mass of the marijuana item as determined by the testing laboratory with no dry weight calculation applied.

~~(7)~~ (9) "Batch" has the same meaning provided ~~for~~ in ARM 42.39.102.

~~(8)~~ (10) "CBD" has the same meaning provided ~~for~~ in ARM 42.39.102.

~~(9)~~ (11) "CBDA" has the same meaning provided ~~for~~ in ARM 42.39.102.

~~(10)~~ (12) "Certificate of analysis (COA)" has the same meaning provided ~~for~~ in ARM 42.39.102.

(11) remains the same but is renumbered (13).

(14) "Composite laboratory test sample" and "composite sample" mean a series of sample increments taken from different laboratory test samples, strains of usable marijuana, marijuana concentrates or extracts, marijuana-infused products, marijuana items, harvest lots, process lots, or test batches thereof, that are combined, mixed, batched, or composited together for testing purposes.

(15) "Container" means the vessel or receptacle that comes into physical contact with the marijuana item.

(16) "Contaminant" means any physical, chemical, or biological substance that may be harmful if consumed at concentrations above the action level. Potency is not a contaminant.

(12) and (13) remain the same but are renumbered (17) and (18).

~~(14)~~ (19) "Customer" has the same meaning provided ~~for~~ in ARM 42.39.102.

(20) "Dilution" means the act of combining the same or different test batches of a harvest lot of marijuana, the same or different test batches of a process lot or marijuana concentrate and extract, or the addition of any ingredient to a harvest lot or process lot with the intention of reducing the level of contaminants to below the action level in a laboratory test sample.

(21) "Direct marijuana-infused product" means a marijuana-infused product manufactured by infusing lipid-based products such as plant-based oils, animal fats, or petroleum-based products (e.g., coconut oil, vegetable oil, butter, salves, etc.) directly from tested and compliant usable marijuana. The term does not include marijuana-infused products manufactured using solvent-based or non-solvent-based concentrates and extracts.

(22) "Final form" means the form of a marijuana item when it is available for sale by a licensee to a customer.

(23) "Final packaging" means the packaging of the final form marijuana item.

~~(15)~~ (24) "Harvest lot" means a the specifically identified quantity of marijuana provided in SOP-001 that is cultivated utilizing the same growing practices, harvested within a 72-hour period at the same location, and cured under uniform conditions. A harvest lot may contain multiple strains until [one day less than six months from date of adoption]. Effective [six months from date of adoption], a harvest lot must not contain multiple strains and must be identical in strain.

(25) "Indirect marijuana-infused product" means a marijuana-infused product manufactured from only tested and compliant solvent-based or non-solvent-based concentrates.

~~(16)~~ (26) "Ingredient" has the same meaning provided ~~for~~ in ARM 42.39.102.

(17) through (21) remain the same but are renumbered (27) through (31).

~~(22)~~ (32) "Laboratory quality assurance" means a set of operating principles that enable laboratories to produce defensible data of known accuracy and precision and includes employee training, traceability, equipment preventative maintenance procedures, calibration procedures, and quality control testing.

(23) through (25) remain the same but are renumbered (33) through (35).

~~(26)~~ (36) "Marijuana" has the same meaning provided ~~for under in~~ 16-12-102, MCA, and ARM 42.39.102.

~~(27)~~ (37) "Marijuana concentrate and extract" or "concentrate and extract" has the same meaning provided ~~for under in~~ 16-12-102, MCA, and ARM 42.39.102.

~~(28)~~ (38) "Marijuana-infused products" has the same meaning provided ~~for under 16-12-102, MCA, and in~~ ARM 42.39.102.

~~(29)~~ (39) "Marijuana items" has the same meaning provided ~~for under in~~ ARM 42.39.102.

(40) "Marijuana pre-roll" or "pre-roll" means any combination of the following typically constructed with rolling paper, a filter, tip, or cone: flower, shake, leaf, trim, kief, or marijuana concentrate and extract. Marijuana pre-rolls are divided into two subgroups: infused pre-rolls and non-infused pre-rolls. Infused pre-rolls contain

previously tested and compliant usable marijuana and previously tested and compliant marijuana concentrate and extract, kief, trim, or other marijuana items. Non-infused pre-rolls contain only previously tested and compliant usable marijuana.

~~(30)~~ (41) "Matrix" means the substances that are present in a sample except for the analytes of interest. The plural of the term – matrices – is also used, where appropriate.

(31) and (32) remain the same but are renumbered (42) and (43).

~~(33)~~ (44) "Method detection limit (MDL)" means a minimum concentration of a substance that can be measured and reported with 99% percent confidence that the analyte concentration is greater than zero as determined from analysis of a sample containing the analyte in a given matrix.

(34) remains the same but is renumbered (45).

(46) "Non-solvent-based marijuana concentrate and extract" means a marijuana concentrate and extract manufactured from usable marijuana using water, ice, dry ice, a press, sieve, or filter and that does not use any solvent listed in the Appendix or solvent defined in (61). The term includes kief, hash, and rosin.

(35) remains the same but is renumbered (47).

~~(36)~~ (48) "Process lot" means:

(a) any amount of marijuana concentrate or extract of the same type and processed in the same 48-hour period, using the same extraction methods, ~~standard operating procedures~~ SOPs, ingredients, reagents, and test batches from the same or different harvest lots; ~~or~~

(b) any amount of marijuana-infused products of the same type and processed in the same 48-hour period, using the same ingredients, reagents, ~~standard operating procedures~~ SOPs, and test batches from the same or different harvest lots or process lots of marijuana concentrate or extract; or

(c) any amount of marijuana pre-rolls constructed in the same 48-hour period, using the same equipment, SOP, ingredients, reagents, and test batches from the same or different harvest lots or process lots.

(37) remains the same but is renumbered (49).

~~(38)~~ (50) "Property owner permission form" has the same meaning provided ~~for under in~~ ARM 42.39.102.

~~(39)~~ (51) "Quality control sample" means a sample that is produced and used by a testing laboratory for the purpose of ensuring the quality of the data and results. Quality control samples include initial calibration verifications, continuing calibration verifications, laboratory control samples, method blanks, replicates, and matrix spikes. When quality control samples fail, it is assumed the preparatory/extraction process, instrumentation, procedures, equipment, etc., are out of statistical control.

~~(40)~~ (52) "Raw data" means any testing laboratory worksheet, records, memorandum, notes, or exact copies thereof, that are the result of original observations and activities of testing laboratory study and are necessary for the reconstruction and evaluation of the report of that study.

(53) "Reagent" means a compound, mixture, substance, or chemical ingredient added to a system to cause a chemical reaction or test if a reaction occurs. A reagent may be used to tell whether a specific chemical substance is present by causing a reaction to occur with a chemical substance.

(54) "Remediation" means the process or technique applied to marijuana items to remove contaminants from such marijuana items that have failed the required quality assurance compliance testing. Dilution is not a permissible form of remediation.

(41) through (43) remain the same but are renumbered (55) through (57).

(58) "Sampling event" means any instance of sample collection conducted by a testing laboratory sampler at a single licensed location for purposes of quality assurance compliance testing.

(44) remains the same but is renumbered (59).

~~(45)~~ (60) "Seed-to-sale tracking system" has the same meaning provided for under in ARM 42.39.102.

(61) "Solvent" means a chemical compound described by its function in chemistry to dissolve, suspend, or extract analytes of interest from materials. Solvents are divided into the following classes:

(a) Hydrocarbon solvents including aliphatic, aromatic, and paraffinic solvents;

(b) Oxygenated solvents including alcohols, ketones, esters, ethers, glycol ethers, and glycol ether esters; and

(c) Halogenated solvents that include halogens such as chlorine, bromine, or iodine.

(62) "Solvent-based marijuana concentrate and extract" means a marijuana concentrate and extract manufactured from usable marijuana using solvents, or subcritical or supercritical carbon dioxide and that does not use water in any state phase. The term includes tinctures, shatter, budder, wax, resin, and hash oils.

(63) "SOP-001" means the department's Quality Assurance Sampling Protocol for Usable Marijuana, Marijuana Concentrates and Extracts, Marijuana-Infused Products, and Marijuana Pre-Rolls document, adopted and incorporated by reference in ARM 42.39.610.

(46) remains the same but is renumbered (64).

~~(47)~~ (65) "Test batch" has the same meaning provided for under in ARM 42.39.102.

(66) "Testing laboratory sampler" means an employee of a licensed testing laboratory who has been trained and authorized to collect random and representative laboratory test samples in accordance with ARM 42.39.610. A testing laboratory sampler shall not collect laboratory test samples from any licensee where an employment relationship exists or where the performance of any aspect of work for a marijuana business creates a conflict of interest.

~~(48)~~ (67) "THC" has the same meaning provided for under in ARM 42.39.102.

~~(49)~~ (68) "THCA" has the same meaning provided for under in ARM 42.39.102.

~~(50)~~ (69) "Total potential psychoactive THC" has the same meaning provided for under in ARM 42.39.102.

(51) remains the same but is renumbered (70).

(71) "Traceability" means the principle of maintaining an unbroken chain of documentation tracking all laboratory samples, standards, reagents, and equipment utilized at every step of the laboratory process. This includes sample collection,

preparation, analysis, data acquisition, and reporting.
(52) remains the same but is renumbered (72).

AUTH: 16-12-202, 16-12-209, MCA
IMP: 16-12-202, 16-12-209, MCA

REASONABLE NECESSITY: In addition to the department's general statement of reasonable necessity, the department proposes to amend ARM 42.39.601 to define new terms and amend existing definitions that apply to new or evolving marijuana product types that are subject to quality assurance testing requirements, such as marijuana pre-roll. The new definitions support the Appendix and SOP-001, and many amendments seek to improve overall clarity or language usage consistent with other department rules.

Notable among the proposed definitions is subcategorizing marijuana-infused products into direct marijuana-infused products and indirect marijuana-infused products. Marijuana concentrates and extracts are proposed for subcategorizing into solvent-based marijuana concentrates and extracts and non-solvent-based marijuana concentrates and extracts which is necessary to ensure terms for all product types are sufficiently captured in the testing rules, are based on the manufacturing processes used to create them, and are clear for industry in the interest of consumer safety.

Harvest lot and process lot definitions are proposed for amendment to clarify composition of laboratory test samples from these lots and how they must be analyzed at the testing laboratory because the current definition of harvest lot allows for egregious sample compositing by diluting contaminants to below the sensitivity of the analytical instrumentation which drastically increases the probability of contaminated product entering the market. A positive impact would also be achieved because the amendment, as adopted, would bring Montana's marijuana testing requirements into alignment with other states that have authorized marijuana for production and sale to the public.

Based on previously expressed stakeholder concerns about implementation schedules for single strain harvest lots, the department proposes a six-month transition period upon adoption of the rulemaking before the revised definition and requirement become enforceable.

Overall definition renumbering will be required based on the department's proposals.

42.39.603 TESTING LABORATORY ENDORSEMENT APPLICATION REQUIREMENTS (1) A testing laboratory applicant must meet all applicable requirements under the ~~Montana Marijuana Regulation and Taxation Act (Title 16, chapter 12, MCA)~~ and this subchapter marijuana laws in order to qualify for endorsement of either licensure or renewal.

(2) An applicant must provide, ~~to the department's state laboratory,~~ with documentation to support fulfillment of these requirements, which includes the following:

(a) through (5) remain the same.

(6) An applicant that meets all of the ISO accreditation requirements under the ~~Montana Marijuana Regulation and Taxation Act (Title 16, chapter 12, MCA) and this subchapter and that is actively seeking ISO/IEC 17025:2017 accreditation~~ marijuana laws may be approved for endorsement if ~~written evidence of pending ISO accreditation and an inspection from the state laboratory indicate that accreditation will be achieved within 12 months from the date of endorsement.~~

(7) A testing laboratory must maintain ISO accreditation for all methods/analytes in ARM ~~37.107.316~~ 42.39.614, at all times.

(8) remains the same.

(9) ~~For the purpose of this subchapter, the state laboratory~~ The department adopts and incorporates by reference ISO/IEC 17025:2017, which sets forth general requirements for the competence of testing and calibration laboratories. A copy of the publication may be obtained from the American National Standards Institute (ANSI), 1899 L St. NW, 11th Floor, Washington, DC 20036; <https://webstore.ansi.org/SDO/ISO>.

AUTH: 16-12-202, 16-12-209, MCA

IMP: 16-12-202, 16-12-209, MCA

REASONABLE NECESSITY: Based on the justification described in the department's general statement of reasonable necessity (above), it is necessary for the department to amend ARM 42.39.603 to implement HB 128 and HB 229.

42.39.610 QUALITY ASSURANCE SAMPLING PROTOCOL (1) ~~A Testing laboratories laboratory~~ shall must collect samples of marijuana items from licensees for the required quality assurance testing.

(2) ~~A Testing laboratories laboratory~~ shall must develop and implement a sampling protocol standard operating procedure SOP that details at minimum:

(a) through (g) remain the same.

(3) Testing laboratories ~~shall must~~ create a sampling ~~plan~~ report form for each sampling event ~~that details at a minimum:~~ as required by SOP-001.

~~(a) the licensee's business/trade name and licensee ID number;~~

~~(b) the physical address from which the laboratory test samples are to be collected;~~

~~(c) the testing laboratory sampler's badge ID number;~~

~~(d) the testing laboratory vehicle and license plate number; and~~

~~(e) the date and time the sampling route begins and ends.~~

(4) remains the same.

(5) An employee from the licensee requesting sample collection shall be present to observe sample collection but shall not assist the testing laboratory sampler while they are physically collecting the laboratory test samples.

(6) The testing laboratory sampler shall collect a laboratory test sample that is random and representative of the test batch, meets the standards of ~~the state laboratory's "Quality Assurance Sampling Protocol for Usable Marijuana, Marijuana Concentrates and Extracts, and Marijuana Infused Products"~~ SOP-001, and is sufficient to complete all required quality assurance testing including quality control samples and re-runs.

(7) remains the same.

(8) At least 50% ~~percent~~ of the laboratory test sample must be homogenized prior to its use for the appropriate analysis.

(9) Testing laboratories must refuse sample collection if sample adulteration is suspected and shall report incidents of suspected adulteration to the ~~state laboratory department~~ within three business days. Adulteration may include:

(a) through (11) remain the same.

(12) Failed or remediated marijuana items shall be re-tested at the same testing laboratory from which the original failed test results came unless explicit written permission from the ~~state laboratory department~~ is granted prior to re-testing.

(13) The ~~state laboratory department~~ may inspect marijuana sampling events to ensure sampling protocols are being followed.

(14) The ~~state laboratory department~~ adopts and incorporates by reference the "Quality Assurance Sampling Protocol for Usable Marijuana, Marijuana Concentrates and Extracts, ~~and Marijuana-Infused Products, and Marijuana Pre-Rolls~~" SOP-001 (Version 4 3.0) ([date of adoption]), which describes the sampling protocol for marijuana, marijuana concentrates and extracts, ~~and marijuana-infused products, and marijuana pre-rolls~~. A copy of this publication SOP-001 is available from the department electronically at <https://dphhs.mt.gov/assets/MarijuanaLab/MarijuanaSamplingProtocolSOP.pdf> www.mtrevenue.gov/cannabis and may also be obtained from the ~~Department of Public Health and Human Services, Laboratory Services Bureau, 1400 E. Broadway, Helena MT, 59620~~ at 125 N. Roberts St., Helena, MT 59601.

AUTH: 16-12-202, 16-12-209, MCA

IMP: 16-12-202, 16-12-209, MCA

REASONABLE NECESSITY: In addition to the department's general statement of reasonable necessity, the department proposes to amend ARM 42.39.610(1), (2), (5), (8), and (9) through (12) through changing non-substantive verbiage for overall consistency with the department's rule styling. Section (3) is proposed for amendment because sampling event protocols are provided in SOP-001, and the redundancy in the rule is unnecessary.

Proposed amendments to SOP-001

The department proposes to amend SOP-001, which is adopted and incorporated by reference in ARM 42.39.610(14), and amend the reference in (14) to reflect the transfer of the cannabis laboratory program to the department. An electronic draft of the proposed revisions to SOP-001 (new matter underlined, deleted matter interlined) is available for viewing and public comment at www.mtrevenue.com/cannabis.

The proposed amendments to SOP-001 are necessary to update guidance for the correct collection of a random and representative laboratory test sample and provide notice that sample results produced by the testing laboratory are required to be representative of the marijuana product ultimately sold to a consumer. Rule changes regarding SOP-001 are necessary to align the document and the rule with

the proposed amendments to ARM 42.39.601 and 42.39.614.

Proposed changes also address liability concerns identified by laboratories regarding the handling of product for test batch weight confirmation as SOP-001 and rule allow for the licensee to physically weigh the test batch under the observation of the testing laboratory sampler.

Sampling information for "marijuana pre-roll" was added to section 7.6 of SOP-001 to ensure consistency across all sample collection and testing rules. Amendments have been proposed to clarify the testing laboratory sampler's responsibility to confirm the mass of harvest and production test batches during each sampling event and provide a procedure if a harvest test batch should exceed the 5-pound weight limit. Video surveillance language was added to ensure testing laboratory samplers conduct compliant sampling methodology. Section 10.1 of SOP-001 has been amended to identify the required elements in the creation of a sampling report form.

42.39.614 TESTING LABORATORY QUALITY ASSURANCE TESTING REQUIREMENTS ~~(1) Except as provided in (10), a licensee must submit for testing a sample of every test batch from a harvest lot of marijuana and process lots of marijuana-infused products, extracts, and concentrates intended for use by a customer prior to selling or transferring the marijuana item to a customer.~~

(2) (1) All marijuana items intended for direct final sale or transfer to a customers shall be tested in its final form. The addition of any ingredient or reagent after final quality assurance compliance testing will require retesting with respect to the mandatory quality assurance testing requirements provided in the Quality Assurance Testing Requirements Appendix and the marijuana laws. The department adopts and incorporates by reference the Quality Assurance Testing Requirements Appendix (Version 1.0) ([date of adoption]), which provides quality assurance testing requirements from marijuana item classifications and subcategories and details specific contaminant testing requirements for these items. A copy of the Appendix is available from the department electronically at www.mtvenue.gov/cannabis and may also be obtained at 125 N. Roberts St., Helena, MT 59601.

(2) All laboratory test sample results shall be reported into the seed-to-sale tracking system on an "as received" basis. Dry weight reporting or corrections are not permitted.

(3) Composite laboratory test samples from the same or different process lots and test batches therein are prohibited.

(4) Composite laboratory test samples from the same or different harvest lots and test batches therein are strictly prohibited. Effective [six months from the date of adoption], multi-strain harvest lots and multi-strain composite laboratory test samples are prohibited.

(5) Usable marijuana: a licensee shall submit for testing all harvest lots and test batches therein of usable marijuana for the analyses required in Table 1.0a of the Appendix prior to final sale to a customer. Usable marijuana, including trim or manicure, shall also be tested for the analyses provided in Table 1.0a of the Appendix prior to use in the production of marijuana pre-rolls and direct marijuana-infused products. A licensee may forgo testing of usable marijuana, including trim

and manicure, only if that usable marijuana is subjected to solvent or non-solvent-based extraction for the production of marijuana concentrates and extracts.

(6) Solvent-based and non-solvent-based marijuana concentrate and extract: a licensee shall submit for testing all process lots and test batches therein of solvent-based and non-solvent-based marijuana concentrate and extract for the analyses provided in Table 1.0b of the Appendix prior to final sale to a customer and prior to use in the production of marijuana-infused products or marijuana pre-rolls.

(7) Marijuana-infused products: a licensee shall submit for testing all process lots and test batches therein of marijuana-infused products for the analyses set forth under Table 1.0c of the Appendix prior to final sale to a customer.

(8) Marijuana pre-rolls: If the potency of the marijuana pre-roll process lot in question is expected to change from that of the previously tested and compliant usable marijuana, a licensee shall submit for testing all the process lots and test batches therein of marijuana pre-rolls for the analyses provided in Table 1.0d of the Appendix prior to final sale to a customer. Examples include mixing multiple strains of usable marijuana into a process lot of pre-rolls and all process lots of infused pre-rolls.

(9) A licensee shall submit for testing all process lots and test batches therein of marijuana items that consist of two or more previously tested and compliant marijuana items into a final form marijuana item (such as moon rocks or cannabis cigars) for potency prior to final sale to customers.

(10) Use of any untested marijuana item as an ingredient in marijuana concentrates and extracts, marijuana-infused products, marijuana pre-rolls, or any marijuana item therein is prohibited.

(3) (11) The cannabinoid profile/potency test for each sample must include:

(a) through (c) remain the same.

(d) CBDA; and

(e) CBD; and

(f) all other cannabinoids a testing laboratory reports to the client on the certificate of analysis, which shall be entered into the seed-to-sale tracking system.

(4) (12) The laboratory test sample and related lot or test batch fail quality assurance testing for moisture analysis if the results are greater than ~~12.0%~~ 15.0 percent.

(5) (13) The laboratory test sample and related lot or test batch fail quality assurance testing for filth and foreign matter screening if the results are greater than the following action levels:

(a) 5.0% percent of stems 3mm or more in diameter; and

(b) 2.0% percent of seeds or other foreign matter.

(6) and (7) remain the same but are renumbered (14) and (15).

(8) (16) The laboratory test sample and related lot fail quality assurance testing for mycotoxins if the results are greater than the following action levels:

(a) and (b) remain the same.

(9) (17) A laboratory test sample and related lot or test batch fail quality assurance testing for residual solvents if the results are greater than the action levels provided in ~~table 1.0~~ Table 2.0 of the Appendix.

Table 1.0

Residual Solvents	(CAS) Registry Number	Action Level ppm
Acetone	67-64-1	5,000
Benzene	71-43-2	2
Total Butanes	See ¹	5,000
* n-butane	106-97-8	
* iso-butane	75-28-5	
Chloroform	67-66-3	2
Cyclohexane	110-82-7	3,880
Dichloromethane	75-09-2	600
Ethyl acetate	141-78-6	5,000
Heptane	142-82-5	5,000
Total Hexanes	See ²	290
* n-hexane	110-54-3	
* 2-methylpentane	107-83-5	
* 3-methylpentane	96-14-0	
* 2,2-dimethylbutane	75-83-2	
* 2,3-dimethylbutane	79-29-8	
Isopropanol (2-propanol)	67-63-0	5,000
Methanol	67-56-1	3,000
Total Pentanes	See ³	5,000
* n-pentane	109-66-0	
* iso-pentane	78-78-4	
* neo-pentane	463-82-1	
Propane	74-98-6	5,000
Toluene	108-88-3	890
Total Xylenes	See ⁴	2,170
* 1,2-dimethylbenzene	95-47-6	
* 1,3-dimethylbenzene	108-38-3	
* 1,4-dimethylbenzene	106-42-3	

1 Total butanes should be calculated as sum of n-butane and iso-butane.

2 Total hexanes should be calculated as sum of n-hexane, 2-methylpentane, 3-methylpentane, 2,2-dimethylbutane and 2,3-dimethylbutane.

3 Total pentanes should be calculated as sum of n-pentane, iso-pentane, and neo-pentane.

4 Total xylenes should be calculated as sum of 1,2-dimethylbenzene, 1,3-dimethylbenzene, and 1,4-dimethylbenzene.

(10) (18) Heavy metals ~~will~~ shall be tested at random. A laboratory test sample and related lot or test batch fail quality assurance testing for heavy metals if the results are greater than the action levels provided in ~~table 2.0~~ Table 3.0 of the Appendix.

Table 2.0

Heavy Metals	Action Level ppm; Inhalable Marijuana Items	Action Level ppm; Other Marijuana Items
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Inorganic Arsenic	0.2	1.5
Cadmium	0.2	0.5
Lead	0.5	0.5
Mercury	0.1	3.0

(14) (19) A laboratory test sample and related lot or test batch fail quality assurance testing for pesticides if the results are greater than the action levels provided in table 3.0 Tables 4.0a and 4.0b of the Appendix, as of their respective effective dates.

Table 3.0

Pesticides	(CAS) Registry Number	Action Level ppm; Dry Flower	Action Level ppm; Concentrates and Extracts
Abamectin	71751-41-2	0.5	2.5
Acequinocyl	57960-19-7	2	10
Bifenazate	149877-41-8	0.2	1
Bifenthrin	82657-04-3	0.2	1
Chlormequat Chloride	999-81-5	1	5
Cyfluthrin	68359-37-5	1	5
Daminozide	1596-84-5	1	5
Etoxazole	153233-91-1	0.2	1
Fenoxycarb	72490-01-8	0.2	1
Imazalil	35554-44-0	0.2	1
Imidacloprid	138261-41-3	0.4	2
Myclobutanil	88671-89-0	0.2	0.6
Paclobutrazol	76738-62-0	0.4	2
Pyrethrins†	8003-34-7	1	5
Spinosad	168316-95-8	0.2	1
Spirotetramat	203313-25-1	0.2	1
Trifloxystrobin	141517-21-7	0.2	1

† Pyrethrins should be measured as the cumulative residues of pyrethrin 1, cinerin 1, and jasmolin 1 (CAS numbers 121-21-1, 25402-06-6, and 4466-14-2 respectively).

(12) Licensees must adhere to testing requirements for all marijuana and marijuana products intended for sale or transfer to customers.

(a) Usable marijuana, including trim and manicure must be tested for:

- (i) pesticides;
- (ii) moisture content;
- (iii) cannabinoid profile/potency;
- (iv) microbiological;
- (v) mycotoxin;
- (vi) filth and foreign matter; and
- (vii) heavy metals (random testing).

~~(b) A licensee has the option to forgo testing of usable marijuana, including trim and manicure, if that usable marijuana is subject to further processing before sale or transfer to customers.~~

~~(c) Marijuana extract and concentrate that is intended for direct sale or transfer to customers must be tested for:~~

- ~~(i) pesticides;~~
- ~~(ii) cannabinoid profile/potency;~~
- ~~(iii) microbiological;~~
- ~~(iv) mycotoxin;~~
- ~~(v) heavy metals (random testing); and~~
- ~~(vi) residual solvents.~~

~~(d) Marijuana extract and concentrate that is intended for further processing before direct sale or transfer to customers must be tested for:~~

- ~~(i) pesticides;~~
- ~~(ii) residual solvents;~~
- ~~(iii) mycotoxin; and~~
- ~~(iv) heavy metals (random testing).~~

~~(e) Marijuana infused products intended for human consumption, ingestion, or used as suppositories, topicals, and transdermal patches must be tested for:~~

- ~~(i) cannabinoid profile/potency; and~~
- ~~(ii) microbiological.~~

~~(f) All marijuana products listed in (e) must use marijuana extract and concentrate that has passed quality assurance testing requirements as set forth in (d).~~

AUTH: 16-12-202, 16-12-209, MCA

IMP: 16-12-202, 16-12-209, MCA

REASONABLE NECESSITY: In addition to the department's general statement of reasonable necessity, the department proposes to amend ARM 42.39.614 to update and clarify quality assurance testing requirements and relocate and revise testing requirements from the rule into the Quality Assurance Testing Requirements Appendix (Appendix), which will be adopted and incorporated by reference into the rule.

The proposed Appendix and quality assurance testing requirements amendments are necessary to address new marijuana item classifications and subcategories and detail specific contaminant testing requirements for these items. The Appendix proposes to address the current inadequacy of marijuana product quality assurance testing requirements under the rule, such as products that previously fell under both the concentrate and extract and infused-product categories, pre-rolls, and products that use multiple marijuana items in the same formulation such as moon rocks.

Lastly, concise language regarding composite laboratory test samples is proposed to further clarify harvest lots and that a laboratory test sample consisting of more than a single harvest or process lot is strictly prohibited. Composite test batches for the purpose of contaminant testing significantly increases the probability of false negative sample results, thereby endangering the health of the consumer.

The proposed amendments seek to fulfill the department's statutory mandate to ensure the quality of marijuana products and protect the health and wellbeing of the Montana consumer.

Proposed Appendix

The department's proposed Appendix contains new, understandable tables that detail the required quality assurance testing according to marijuana product type. Table 1.0a provides the required testing for usable marijuana; Table 1.0b provides the required testing for marijuana concentrates and extracts; Table 1.0c provides the required testing for marijuana-infused products; and Table 1.0d provides the required testing for marijuana pre-rolls. Additionally, the Appendix proposes to contain the relocated contaminant action level tables from the rule for residual solvents (Table 2.0), heavy metals (Table 3.0), and pesticides (Tables 4.0a and 4.0b). One notable update to the action level tables includes Table 4.0b which contains an expanded pesticides list and actions levels that span all product types that replaces the variable action levels for different product types. The proposed expanded pesticide list in Table 4.0b of the Appendix provides a more comprehensive screen for harmful chemicals which, if applied on marijuana flower and consumed, pose serious health and safety risks to consumers. Based on previously expressed stakeholder concerns, the department proposes a six-month transition period from the adoption of this rulemaking before Table 4.0b becomes enforceable.

5. Concerned persons 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: Todd Olson, Department of Revenue, Director's Office, P.O. Box 7701, Helena, Montana 59604-7701; telephone (406) 444-7905; fax (406) 444-3696; or e-mail todd.olson@mt.gov and must be received no later than 5:00 p.m., July 1, 2024.

6. Todd Olson, Department of Revenue, Director's Office, has been designated to preside over and conduct the hearing.

7. The Department of Revenue maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request, which includes the name and e-mail or mailing address of the person to receive notices and specifies that the person wishes to receive notice regarding particular subject matter or matters. Notices will be sent by e-mail unless a mailing preference is noted in the request. A written request may be mailed or delivered to the person in number 5 above or faxed to the office at (406) 444-3696, or may be made by completing a request form at any rules hearing held by the Department of Revenue.

8. An electronic copy of this notice is available on the department's web site at www.mtrevenue.gov, or through the Secretary of State's web site at sosmt.gov/ARM/register.

9. The bill sponsor contact requirements of 2-4-302, MCA, apply and have been fulfilled. The primary bill sponsor of HB 229, Representative Hopkins, was contacted by email on August 11, 2023, and May 13, 2024.

10. With regard to the requirements of 2-4-111, MCA, the department has determined that this rulemaking may significantly and directly impact small businesses, as described below.

SMALL BUSINESS IMPACT STATEMENT. The department has analyzed the proposed rule amendments, SOP-001, and the Appendix and concludes they may significantly and directly impact small businesses assuming that testing laboratories, cultivators, dispensaries, or manufacturers of marijuana and marijuana products meet the definition of a small business under 2-4-102(13), MCA. As of April 30, 2024, there are 229 cultivator, 142 manufacturer, and three testing laboratory licensees active within Montana.

The department's proposal to amend the definition of harvest lot in ARM 42.39.601 requires these lots be composed of a single marijuana strain and will increase testing costs for those cultivators who composite multiple marijuana strains into one laboratory test sample for quality assurance compliance testing.

The department's proposal in ARM 42.39.614 prohibits all sample types from being compositing for purposes of contaminant testing. The department presents estimated fiscal impact through an evaluation of four different license groups (based on 2023 annual dispensary sales volume): (1) the small group with sales of approximately \$200,000; (2) the medium group with sales of approximately \$500,000; (3) the large group with sales of approximately \$2M; and (4) the extra-large group with sales of \$6M and above.

The cost analyses provided below were calculated by reviewing market test pricing (i.e., tests conducted by licensed marijuana testing laboratories at their designated cost, outside of the department), establishing a low and high price range, and accounting for testing in an environment without composited test batches. The estimated average annual testing cost ranges are:

- for the small group - from \$5,663 - \$8,900 with an average testing cost as a percentage of annual sales ranging from 2.29% - 3.60%.
- for the medium group - from \$8,143 - \$12,796 with an average testing cost as a percentage of annual sales ranging from 1.60% - 2.51%.
- for the large group - from \$28,577 - \$44,907 with an average testing cost as a percentage of annual sales ranging from 1.19% - 1.53%.
- for the extra-large group - from \$99,172 - \$155,841 with an average testing cost as a percentage of annual sales ranging from 1.15% - 1.81%.

The department reiterates that any of the above-described costs would be paid by licensees to the licensed testing laboratory of their choice and are only estimates. Testing costs may vary as licensees that composite larger numbers of strains or more concentrates and extracts into a single laboratory test sample will be

more affected than those licensees that participate in sample compositing with less frequency. Licensees can mitigate increased costs through changes in their business practice.

In order to ease the transition for affected licensees, the department proposes to delay implementation of the requirement for six months from adoption of this rulemaking.

/s/ Todd Olson
Todd Olson
Rule Reviewer

/s/ Brendan Beatty
Brendan Beatty
Director of Revenue

Certified to the Secretary of State May 14, 2024.

BEFORE THE COMMISSIONER OF SECURITIES AND INSURANCE
OFFICE OF THE MONTANA STATE AUDITOR

In the matter of the amendment of) NOTICE OF AMENDMENT
ARM 6.6.509 pertaining to Required)
Disclosure Provisions in Medicare)
Supplements)

TO: All Concerned Persons

1. On March 22, 2024, the Commissioner of Securities and Insurance, Office of the Montana State Auditor (CSI) published MAR Notice No. 6-287 pertaining to the proposed amendment of the above-stated rule at page 496 of the 2024 Montana Administrative Register, Issue Number 6.

2. A public hearing was not contemplated or requested. CSI received one comment supporting the amendment for the reasons CSI gave in the notice. CSI received no opposing comments on the rule proposed to be amended.

3. CSI has amended ARM 6.6.509 as proposed.

/s/ Kirsten Madsen
Kirsten Madsen
Rule Reviewer

/s/ Ole Olson
Ole Olson
Chief Legal Counsel
Commissioner of Securities and Insurance,
Office of the Montana State Auditor

Certified to the Secretary of State May 14, 2024.

BEFORE THE BOARD OF PUBLIC EDUCATION
OF THE STATE OF MONTANA

In the matter of the amendment of	)	NOTICE OF AMENDMENT
ARM 10.57.102, 10.57.114,)	
10.57.215, 10.57.410, 10.57.411,)	
10.57.412, 10.57.414, 10.57.415,)	
10.57.418, 10.57.419, 10.57.420,)	
10.57.421, 10.57.424, 10.57.425,)	
10.57.427, 10.57.428, 10.57.431,)	
10.57.432, 10.57.434, 10.57.435, and)	
10.57.437 pertaining to Educator)	
Licensure Standards)	

TO: All Concerned Persons

1. On February 9, 2024, the Board of Public Education (board) published MAR Notice No. 10-57-289 pertaining to the public hearing on the proposed amendment of the above-stated rules at page 175 of the 2024 Montana Administrative Register, Issue Number 3.

2. The board has amended the following rules as proposed: ARM 10.57.102, 10.57.114, 10.57.215, 10.57.410, 10.57.411, 10.57.412, 10.57.414, 10.57.415, 10.57.418, 10.57.419, 10.57.420, 10.57.421, 10.57.424, 10.57.425, 10.57.427, 10.57.428, 10.57.431, 10.57.432, 10.57.434, 10.57.435, and 10.57.437.

3. The board has thoroughly considered the comments and testimony received. A summary of the comments received, and the board's responses are as follows:

COMMENT 1: One commenter opposed the revisions to ARM 10.57.102(2) and stated that the "a state board of public education or state agency" language is unclear on how this constitutes an accrediting body for higher education that is equivalent to CHEA or other similar institutions and has requested the board maintain licensing criteria that aligns to nationally recognized standards.

RESPONSE: The board disagreed with Comment 1 and stated that this language aligns with accredited specialist programs for school counselors ARM 10.57.102(2)(b)(ii) and approved preparation programs for educators ARM 10.57.102(5)(b).

COMMENT 2: Two commenters and MSCA opposed the removal of "school counseling K-12" in ARM 10.57.425(4) and stated that the Montana State University Counseling Department is currently working on a hybrid school counseling endorsement that would fulfill these licensure requirements and would allow vested and licensed educators to stay in their home communities, receive school counseling

training, and increase the amount of prepared, professional school counselors in the field, and decrease the need for emergency authorizations.

RESPONSE: The board disagreed with Comment 2 and stated the provisions for receiving a Class 5 Provisional License for school counselors are outlined in ARM 10.57.435.

COMMENT 3: Seven commenters, LDA, MASP, MPA, MSCA, NASP, and NCLD opposed the revisions to ARM 10.57.432 and stated it is unclear how OPI would determine whether people who have a degree in another field but taking courses concurrently would have sufficient course content and experience to be successful, and encourages the board to consider modifying or revising the proposal to ensure that school psychologists have affiliated school psychologist training, and has requested that the board maintain the requirement for verification from an accredited specialist-level program in school psychology and maintain the requirement to be within four course deficiencies of completion.

COMMENT 4: The MCASE Board and SAM Board supported the revisions in ARM 10.57.432 and stated that the revisions allow for more flexibility for recruitment into the field and that the proposal would not allow for individuals to become licensed who do not have the appropriate education or experience.

RESPONSE: The board disagreed with Comment 3 and agreed with Comment 4 and stated that the proposed revisions in ARM 10.57.432 allow for more flexibility by allowing more participation, rather than only those who are within four course deficiencies.

COMMENT 5: Seven commenters, LDA, MASP, MSCA, NASP, and NCLD opposed the revisions to ARM 10.57.434 and stated that due to the reduction in hours, Montana would no longer meet the standard requirements set forth by the National Association of School Psychologists. This reduction could potentially harm the ability to negotiate the opportunity to participate in an interstate compact, which they are currently working on, receive federal funding and grants, and support recruitment in the profession. The commenters have requested the board maintain the 1200-hour requirement.

COMMENT 6: The MCASE Board and SAM Board supported the revisions in ARM 10.57.434 and stated that the revisions allow for more flexibility for recruitment into the field and that the proposal would not allow for individuals to become licensed who do not have the appropriate education or experience.

RESPONSE: The board disagreed with Comment 5 and agreed with Comment 6 and stated that the reduction in hours in ARM 10.57.434 allows for a pathway for those seeking a Class 6 Specialist Licensure from out-of-state.

4. The rules amended in this notice are effective July 1, 2024.

/s/ McCall Flynn
McCall Flynn
Executive Director
Board of Public Education

/s/ Tim Tharp
Tim Tharp
Chair
Board of Public Education

Certified to the Secretary of State May 14, 2024.

BEFORE THE DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the amendment of	)	NOTICE OF AMENDMENT AND
ARM 24.33.401, 24.33.406,	)	REPEAL
24.33.411, 24.33.416, 24.33.421,)	
24.33.431, 24.33.441, 24.33.461,)	
24.33.471, and 24.33.475 and the)	
repeal of ARM 24.33.445 and)	
24.33.486 pertaining to home)	
inspector program)	

TO: All Concerned Persons

1. On April 12, 2024, the Department of Labor and Industry (agency) published MAR Notice No. 24-33-416 regarding the public hearing on the proposed changes to the above-stated rules, at page 672 of the 2024 Montana Administrative Register, Issue No. 7.

2. On May 7, 2024, a public hearing was held on the proposed changes to the above-stated rules via the videoconference and telephonic platform. Comments were received by the deadline.

3. The agency has thoroughly considered the comments received. A summary of the comments and the agency responses are as follows:

COMMENT 1: A commenter objected to amendments to ARM 24.33.431 and its removal of language referencing the Examination Board of Professional Home Inspectors. Specifically, the commenter suggested that by removing the language, the rule comes into conflict with its authorizing statute by requiring all proposed examiners, to include the Examination Board of Professional Home Inspectors, to apply for licensure.

RESPONSE 1: The department appreciates the comments, but disagrees. Section 39-9-212(2)(a), MCA specifically requires acceptance of the examination offered by the Examination Board of Professional Home Inspectors. The statute goes on to permit the department to accept other examinations by department rule. Because the statute necessarily supersedes the rule and the rule cannot be read to conflict with the statute, the objection is unwarranted. That is, the Examination Board's exam is statutorily accepted. Any other examiner seeking approval must consult the applicable administrative rule—which requires application to the department for consideration. As set forth in the statement of reasonable necessity, adoption in rule of a statutorily adopted examination is merely unnecessary duplication of statute.

COMMENT 2: A commenter suggested revising the verbiage of ARM 24.33.431 to refer to a psychometrically "sound" examination, rather than a psychometrically "valid" examination.

RESPONSE 2: The comment is outside the scope of the proposed rulemaking. The change may be considered for future rulemaking.

4. The agency has amended ARM 24.33.401, 24.33.406, 24.33.411, 24.33.416, 24.33.421, 24.33.431, 24.33.441, 24.33.461, 24.33.471, and 24.33.475 as proposed.

5. The agency has repealed ARM 24.33.445 and 24.33.486 as proposed.

/s/ QUINLAN L. O'CONNOR
Quinlan L. O'Connor
Rule Reviewer

/s/ SARAH SWANSON
Sarah Swanson, Commissioner
DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State May 14, 2024.

BEFORE THE STATE ELECTRICAL BOARD
DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the amendment of	)	NOTICE OF ADOPTION,
ARM 24.141.301, 24.141.405,	)	AMENDMENT, AND REPEAL
24.141.502, 24.141.503, 24.141.504,)	
24.141.505, 24.141.509, 24.141.2102,)	
and 24.141.2301, the adoption of)	
NEW RULES I through III, and the)	
repeal of ARM 24.141.403,)	
24.141.501, 24.141.507, 24.141.511,)	
and 24.141.2401 pertaining to the)	
state electrical board)	

TO: All Concerned Persons

1. On March 22, 2024, the State Electrical Board (board) published MAR Notice No. 24-141-39 regarding the public hearing on the proposed changes to the above-stated rules, at page 579 of the 2024 Montana Administrative Register, Issue No. 6.

2. On April 16, 2024, a public hearing was held on the proposed changes to the above-stated rules via the videoconference and telephonic platform. Comments were received by the deadline.

3. The board has thoroughly considered the comments received. A summary of the comments and the board's responses are as follows:

COMMENT 1: Commenters generally spoke in favor of the board's proposed rule changes.

RESPONSE 1: The board appreciates the comments.

COMMENT 2: Commenters spoke in favor of the removal of the minimum residential hours requirement for master electrician licensure, citing this requirement as a barrier for journeymen electricians to earn a master electrician's license in Montana. Commenters stated that the update brings licensure requirements more in line with current realities of electrical work in Montana.

RESPONSE 2: The board appreciates the comments.

COMMENT 3: A commenter spoke in favor of the amendments allowing applicants to retake the journeyman licensing examination after two failed attempts at passing the examination. The commenter stated that many applicants are excellent electricians, but they are not good test-takers.

RESPONSE 3: The board appreciates the comment.

COMMENT 4: A commenter stated that the rules do not specifically address how applicants can get certification of hours worked in order to apply for licensure. The commenter noted that some states do not require a certification of hours worked to apply for licensure. The commenter stated that states such as Alaska require certification of lifetime earnings from the Social Security Administration, and this process generally takes several weeks and delays applicants' ability to attain licensure and work. The commenter further stated that it can be difficult for applicants to get certification for work in the military or on Indian reservations.

RESPONSE 4: The board appreciates the comment. The board's statutes and rules contain specific requirements for written evidence of experience and hours worked to apply for licensure. Applicants for journeyman-level licensure must provide written evidence of "8,000 hours of legally obtained practical experience" or "work in the electrical maintenance field for at least 20,000 hours," under 37-68-305(1)(c) and (d), MCA. The board statute defines "practical experience" to mean

experience gained in the electrical construction industry consisting of layout, assembly, repairs, wiring, and connection and testing of electrical fixtures, apparatus, and control equipment in residential and nonresidential settings pursuant to the provisions of the national electrical code or pursuant to the requirements of another authority having jurisdiction.

Section 37-68-102(9), MCA. Furthermore, the board's rules define "legally obtained" to mean experience "obtained in accordance with the laws and rules of the jurisdiction in which an applicant obtained the experience and within the statutes and rules of the Montana State Electrical Board." ARM 24.141.301(3). Similarly, applicants for master-level licensure must show written evidence of having an electrical engineering degree and "a minimum of 2,000 hours of legally obtained practical electrical experience," or the applicant must have written evidence of "having at least 8,000 hours of legally obtained journeyman level experience in planning, laying out, or supervising the installation and repair of wiring, apparatus, or equipment for electrical light, heat, and power." 37-68-304(1)(a)-(b), MCA. "Journeyman level experience" is defined in statute to mean "being recognized as a journeyman electrician by a state or other legally authorized jurisdiction or having a minimum of 8,000 hours of practical experience." 37-68-102(7), MCA.

Practically speaking, the board typically accepts signed affidavits from employers as written evidence of experience and hours worked. If an applicant cannot provide an affidavit from a prior employer, the board's staff work with each applicant to find alternative documentation, such as tax records or other employment documentation, to verify the applicant's hours and experience. If an applicant is unable to provide documentation of the applicant's legally obtained experience and hours, the application is often deemed a "nonroutine application" under ARM 24.101.402(12). "Nonroutine applications" are defined by department rule as

an application that staff has determined requires board review, because it involves:

- (a) evidence of unprofessional conduct as defined by law or rule;
- (b) **materials that require evaluation by the professional members of the board to determine compliance with qualifications for licensure;**
- (c) **missing documentation due to natural disaster, national emergency, or other good cause supported by reliable information;**
- (d) a matter specifically defined by board or program rule or law as nonroutine; or
- (e) an issue staff deems necessary for the board to review.

ARM 24.101.402(12) (emphasis added). All applicants with a nonroutine application are given the opportunity to explain why they cannot provide standard written evidence of their experience and hours worked and why the applicant's experience should be accepted for licensure. Finally, the board notes that electrical work for government clients, including for the military and on Indian reservations, are often subject to federal or state Davis-Bacon laws. General contractors are required to provide certified payroll on a weekly basis to the applicable government agency to prove compliance with the Davis-Bacon laws, making the hours worked easier to verify than in other circumstances.

COMMENT 5: A commenter spoke against the board's decision to grant reciprocity for a master electricians license. The commenter cited an increase in out-of-state businesses bidding on projects in Montana at more competitive rates than local businesses because out-of-state businesses have lower labor costs than local Montana businesses. The commenter also cited instances of out-of-state businesses failing to properly pull permits for electrical work.

RESPONSE 5: The board appreciates the comment. The board is required to grant licensure to out-of-state master electricians due to the 2019 amendments to 37-1-304, MCA, which state that "the board shall issue a license to practice without examination to a person licensed in another state if the board determines that" the out-of-state license requirements are substantially similar to Montana's licensure requirements. The department carefully evaluates each state's requirements for all license types to determine if those requirements are substantially equivalent to Montana's license requirements before granting reciprocal licensure. Furthermore, the failure of any licensee to pull the necessary permit for any electrical work can and should be addressed through the board's complaint process by contacting the board to file a complaint or filing a complaint online at <https://bsd.dli.mt.gov/filing-complaint>.

COMMENT 6: A commenter spoke against the reduction of the license renewal fee due to the board's budget surplus and suggested hiring more department staff to process licenses and address compliance issues. The commenter cited an abundance of unlicensed electrical workers in Montana.

RESPONSE 6: First, the board appreciates the comment. Second, the board acknowledges the importance of licensure in the electrical field in Montana and that unlicensed electrical work is a threat to the public's health and safety. The board is proposing to reduce licensing fees because licensing fees contribute to the board's individual budget, and the board is not allowed to carry a budget balance that is more than two times the board's annual appropriation under 37-1-101(10), MCA. Furthermore, the board's budget cannot be used to hire staff under 37-1-121(1)(b), MCA. By statute, the department provides staff to the board under 37-1-101(1), MCA. The department's budget for hiring personnel, including staff for licensing boards, is determined every other year by the Montana Legislature as part of the executive branch's appropriation bill, known as House Bill 2. Therefore, any surplus to the board's budget cannot be used to hire additional staff to enforce licensing laws and rules.

COMMENT 7: A commenter spoke against the reduction of licensing fees and asked that the funds be used to support greater efforts by the department to verify licensure of individuals working at job sites.

RESPONSE 7: The board appreciates the comment. As stated in response to Comment 6, licensing fees that contribute to the board's budget cannot be directly applied to funding of the department's staff. The board again acknowledges the importance of licensure in the electrical field in Montana.

COMMENT 8: Commenters spoke against lowering the passing test score for journeyman licensure from 75 to 70 percent.

RESPONSE 8: The board appreciates the comments. The amendment to the passing test score for journeyman licensure brings Montana in line with the majority of states that require individual licensure for journeyman-level electrical work. The department, on behalf of the board, evaluated the journeyman-level licensing criteria for 32 states, and 23 of those states require a 70 percent passing score for the journeyman-level licensure exam, including 9 of the 12 states that are part of the National Electrical Reciprocal Alliance (NERA) of which Montana is a member. Furthermore, in calendar year 2023, 28 individuals with Montana addresses who took the journeyman's examination failed with a score between 70 and 74 percent. While several of the 28 individuals took the exam again and passed, every year applicants decide to stop pursuing licensure in Montana after failing the exam. The board believes that lowering the passing test score by five percentage points will allow more applicants to become licensed at the journeyman level without risking the health and safety of the public.

4. The board has amended ARM 24.141.301, 24.141.405, 24.141.502, 24.141.503, 24.141.504, 24.141.505, 24.141.509, 24.141.2102, and 24.141.2301 as proposed.

5. The board has adopted NEW RULE I (24.141.515), NEW RULE II (24.141.2305), and NEW RULE III (24.141.2405) as proposed.

6. The board has repealed ARM 24.141.403, 24.141.501, 24.141.507, 24.141.511, and 24.141.2401 as proposed.

STATE ELECTRICAL BOARD
DERRICK HEDALEN, PRESIDENT

/s/ QUINLAN L. O'CONNOR
Quinlan L. O'Connor
Rule Reviewer

/s/ SARAH SWANSON
Sarah Swanson, Commissioner
DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State May 14, 2024.

NOTICE OF FUNCTION OF ADMINISTRATIVE RULE REVIEW COMMITTEES

Interim Committees and the Environmental Quality Council

Administrative rule review is a function of interim committees and the Environmental Quality Council (EQC). These interim committees and the EQC have administrative rule review, program evaluation, and monitoring functions for the following executive branch agencies and the entities attached to agencies for administrative purposes.

Economic Affairs Interim Committee

- Department of Agriculture
- Department of Commerce
- Department of Labor and Industry
- Department of Livestock
- Office of the State Auditor (Commissioner of Securities and Insurance)
- Office of Economic Development
- Division of Banking and Financial Institutions
- Alcoholic Beverage Control Division
- Cannabis Control Division

Education Interim Committee

- State Board of Education
- Board of Public Education
- Board of Regents of Higher Education
- Office of Public Instruction
- Montana Historical Society
- Montana State Library

Children, Families, Health, and Human Services Interim Committee

- Department of Public Health and Human Services

Law and Justice Interim Committee

- Department of Corrections
- Department of Justice

Energy and Telecommunications Interim Committee

- Department of Public Service Regulation

Revenue Interim Committee

- Department of Revenue
- Montana Tax Appeal Board

State Administration and Veterans' Affairs Interim Committee

- Department of Administration
- Montana Public Employee Retirement Administration
- Board of Investments
- Department of Military Affairs
- Office of the Secretary of State
- Office of the Commissioner of Political Practices

Transportation Interim Committee

- Department of Transportation
- Motor Vehicle Division (Department of Justice)

Environmental Quality Council

- Department of Environmental Quality
- Department of Fish, Wildlife and Parks
- Department of Natural Resources and Conservation

Water Policy Interim Committee (where the primary concern is the quality or quantity of water)

- Department of Environmental Quality
- Department of Fish, Wildlife and Parks
- Department of Natural Resources and Conservation

These interim committees and the EQC have 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. They also 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, amend, or repeal a rule.

The interim committees and the EQC welcome comments and invite members of the public to appear before them or to send written statements in order to bring to their attention any difficulties with the existing or proposed rules. The mailing address is P.O. Box 201706, Helena, MT 59620-1706.

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 or Register) is an online 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

1. Consult ARM Topical Index.
Update the rule by checking recent rulemaking and the table of contents in the last Montana Administrative Register issued.

Statute

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

RECENT RULEMAKING BY AGENCY

The Administrative Rules of Montana (ARM) is a compilation of existing permanent rules of those executive agencies that have been designated by the Montana Administrative Procedure Act for inclusion in the ARM. The ARM is updated through December 31, 2023. This table includes notices in which those rules adopted during the period December 8, 2023, through May 10, 2024, occurred and any proposed rule action that was pending during the past 6-month period. (A notice of adoption must be published within six months of the published notice of the proposed rule.) This table does not include the contents of this issue of the Montana Administrative Register (MAR or Register).

To be current on proposed and adopted rulemaking, it is necessary to check the ARM updated through December 31, 2023, this table, and the table of contents of this issue of the Register.

This table indicates the department name, title number, notice numbers in ascending order, the subject matter of the notice, and the page number(s) at which the notice is published in the 2023 or 2024 Montana Administrative Register.

To aid the user, this table includes rulemaking actions of such entities as boards and commissions listed separately under their appropriate title number.

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EXECUTIVE BRANCH APPOINTEES AND VACANCIES

Section 2-15-108, MCA, passed by the 1991 Legislature, directed that all appointing authorities of all appointive boards, commissions, committees, and councils of state government take positive action to attain gender balance and proportional representation of minority residents to the greatest extent possible.

One directive of 2-15-108, MCA, is that the Secretary of State publish monthly in the ***Montana Administrative Register*** a list of executive branch appointees and upcoming vacancies on those boards and councils.

In this issue, appointments effective in April 2024 appear. Potential vacancies from June 1, 2024 through June 30, 2024, are also listed.

IMPORTANT

Membership on boards and commissions changes constantly. The following lists are current as of May 1, 2024.

For the most up-to-date information of the status of membership, or for more detailed information on the qualifications and requirements to serve on a board, contact the appointing authority.

EXECUTIVE BRANCH APPOINTEES FOR APRIL 2024

<u>Appointee</u>	<u>Appointed By</u>	<u>Succeeds</u>	<u>Appointment/End Date</u>
9-1-1 Advisory Council			
Mr. Chan Barry Boulder	Governor	Lavin	4/1/2024 1/5/2025
Qualifications (if required): MHP Representative			
Board of Medical Examiners			
Dr. Ashleigh Marie Magill Whitefish	Governor	Reappointed	4/1/2024 7/1/2027
Qualifications (if required): Doctor of Medicine			
State Rehabilitation Council			
Ms. Chanda Hermanson Helena	Governor	Reappointed	4/1/2024 10/1/2026
Qualifications (if required): DPHHS-DETD Division Administrator			
Ms. June Hermanson Helena	Governor	Ramalho	4/1/2024 10/1/2026
Qualifications (if required): Statewide Independent Living Council Representative			
Ms. Morgan McQuillan Joliet	Governor	Keough	4/1/2024 10/1/2026
Qualifications (if required): Advocacy Community Representative			

EXECUTIVE BRANCH APPOINTEES FOR APRIL 2024

<u>Appointee</u>	<u>Appointed By</u>	<u>Succeeds</u>	<u>Appointment/End Date</u>
State Rehabilitation Council Cont.			
Ms. Jennifer Owen	Governor	Feist	4/1/2024
Billings			10/1/2025
Qualifications (if required): SWIB Representative			
Statewide Independent Living Council (SILC)			
Ms. Melanie Beagle	Governor	Morris	4/1/2024
Butte			12/1/2024
Qualifications (if required): Not employed by a state agency or Center for Independent Living			
Ms. Heather Giese	Governor	New	4/1/2024
Bainville			12/1/2026
Qualifications (if required): Parent of a Child with Disability			
Mr. Christopher Johnsrud	Governor	Hixon	4/1/2024
Great Falls			12/1/2024
Qualifications (if required): Person with a Disability			
Ms. Nichole Lowrance	Governor	New	4/1/2024
Billings			12/1/2026
Qualifications (if required): Advocacy Community Representative			

EXECUTIVE BRANCH VACANCIES – JUNE 1, 2024 THROUGH JUNE 30, 2024

<u>Board/Current Position Holder</u>	<u>Appointed By</u>	<u>Term End</u>
Agriculture Land Valuation Advisory Council		
Mr. Jerry Nielsen, Bozeman Qualifications (if required): Knowledgeable in agriculture economics	Governor	6/30/2024
Mr. John Schutter, Manhattan Qualifications (if required): Knowledgeable in agriculture	Governor	6/30/2024
Ms. Helen (Jo) Shipman, Lewistown Qualifications (if required): Knowledgeable in agriculture	Governor	6/30/2024
Mr. James Johnson, Bozeman Qualifications (if required): Knowledgeable in agriculture	Governor	6/30/2024
Mr. Dennis McDonald, Melville Qualifications (if required): Knowledgeable in agriculture	Governor	6/30/2024
Mr. Keith Kelly, Helena Qualifications (if required): Knowledgeable in agriculture economics	Governor	6/30/2024
Dr. Daniel Bigelow, Bozeman Qualifications (if required): MSU College of Agriculture	Governor	6/30/2024
Mrs. Jane DeBruycker, Dutton Qualifications (if required): Knowledgeable in agriculture	Governor	6/30/2024
Mr. Michael Jopek, Whitefish Qualifications (if required): Knowledgeable in agriculture	Governor	6/30/2024

EXECUTIVE BRANCH VACANCIES – JUNE 1, 2024 THROUGH JUNE 30, 2024

<u>Board/Current Position Holder</u>	<u>Appointed By</u>	<u>Term End</u>
Board of Nursing Home Administrators		
Ms. Theresa DeNevi Cox, Missoula Qualifications (if required): Public At-Large and 55 years of age or older	Governor	6/1/2024
Board of Outfitters		
Mr. Ernest Barker, Augusta Qualifications (if required): Outfitter for hunting and fishing with knowledge in government permitting	Governor	6/30/2024
Board of Physical Therapy Examiners		
Mrs. Bridget Mennie, Laurel Qualifications (if required): Licensed Physical Therapist	Governor	6/30/2024
Ms. Bonnie Larson, Troy Qualifications (if required): Public member	Governor	6/30/2024
Ms. Anna Larson, Helena Qualifications (if required): Licensed Physical Therapist	Governor	6/30/2024
Board of Professional Engineers and Professional Land Surveyors		
Mr. Wallace J. Gladstone III, Billings Qualifications (if required): Professional engineer	Governor	6/30/2024
Mr. Byron David Stahly, Helena Qualifications (if required): Professional engineer	Governor	6/30/2024

EXECUTIVE BRANCH VACANCIES – JUNE 1, 2024 THROUGH JUNE 30, 2024

<u>Board/Current Position Holder</u>	<u>Appointed By</u>	<u>Term End</u>
Board of Water Well Contractors		
Mr. Doug Askin, Miles City Qualifications (if required): Certified water well contractor	Governor	6/30/2024
Mr. Dan O'Keefe, Butte Qualifications (if required):	Governor	6/30/2024
Committee on Telecommunications Access Services for Persons With Disabilities		
Ms. Michelle Owens, Missoula Qualifications (if required): Independent Service Provider	Governor	6/30/2024
Ms. Tina Shorten, Helena Qualifications (if required): Public Service Commission representative	Governor	6/30/2024
Mr. James M. Streeter, Missoula Qualifications (if required): Disabilities Community	Governor	6/30/2024
Mrs. Sherri Odlin, Missoula Qualifications (if required): Public safety answering point	Governor	6/30/2024

EXECUTIVE BRANCH VACANCIES – JUNE 1, 2024 THROUGH JUNE 30, 2024

<u>Board/Current Position Holder</u>	<u>Appointed By</u>	<u>Term End</u>
Medical Licensure Compact Commission		
Dr. James N. Burkholder, Helena Qualifications (if required): Physician member of the Board of Medical Examiners	Governor	6/30/2024
Mr. Samuel Hunthausen, Helena Qualifications (if required): Executive officer of the Board of Medical Examiners	Governor	6/30/2024
Montana Small Business Development Center Advisory Council		
Shandy Hanks Moran, Scobey Qualifications (if required): Public representative	Governor	6/30/2024
Ms. Julia Jaksha, Butte Qualifications (if required): Public representative	Governor	6/30/2024
Ms. Tracy McIntyre, Great Falls Qualifications (if required): Public representative	Governor	6/30/2024
Mr. Brent Donnelly, Helena Qualifications (if required): Public representative	Governor	6/30/2024
Mr. Paddy Fleming, Bozeman Qualifications (if required): Public representative	Governor	6/30/2024
Mr. Reed W. Bassett, Great Falls Qualifications (if required): Public representative	Governor	6/30/2024

EXECUTIVE BRANCH VACANCIES – JUNE 1, 2024 THROUGH JUNE 30, 2024

<u>Board/Current Position Holder</u>	<u>Appointed By</u>	<u>Term End</u>
Montana Small Business Development Center Advisory Council Cont.		
Mr. Joe Fanguy, Missoula Qualifications (if required): Public representative	Governor	6/30/2024
Mr. Dan Gorton, Kalispell Qualifications (if required): Public representative	Governor	6/30/2024
Petroleum Tank Release Compensation Board		
Mr. John Monahan, Missoula Qualifications (if required): Representative of independent petroleum marketers and chain retailers	Governor	6/30/2024
Mr. Grant Jackson, Helena Qualifications (if required): Member of the general public	Governor	6/30/2024
Pulse Crop Committee		
Mr. Ryan Bogar, Vida Qualifications (if required): Member from Eastern District	Governor	6/30/2024
Mr. Brian Akelstad, Galata Qualifications (if required): At large representative	Governor	6/30/2024
Mr. Todd Hansen, Gildford Qualifications (if required): At large representative	Governor	6/30/2024

EXECUTIVE BRANCH VACANCIES – JUNE 1, 2024 THROUGH JUNE 30, 2024

<u>Board/Current Position Holder</u>	<u>Appointed By</u>	<u>Term End</u>
State Banking Board		
Ms. Sarah Converse, Great Falls Qualifications (if required): Public member	Governor	6/30/2024
Mr. Loren Brown, Helena Qualifications (if required): Active state bank member	Governor	6/30/2024
State Workforce Innovation Board		
Mr. Dean Bentley, Butte Qualifications (if required): Business Representative	Governor	6/24/2024
Mr. Paul Hopfauf, Glendive Qualifications (if required): Business Representative	Governor	6/30/2024
Mr. Quinton Queer, Butte Qualifications (if required): Workforce representative	Governor	6/30/2024
Ms. Heather O'Hara, Helena Qualifications (if required): Business Representative	Governor	6/30/2024
Mr. Paddy Fleming, Bozeman Qualifications (if required): Business representative	Governor	6/30/2024
Commissioner Mary Armstrong, Glasgow Qualifications (if required): City Commissioner	Governor	6/30/2024

EXECUTIVE BRANCH VACANCIES – JUNE 1, 2024 THROUGH JUNE 30, 2024

<u>Board/Current Position Holder</u>	<u>Appointed By</u>	<u>Term End</u>
State Workforce Innovation Board Cont.		
Ms. Sarah Swanson, Helena Qualifications (if required): DLI representative	Governor	6/30/2024
Bo Bruinsma, Billings Qualifications (if required): Workforce representative	Governor	6/30/2024
Mr. Jim Wonnacott, Butte Qualifications (if required): Workforce representative	Governor	6/30/2024
Mr. Adam Gilbertson, Laurel Qualifications (if required): Business representative	Governor	6/30/2024
Mr. Jason Palin, Big Timber Qualifications (if required): Business representative	Governor	6/30/2024
Mr. David Smith, Helena Qualifications (if required): Business representative	Governor	6/30/2024
Mr. Scott Osterman, Helena Qualifications (if required): Business representative	Governor	6/30/2024
Tourism Advisory Council		
Mr. Scott Collinsworth, Ft. Peck Qualifications (if required): Missouri River region representative	Governor	6/30/2024

EXECUTIVE BRANCH VACANCIES – JUNE 1, 2024 THROUGH JUNE 30, 2024

<u>Board/Current Position Holder</u>	<u>Appointed By</u>	<u>Term End</u>
Tourism Advisory Council Cont.		
Ms. Haylie Shipp, Glasgow Qualifications (if required): Missouri River region representative	Governor	6/30/2024
Mr. Nathan St. Goddard, Browning Qualifications (if required): Tribal member from the private sector	Governor	6/30/2024
Mr. Michael Johnson, Butte Qualifications (if required): Southwest Montana region representative	Governor	6/30/2024
Mr. Paul Makarechian, Bozeman Qualifications (if required): Yellowstone County region representative	Governor	6/30/2024
Underground Facility Protection Advisory Council		
Mr. Corey Sell, Billings Qualifications (if required): Member representing excavators	Governor	6/30/2024



Children, Families, Health, and Human Services Interim Committee

68th Montana Legislature

PO BOX 201706
Helena, MT 59620-1706
(406) 444-3064
FAX (406) 444-3036

SENATE MEMBERS

CHRIS FRIEDEL
JEN GROSS
DANIEL EMRICH
DENNIS LENZ

HOUSE MEMBERS

JENNIFER CARLSON
SJ HOWELL
RON MARSHALL
MIKE YAKAWICH

COMMITTEE STAFF

MILLY ALLEN, Lead Staff
MADDIE KREZOWSKI, Staff Attorney
JOLANDA SONGER, Secretary

March 12, 2024

Director Charles Brereton
Department of Public Health and Human Services
PO Box 4210
Helena, Montana 59604-4210

Dear Director Brereton:

Pursuant to 5-5-225, MCA, the Children, Families, Health, and Human Services Interim Committee (Committee) reviewed MAR Notice No. 37-1044, pertaining to Licensure of Day Care Facilities. The Committee objected to the rule pursuant to 2-4-305(9), MCA, at its November 16, 2023 and January 18, 2024 meetings.

This letter constitutes notice to the Department that the Committee now objects pursuant to 2-4-406, MCA, to the rules proposed in MAR Notice No. 37-1044.

Under 2-4-406, MCA, the Committee may object to the proposed rulemaking if the Committee considers the proposed rulemaking to not have been proposed in substantial compliance with 2-4-302, 2-4-303, and 2-4-305, MCA. The Committee objects to MAR Notice No. 37-1044 for the following reasons:

1. The proposed rules are not in substantial compliance with 2-4-305(6)(a), MCA, because definitions in proposed new Rule 1 and used throughout the proposed rulemaking are not consistent and are in conflict with the statutory definitions found in 52-2-703, MCA.

The proposed new rule creates and defines its own categories of day-care facilities that do not align with the categories of day-care facilities defined in 52-2-703, MCA. For example, proposed new Rule 1 states:

“Child care center” has the same meaning as “day-care center” as defined in 52-2-703, MCA, and means an out-of-home place in which child care is provided to 16 or more children on a regular basis. The term does not include a place where child care is provided if a parent of a child for whom child care is provided remains on the premises, unless the parent is a director/owner, staff member, support staff, or volunteer of the child care center, *or unless the child care center is on the premises or campus of an employer who employs the parent.*

However, the 52-2-703(3) states:

- (a) “Day-care center” means an out-of-home place in which day care is provided to 16 or more children on a regular *or irregular* basis.
- (b) The term does not include a place where day care is provided if a parent of a child for whom day care is provided remains on the premises.

MONTANA LEGISLATIVE SERVICES DIVISION STAFF: JERRY HOWE, EXECUTIVE DIRECTOR • RACHEL WEISS, DIRECTOR, OFFICE OF RESEARCH AND POLICY ANALYSIS • TODD EVERTS, DIRECTOR, LEGAL SERVICES OFFICE • DALE GOW, CHIEF INFORMATION OFFICER, OFFICE OF LEGISLATIVE INFORMATION SERVICES • ANGIE CARTER, FINANCIAL MANAGER

The italics have been added to both definitions to highlight conflicting language. The Committee believes the definitions conflict, in part, because the Department's definition excludes irregular care and impermissibly expands the definition of child care center to include day care provided on the premises or campus of a parent's employer, which is excepted from the definition of day-care center in statute.

The proposed rules then provide exceptions and requirements for the newly defined categories that are not consistent and are in conflict with the statutory requirements. For example, the proposed definition of "School-age care" to mean "regularly scheduled care exclusively for school-age children during out-of-school-time hours, licensed by the department" could fall within the statutory definition of "day-care center" if care is provided for 16 or more children. Yet proposed new Rule II(3)(a)(i) provides that school-age care facilities "have the option of being licensed" despite the requirement in 52-2-721(1)(a), MCA, for all day-care centers that provide care on a regular basis to be licensed.

The Committee's objections to the definitions are not limited to the few specific examples provided here, but to all the definitions that are not consistent and are in conflict with the statutory definitions found in 52-2-703, MCA, or for which the proposed rules provide exceptions or requirements that conflict with Title 52, chapter 2, part 7, MCA.

2. The proposed rules are not in substantial compliance with 2-4-305(6)(b), MCA, because the rules are not reasonably necessary to effectuate the stated purpose of the statute under 52-2-702(2)(d)(ii), MCA, to promote "the availability and diversity of quality child-care services for all children and families that need such services".

The day care statutes in Title 52, chapter 2, part 7, MCA, seek to support a diversity of child-care options, in part, by providing for a dual system of *licensure* for day-care centers and *registration* for family day-care homes or group day-care homes under 52-2-721, MCA. The proposed rules largely treat licensure and registration the same, placing overly onerous requirements on registration. The Committee believes this one-size fits all approach does not effectuate the purpose of the statutes to promote a diversity of options.

3. The proposed rules are not in substantial compliance with 2-4-305(6)(a), MCA, because the immunization requirements in the proposed rules misapply state law for exemptions and are also not in substantial compliance with 2-4-305(5), MCA, because the immunization requirements exceed the statutory rulemaking authority of the Department.

The Committee believes the proposed new Rule LXV misapplies state law for exemptions from vaccinations for registered day care providers by allowing certain providers to choose whether to accept exemptions and is therefore not in substantial compliance with 2-4-305(6)(a), MCA.

Additionally, the Committee believes the proposed new rules providing immunization requirements for day-care facilities other than day-care centers exceed the statutory rulemaking authority of the Department and is thus not in substantial compliance with 2-4-305(5), MCA. Section 52-2-735, MCA, provides authorization for the Department to adopt rules to protect children in day-care centers from communicable diseases, which must include requiring children under 5 years of age to be immunized against Haemophilus influenza type "b" unless an exemption is claimed as provided in 20-5-405, MCA. This statute does not authorize the Department to require immunization for day-care facilities other than day-care centers, such as family day-care homes or group day-care homes. Section 52-2-731, MCA, the other substantive statute cited by the Department, does not provide the foothold needed for the proposed immunization requirements for day-care facilities that are not day-care centers. That statute requires the Department to develop standards for "child-care programs and practices necessary to ensure the health, safety, safety in transportation, development, and well-being of children." However, this section applies

to all licensed and registered day-care facilities, including day-care centers. If the Legislature intended this section to provide sufficient authority for immunization requirements, 52-2-735, MCA, would be superfluous.

In summary, the Committee believes that for the adoption of the rules proposed in MAR No. 37-1044 to be valid as proposed, the Legislature would first need to amend the statutes governing day care under Title 52, chapter 2, part 7, MCA. For an agency to adopt rules implementing its desired policy changes that are not consistent and conflict with the current statutes is a violation of the separation of powers and usurps the role of the Legislature.

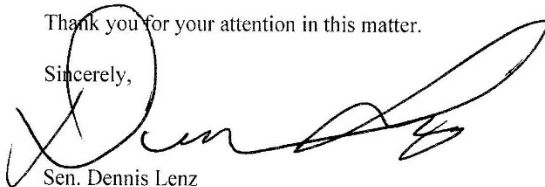
If a rule is objected to under 2-4-406, MCA, before the rule is adopted, as is the case here, the rule is not effective until the day after final adjournment of the regular session of the Legislature that begins after the notice proposing the rule was published by the Secretary of State unless the Committee withdraws its objection pursuant to 2-4-306(3)(c), MCA.

Please note that the Department is required to respond in writing to the Committee's objection within 14 days of the mailing of this objection pursuant to 2-4-406(2), MCA. After receipt of the response, the Committee may withdraw or modify its objection.

If the Committee fails to withdraw or substantially modify its objection, it may vote to send the objection to the Secretary of State for publication in the MAR and ARM. Under 2-4-406(4), MCA, if the objection is published, the Department would bear the burden, in any action challenging the legality of the rule objected to by the Committee, of proving that the rule objected to was adopted in substantial compliance with 2-4-302, 2-4-303, and 2-4-305, MCA.

Thank you for your attention in this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Dennis Lenz", written over a horizontal line.

Sen. Dennis Lenz
Presiding Officer

GREG GIANFORTE
GOVERNOR



DEPARTMENT OF
**PUBLIC HEALTH &
HUMAN SERVICES**

CHARLIE BRERETON
DIRECTOR

March 26, 2024

Senator Dennis R. Lenz, Chair
Children, Families, Health, and Human Services Interim Committee
P.O. Box 201706
Helena, MT 59620-1706

c/o Maddie Krezowski, Interim Committee Staff Attorney
via Madelyn.Krezowski@legmt.gov

Dear Senator Lenz,

Pursuant to § 2-4-406(2), MCA, this letter serves as the response of the Department of Public Health and Human Services (the Department) to the Children, Families, Health, and Human Services Committee's (the Interim Committee) March 12, 2024 notice of formal objection to MAR Notice No. 37-1044 (Formal Objection Letter).

BACKGROUND AND INTRODUCTION

Montana faces a child care crisis. According to a recent study, as much as 60 percent of Montana's counties qualify as child care deserts, meaning many families do not have access to reliable and affordable child care. The shortage of child care options has kept more than 66,000 Montanans from fully working.

In the 2023 legislative session, the Legislature passed several laws to address the shortage of child care services facing Montana and Governor Greg Gianforte signed them into law. Those measures aimed to expand access to quality child care, including removing barriers to allow for more home-based providers to offer services, safely increasing capacity at child care centers, and supporting lower-income working families who need and use child care. Upon the enactment of these measures, the Department began working to implement the Legislature's will and finally deliver affordable and reliable child care solutions for Montana families.

In October 2023, the Department published notice that it intended to repeal the entirety of Title 37, chapter 95 of the Administrative Rules of Montana (ARM) and replace the chapter with an updated and streamlined package of regulations relating to the licensure and registration of child care facilities. The rulemaking was the culmination of two multi-year efforts undertaken by the Department:

DIRECTOR'S OFFICE
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PAGE 1

- Implementing Governor Gianforte's signature Red Tape Relief Initiative, the Department reviewed the existing child care rules to identify ways to expand access to safe, high-quality care for Montana families while reducing regulatory burden. The Department analyzed each child care rule to ensure it was necessary, easy to understand, and did not create undue burdens on providers.
- The Department engaged in a sustained, years-long process of outreach to, engagement of, and consultation with, stakeholders, members of the public, and members of the Interim Committee. This outreach process engaged over 700 child care stakeholders across Montana: current providers; those wishing to become licensed or registered; parents; fire and environmental safety professionals; and public and community health experts. The feedback included 627 responses to surveys, 125 focus group attendees, and 27 interviews.

As a result of these initiatives, the Department recognized that the existing rules are confusing, poorly arranged, discourage new entrants into the child care provider market, and were ultimately the result of years of layered administrative rule changes that did not consider the regulatory framework at large.¹ To address these issues, the Department chose to propose repealing all existing rules and undertake a comprehensive, total revision and reorganization of these rules. In addition to making the rules more user-friendly, the proposed rules package:

- Proposes graduated licensing or registration requirements that are tailored to the location in which child care is provided and the number of children in care;
- Reflects that each provider is unique, allowing eligible providers to apply for waivers of licensing or registration standards;
- Includes a new license category for school-age care (out-of-school-time) providers that considers the unique needs of serving school-age children;
- Removes requirements for duplicative inspections (i.e., if a facility has already been inspected by fire safety and public health officials, child care licensing will not require additional inspections);

¹ In August 2022, the Department published MAR Notice No. 37-994. This was a discrete proposed rules package that would have made changes necessary to bring child care immunization requirements into alignment with statutory changes from the 2021 Legislative session, align the child care immunization requirements with school immunization requirements, and recognized a religious exemption. The Interim Committee objected to 37-944 pursuant to §2-4-305(9), MCA, effectively delaying the adoption of the rules package.

In November 2022, the Department published MAR Notice No. 37-1020, a comprehensive proposed rules package intended to address the issues identified by the Department. The Interim Committee also objected to 37-1020 pursuant to §2-4-305(9), MCA, effectively delaying the adoption of the rules package.

- Incorporates legislative updates from the 2021 and 2023 sessions including updating child-to-staff ratios, increasing the number of children in care without needing to be licensed or registered, and offering military licensing reciprocity;
- Aligns child care licensing and registration requirements with federal Child Care Development Fund (CCDF) requirements; and
- Results in an approximately 20% reduction in content.

After the Department became aware that certain members of the Interim Committee had concerns about child care licensing, the longstanding role of government in such licensing, and the proposed revisions to the child care licensing and registration rules, it repeatedly sought feedback from members of the Children, Families, Health, and Human Services Interim Committee throughout 2023, including:

July 31, 2023: Following the 2023 Legislative session, the Department met with Chair Sen. Lenz and Rep. Carlson for a multi-hour work session to review draft child care rules and discuss legislative feedback.

August 11, 2023: Following legal review, legislator feedback was incorporated into an updated draft of the proposed rules. The draft explicitly noted the Department's rationale for changes made pursuant to legislators' feedback, as well as for requested changes that were rejected. This draft was provided to Chair Lenz and Rep. Carlson on August 11, 2023. The legislators did not respond or provide additional feedback, despite repeated requests from the Department. (Please see Attachment 1.)

November 13, 2023: The public hearing on the proposed rules package (MAR 37-1044) was held and no legislators from the Interim Committee provided testimony. A review of all written comments indicates no member of the Interim Committee has provided public comment on the proposed rules. Rep. Jedediah Hinkle and Rep. Dunwell, neither of whom are members of the Interim Committee, commented on the proposed rules.

November 13, 2023: Interim Committee member Rep. Yakawich left a voicemail for Tracy Moseman, Early Childhood and Family Support Division Administrator, to discuss the child care rules package. Ms. Moseman returned Rep. Yakawich's call and left a message. To date, Rep. Yakawich has not contacted Ms. Moseman to discuss the proposed rules.

November 16, 2023: During the Children, Families, Health, and Human Services Committee meeting held on this date, a majority of the Interim Committee objected to the rules package. The basis for some Interim Committee members' objection to MAR 37-1044 conflicted with the bases of other Interim Committee members' objections.

December 6, 2023: Interim Committee member Sen. Emrich had a phone conversation with Ms. Moseman to discuss the proposed rule changes related to the recognition of religious exemptions to child care vaccination requirements. He requested a follow up meeting with Ms. Moseman and me to discuss further. Sen. Emrich also requested that the Department provide to him information regarding the Department's regulatory proposals regarding religious exemptions.

December 7, 2023: Ms. Moseman emailed Sen. Emrich the documents he requested pertaining to religious exemptions. (Attachment 2.)

December 14, 2023: Sen. Emrich did not attend the meeting the Department had arranged with him to discuss the religious exemption proposal.

It is important to note that the above list of events only offers a glimpse into the Department's diligent efforts to collect and respond to legislators' feedback on the proposed rules package, MAR 37-1044. Other in-person meetings and phone conversations between legislators (both Interim Committee members and non-members), the Department, and other state staff occurred over the course of 2023.

RESPONSES TO INTERIM COMMITTEE OBJECTIONS

On March 12, 2024, the Interim Committee objected to MAR Notice No. 37-1044. In response, the Department now offers the following:

1. The proposed rules are not in substantial compliance with 2-4-305(6)(a), MCA, because definitions in proposed [N]ew Rule I and used throughout the proposed rulemaking are not consistent and are in conflict with the statutory definitions found in 52-2-703, MCA.

The Department disagrees. As the Montana Supreme Court has stated,

[w]e construe a statute by reading and interpreting the statute as a whole, without isolating specific terms from the context in which they are used by the Legislature. Statutory construction is a holistic endeavor and must account for the statute's text, language, structure, and object. We must also read and construe each statute as a whole so as to avoid an absurd result and to give effect to the purpose of the statute.

Totem Bevs., Inc. v. Great Falls-Cascade Cty. City-Cty. Bd. Of Health, 2019 MT 273, ¶ 14, 397 Mont. 527, 452 P.3d 923 (citation omitted). To resolve an asserted conflict between a regulation and a statute, a court will "consider whether the regulation 'engraft[s] additional and contradictory requirements on the statute,' or 'engraft[s] additional, noncontradictory requirements on the statute which were not envisioned by the legislature.'" *Id.* Regulations that are consistent with the statute "must also be reasonably necessary to effectuate the statute's purpose." *Id.*; see also *Gold Creek Cellular of Montana LP v. State Dep't of*

Revenue, 2013 MT 273, ¶ 12, 373 Mont. 71, 310 P.3d 533 (citing *Bell v. Dep't of Licensing*, 182 Mont. 21, 23, 594 P.2d 331, 333 (1979)); § 2-4-305(6), MCA. "When a department's regulation restricts a broad statutory exemption, that regulation is in direct conflict with the statute." *Gold Creek* at ¶ 13. In *Totem Beverages*, the Supreme Court reversed the invalidation of certain rules, concluding that the rules did not violate these standards, and finding "important" the "Legislature's directive" that the statute "be supervised and enforced by the department and the department's designees . . . and the Legislature's grant of rulemaking authority." *Totem Bevs.*, 2019 MT 273, ¶ 18 ("The Legislature clearly intended that the Department and local boards would address the details necessary for the Act's application and enforcement.").

Definition of "Child Care Center"

The Interim Committee specifically objected to the proposed regulatory definition of "child care center," contending that "the definitions conflict, in part, because the Department's definition excludes irregular care and impermissibly expands the definition of child care center to include day care provided on the premises or campus of a parent's employer, which is excepted from the definition of day care center in the statute." (Formal Objection Letter at 2.)

The statutory definition of "day care center" is "an out-of-home place in which day care is provided to 16 or more children on a regular or irregular basis." § 52-2-703(3)(a). The Interim Committee's contention that the omission of "irregular" from the definition of "child care center" means that the proposal is in conflict with the statute is wrong. To give meaning to these two different, but statutorily undefined, categories, the Department appropriately promulgated regulatory definitions.²

§ 52-2-703(3)(b), MCA, exempts from the definition of "day care center" a "place where day care is provided if a parent of a child for whom day care is provided remains on the premises." Proposed New Rule I(5) replicates the statutory definition and exemption, and clarifies that day care centers (facilities providing out-of-home care to 16 or more children) on the premise or campus of an employer who employs the parent would need to be licensed. The Interim Committee apparently objects to this clarification as being in conflict with the statutory exemption.³

² The Department notes that it is required to "adopt rules for day care centers that provide day care on an irregular basis," § 52-2-704(2)(g), MCA, and "may" "issue a license to a person to receive children into a day-care center on an irregular basis if the person chooses to apply for licensure," § 52-2-704(3)(d), MCA.

³ Based on the Formal Objection Letter, the Committee does not object to the clarification that the exemption does not apply if the parent is a director/owner, staff member, or volunteer of the child care center.

§ 52-2-703, MCA (2000), was amended⁴ by House Bill 324 during the 57th Legislature amid concerns that unregulated “drop-in” care was being provided to the detriment of child safety: insufficient square footage per child; staff training requirements, including CPR and first aid training; and staff-to-child ratios. (57th Leg. Reg. Sess., Comm. on Human Services minutes, Jan. 24, 2001, at 17, 18.) Specifically, bill sponsor Representative Mangan stated that HB 324 was intended to address large centers that are taking in large numbers of children and were unlicensed, and that HB 324 would address the health and safety standards for children. (*Id.* at 19.)

Proposed New Rule I(5) directly addresses the concerns from the 57th Legislature — that is, unlicensed care skirting safety requirements — by clarifying that large-scale, employer-based child care facilities do need to be licensed. Child care in Montana continues to be a barrier for parents remaining at or returning to work. To address this challenge, some Montana employers are offering child care to their employees, with the facility located on the campus of the worksite.

§ 52-2-703(3)(b), MCA, excludes from the definition of day-care center a place where day care is provided if a parent of a child for whom day care is provided remains on the premises. The Department found it necessary to clarify this exception because a child’s attendance, as well as the presence of a child’s parent, may vary from week to week, or even day to day. This ever-changing precedent condition made it difficult for providers to determine if they needed to be licensed; this has been particularly true for employer-based facilities where the presence of one child whose parent is not working on-premises on one particular day could threaten the facility’s compliance. Proposed New Rule I(5) gives meaning to § 52-2-703(3)(b). The clarifying, noncontradictory proposed language of New Rule I was envisioned by the 57th Legislature, and is necessary to effectuate § 52-5-703(3).

Definition of “School-age Care”

The Interim Committee apparently objects to the proposed new category of “out-of-school time” child care facility, contending that it is in conflict with the statutory requirements, apparently because “school-age care” — proposed to mean “regularly scheduled care exclusively for school-age children during school-time hours, licensed by the department” — “could fall within the definition of ‘day-care center’ if care is provided for 16 or more children,” but “proposed new Rule II(3)(a)(i) provides that they have the option of being licensed despite the requirement in 52-2-721(1)(a), for all day-care centers that provide care on a regular basis to be licensed.” (Formal Objection Letter at 2.)

⁴ HB 324 added “irregular” to § 52-2-703, MCA, currently codified under (a), and added, “The term does not include a place where day care is provided if a parent of a child for whom day care is provided remains on the premises.” to new (b).

§ 52-2-703(17), MCA, defines school-age care as "an adult-supervised program that is provided for school-age children during nonschool hours." The Legislature saw fit to define separately school-age care from day-care center care. Under statute, school-age care is categorized by the age of the children in care and the hours during which care is being provided. In comparison, day care centers are not limited by the age of the children being cared for nor by the hours in which care is provided. Because the Legislature saw fit to separate "school-aged care" from other types of child care, the Department proposed definitions that would give meaning to the statutory distinction.

Unspecified Objection to Other, Unidentified Proposed Definitions

The Interim Committee generally contends that it objects to "all definitions that are not consistent and are in conflict with the statutory definition found in 52-2-703, MCA, or for which the proposed rules provide exceptions or requirements that conflict with Title 52, chapter 2, part 7, MCA." (Formal Objection Letter at 2.)

§ 2-4-406(1), MCA, requires the Interim Committee to make a "concise statement of the committee's reasons for its action" when it sends a written objection to the agency that promulgated the rule. The Interim Committee has not met its statutory obligation with respect to this catchall objection, which leaves the Department without fair notice of what the Interim Committee's objections are as they relate to other definitions proposed in New Rule I. The Department cannot be responsible for attempting to determine which proposed definitions the Interim Committee objects to and why.

2. The proposed rules are not in substantial compliance with 2-4-305(6)(b), MCA, because the rules are not reasonably necessary to effectuate the stated purpose of the statute under 52-2-702(2)(d)(ii), MCA, to promote "the availability and diversity of quality child-care services for all children and families that need such services[.]"

Regulations that are consistent with the statute must also be reasonably necessary to effectuate the statute's purpose. § 2-4-305(6)(b), MCA; *Michels v. Dep't of Social and Rehabilitation Servs.*, 187 Mont. 173, 177-78, 609 P.2d 271, 273 (1980).

The purpose of the Montana Child Care Act "is to assure that children requiring day care be provided such food, shelter, security and safety, guidance and direction, nurture and comfort, and learning experiences commensurate to their ages and capabilities so as to safeguard the growth and development of such children, thereby facilitating their proper physical and emotional maturation." § 52-2-702(1), MCA. The Legislature further specified its intent, tasking the Department with "promoting the availability and diversity of quality child-care services for all children and families that need such services[.]" *Id.* at § 52-2-702 (2)(d)(ii).

The Interim Committee vaguely asserts that the proposed rules are not necessary to effectuate the stated purpose of § 52-2-702(2)(d)(ii). The Interim Committee did not identify which of the proposed registration and licensing regulations are not reasonably

necessary to effectuate this purpose, nor did the Interim Committee even attempt to explain the rationale for its imprecise objection. As such, the Department is left guessing. To the extent that it is the Interim Committee's position that the proposed regulations create a one-size-fits-all approach to facilities — that is, requiring small, home-based providers to meet the same regulatory standards as large, out-of-home child care centers — the Department disagrees.

As noted above, MAR 37-1044 is the result of a years-long process that engaged over 700 child care stakeholders across Montana: current providers; those wishing to become licensed or registered; parents; fire and environmental safety professionals; and public and community health experts, among others. Based on their feedback, the proposed new rules impose graduated requirements depending on the size of the facility. In addition, MAR 37-1044 establishes clear distinctions between the requirements imposed on licensed child care facilities and those requirements imposed on registered facilities.

For example, licensed, out-of-home facilities are required to have a two-compartment sink as back-up in the event their dishwasher becomes inoperable; registered home-based providers are not subject to this regulation.⁵ Similarly, any licensed facilities using a two-compartment sink to handwash dishes must use the wash, rinse, and sanitize three-step process⁶:

All dishware, utensils, and food service equipment are thoroughly cleaned in the first sink compartment with a hot detergent solution, at a concentration indicated on the manufacturer's label, then rinsed with clear water separately, and then dipped/soaked in sanitizer solution in a separate compartment or container that will provide the equivalent bactericidal effect of a solution containing at least 50 ppm of available chlorine at a temperature of at least 75°F for one minute. Dishes must be air dried before being stored.⁷

Registered home-based providers are not subject to this regulation.

The proposed child care licensing package would also allow the Department to approve innovative and creative child care models through a formal waiver process.⁸ The case-by-case waiver review process is the epitome of customizable licensing or registration options for eligible providers. It would allow the Department to support diverse and customized child care models while maintaining safety standards. The Department believes that demand for such models in Montana is great.

Balanced regulation based on the setting and number of children in care, along with a waiver process that would offer flexibility to providers, illustrate how the Department's

⁵ New Rule LVIII (4)(a).

⁶ *Id.* at (5).

⁷ *Id.* at (5)(a).

⁸ New Rule XIV.

proposed child care regulations implement the Legislature's edict of "promoting the availability and diversity of quality child-care services for all children and families that need such services[.]" § 52-2-702(2)(d)(ii), MCA.

The Department also proposed regulatory changes responsive to feedback received from the federal Department of Health and Human Services (HHS), Administration for Children and Families (ACF), Office of Child Care's (OCC's) July 2023 monitoring visit. States are required to comply with Child Care and Development Fund (CCDF) requirements as a condition of receiving these federal funds. CCDF regulations require Lead Agencies, such as the Department, to maintain compliance with all provisions of the Child Care and Development Block Grant Act, regulations, and the State's approved CCDF Plan during the administration of their program.⁹

After OCC's monitoring visit, the following areas of possible non-compliance were identified:

- Prevention/Response to Emergencies due to Food and Allergic Reactions in accordance with 45 CFR § 98.41(a)(1)(iv). The Lead Agency does not have requirements in place for the prevention of and response to emergencies due to food and allergic reactions for CCDF license-exempt FFN providers.
- Shaken Baby Syndrome, Abusive Head Trauma, and Child Maltreatment requirement in accordance with 45 CFR § 98.41(a)(1)(vi). The Lead Agency does not have requirements in place for the prevention of shaken baby syndrome and abusive head trauma for FFN providers.¹⁰

New Rule XXI addressed both of these possible non-compliance points to help ensure Montana remains eligible for nearly \$39,000,000 in federal funds needed to support healthy and safe child care options in Montana.

3. The proposed rules are not in substantial compliance with 2-4-305(6)(a), MCA, because the immunization requirements in the proposed rules misapply state law for exemptions and are also not in substantial compliance with 2-4-305(5), MCA, because the immunization requirements exceed the statutory rulemaking authority of the Department.

Statutory Rulemaking Authority for Vaccination Requirements

The Interim Committee contends that the Department does not have statutory authority to adopt rules setting immunization requirements for children receiving child care, except for requiring a single dose Haemophilus influenza type 'b' (Hib) and only for children attending a child care center. Stated differently, the Interim Committee argues the Department cannot require any vaccinations for children in family or group child care

⁹ Preliminary Notice of Possible Non-Compliance, pg. 1.

¹⁰ *Id.* at pg. 2.

facilities,¹¹ and may only require one dose of one vaccination for children attending facilities that care for 16 or more children.

The Department disagrees with this idiosyncratic interpretation of the Montana Child Care Act. The Interim Committee's argument does not acknowledge that the vaccination requirements in MAR 37-1044 are not new – they are long-standing requirements under ARM 37.95.140 that are applicable to all Montana day care facilities.¹² The Department notes that, to the best of its knowledge, there has been no legal challenge to the Department's statutory authority to impose such child care vaccination regulations, much less a successful challenge to that authority.

That fact is not surprising: The Department has clear statutory authority "to prescribe the conditions and publish the minimum standards upon which licenses and registration certificates are issued" and to "adopt rules for day-care facilities" consistent with the Montana Child Care Act. § 52-2-704(2)(e), (f). The Act, among other things, seeks to assure that children requiring day-care are provided with "security and safety," and that parents "are not forced by lack of available programs or financial resources to place a child in an unsafe or unhealthy child-care facility." § 52-2-702(1), (2)(d)(iv), MCA. Moreover, the Act recognizes that one area in which the Department may adopt standards for day care is "child care programs and practices necessary to ensure the health, safety, safety in transportation, development, and well-being of children." § 53-2-731(3). These provisions in the Act provide ample statutory authority for the longstanding child care vaccination regulations.

The specific authority with respect to day care/child care centers is not to the contrary. § 52-2-735 directs the Department to adopt rules for the "protection of children in day-care centers from the health hazards" of communicable diseases. The statute then states said rules "**must include** rules requiring children under 5 years of age to be immunized against Haemophilus influenza type 'b' (Hib) before being admitted for care in the facility," unless exempt. (Emphasis added.) The use of the word "include" is instructive: the Department

¹¹ During the 68th Legislature, Committee member Rep. Carlson sponsored House Bill 954, A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY REVISING REQUIREMENTS FOR IMMUNIZATIONS 5 IN DAY-CARE FACILITIES; REQUIRING A DAY-CARE CENTER TO RECORD THE IMMUNIZATION 6 STATUS OF ENROLLED CHILDREN; PROHIBITING A FAMILY DAY-CARE HOME OR GROUP DAY-CARE 7 HOME FROM REQUIRING IMMUNIZATIONS PRIOR TO ENROLLMENT; REQUIRING A FAMILY DAY-CARE 8 HOME OR GROUP DAY-CARE HOME TO MAINTAIN IMMUNIZATION STATUS RECORDS FOR ENROLLED 9 CHILDREN; PROVIDING AN APPROPRIATION; AND AMENDING SECTION 52-2-735, MCA."

Inter alia, HB 954 would have codified what the Committee is inappropriately attempting to do now through the formal objection process. HB 954 was referred to the House Human Services Standing Committee where it was unanimously tabled and where the bill ultimately died.

¹² Day care/child care facility vaccination requirements date back to at least 2000. In 2000, the Department proposed and then adopted child care rules that included vaccination requirements applicable to all Montana child care facilities. See MAR Notice 37-160, 2000 MAR 1573 at 1581-83 (June 30, 2000) (proposal notice, Rule VIII); 2000 MAR 2415 (Sept. 7, 2000) (adoption notice).

must adopt rules requiring children in day-care centers to be immunized for Hib, but the Department is not limited to only that requirement.

The Legislature clearly granted the Department administrative authority to set minimum safety and health standards for child care facilities in § 52-2-704. § 52-2-735 further defines the minimum standards for a defined category of facilities, but it is not exhaustive. Additional rules setting forth the health and safety standards for Montana child care facilities were necessary to effectuate the purpose of the Act and § 52-2-704 – ensuring that children in child care are provided with security, safety, and healthy child care facilities. The Department properly exercised its authority when it adopted rules requiring vaccines in accordance with ACIP recommendations.¹³

Especially in light of the longstanding nature of the Department's child care vaccination requirements, the Legislature is presumed to know of the Department's administrative interpretation of the Act; the Legislature's actions or lack of action on the subject has occurred with the backdrop of such interpretations. And it should be noted that all legislative efforts to expressly limit the Department's authority to impose child care vaccination requirements have failed.

Finally, it is important to note that the federal regulations governing the Child Care and Development Fund (CCDF) requires states, as a condition of receiving CCDF funds, to have health and safety requirements related, *inter alia*, to the prevention and control of infectious diseases, including immunizations. 45 CFR § 98.41(a)(1).

As part of their health and safety provisions in this area, [the Department] shall assure that children receiving services under the CCDF are age-appropriately immunized. Those health and safety provisions shall incorporate (by reference or otherwise) the latest recommendation for childhood immunizations of the respective State, territorial, or tribal public health agency.

Id. at § 98.41(a)(1)(i)(A).

The Department knows of no state, territorial, or tribal public health agency that endorses a single dose of the Haemophilus influenza type 'b' vaccine as the exclusive adequate, age-appropriate vaccine recommendation. The Interim Committee's apparent position would threaten nearly \$39,000,000 in yearly CCDF awards, money that is used to provide support and access to safe and quality child care for hardworking Montana families. The Department cannot believe that the Interim Committee, much less the entire Legislature, would knowingly adopt an interpretation of the Department's statutory authority that

¹³ "Based upon disease epidemiology and burden, vaccine efficacy and effectiveness, vaccine safety, economic analyses and implementation, [the Advisory Committee on Immunization Practices] develops uniform guidance on the use of vaccines for effective control of vaccine-preventable diseases in the civilian population of the United States." State. of Reasonable Necessity, Mont. Admin. Reg. Not. 37-814, No. 21 (Nov. 9, 2017).

would jeopardize the receipt of tens of millions of dollars in federal funds to support access to affordable, quality child care in Montana — federal funds that the Legislature very recently incorporated into the Department's budget and appropriations for child care.

Vaccination Requirement and the Proposed Religious Exemptions

After the conclusion of the 2021 Legislative Session, the Department assessed the child care vaccination requirements, in light of the enactment of SB 215, the Montana Religious Freedom Restoration Act (RFRA). Montana RFRA prohibits state action that substantially burdens a person's exercise of religion, unless the action is essential to further a compelling state interest and is the least restrictive means of furthering that compelling governmental interest. Many religiously observant families object to certain childhood vaccines on religious grounds because such vaccines were developed using cell lines derived from aborted fetal tissue. Because the child care rules then (and now) do not provide any religious exemptions for staff members and provide opportunity for a religious exemption for only one childhood vaccine — while providing for medical exemptions — the Department concluded that the failure to provide for a religious exemption for families with a religious objection to any of the required vaccines likely violates Montana RFRA. The Department's RFRA concerns led it to issue, on October 31, 2022, a notice of non-enforcement of the vaccination requirements if the failure to comply was a result of a religious objection. (See Attachment 3.)

During hearings, certain witnesses (and certain members of the Interim Committee) argued that the Legislature's later consideration of, but failure to adopt, specific legislation on religious exemptions for child care vaccination requirements meant that the Legislature had reserved the issue for itself and that the Department lacked the statutory authority to establish, administratively, religious exemptions for the child care vaccination requirements. This argument ignores the fact that the Legislature adopted Montana RFRA in 2021, and that the Department is obligated to comply with it.

Home-Based Child Care Facilities and Religious Exemptions

Finally, the Interim Committee objects to New Rule LXV because it "believes [New Rule LXV] misapplies state law for exemptions from vaccinations for registered day care providers by allowing certain providers to choose whether to accept exemptions and is therefore not in substantial compliance with 2-4-305(6)(a)." (Formal Objection Letter at 2.) Once again, the Interim Committee does not adequately set forth the basis of its objection — it does not specify if it objects because it believes all providers should have the choice of whether to enroll children with vaccination exemptions, or because it believes no providers should have that choice. Further, the Interim Committee does not identify which state law has allegedly been misapplied.

The Department proposed New Rule LXV so a home-based child care provider has the option as to whether it enrolls children who are not vaccinated in accordance with the

recommended minimum recommended immunization requirements. (New Rule LXIV.) Home-based providers would have to maintain policies and procedures to inform parents and guardians if the child care provider accepts children with exemptions from required vaccines. This proposal would give choice to families with medical or religious exemptions; allow for parental choice in any additional vaccines a parent may choose for their child; and give in-home providers the choice to set policies to align with the needs of their own households. Under the proposal, child care centers would not have the same flexibility because the concerns that led to the proposal to provide flexibility for in-home providers do not apply to child care centers. The Department believes that home-based business owners caring for mixed age groups are allowed autonomy in their choice to serve vaccination-exempt children; this will allow home-based providers to make choices for their own health and the health of their family members and the children in their care, who may not be old enough to be vaccinated. By contrast, child care centers are required to separate children by age group to protect younger children who may be more vulnerable to infectious disease and have not yet had the opportunity to be vaccinated.

The Department carefully weighed the needs of children receiving child care, of parents and guardians, and of small business owners who operate as home-based providers. Consistent with the analyses required by Montana RFRA, proposed Rule LXV balances the medical and religious autonomy of all.

SEPARATION OF POWERS

"In Montana each branch of government is equal, coordinate and independent, in that powers belonging to one branch may not be exercised by another." *MEA-MFT v. McCulloch*, ¶28, 366 Mont. 266, 291 P.3d 1075 (citing *Powder River County v. State*, 2002 MT 259, ¶ 112, 312 Mont. 198, 60 P.3d 357). Article III, section 1 of the Montana Constitution divides the government into legislative, executive, and judicial branches, and provides that "[n]o person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted." Article V, section 1 of the Montana Constitution provides that the "legislative power is vested in a legislature consisting of a senate and a house of representatives." During an interim when the Legislature is not in session, the Children, Families, Health, and Human Services Committee is an interim committee of the Legislature. It is empowered to sit as a committee and may act in its respective area of responsibility. § 5-5-202(1), (2)(c), MCA. The Interim Committee has the statutory authority to review administrative rules within its jurisdiction. § 5-5-215(1)(a), MCA.

However, Article VI, section 4 of the Montana Constitution provides that the "executive power is vested in the governor who shall see that the laws are faithfully executed." The Legislature made the Department responsible for planning, implementing, and coordinating programs under the Montana Child Care Act, and specifically delegated

to the Department the responsibility to "prescribe the conditions and publish minimum standards upon which licenses and registration certificates are issued" to Montana child care facilities. § 52-2-704(1), (2)(e), MCA. The Children, Families, Health, and Human Services Committee is an interim committee of eight legislative members that, through its use of the objection process, is undermining the rulemaking authority granted to the Executive Branch and Department by the entire Legislature, making it difficult for the Department to address the child care shortage.

The Department has consistently acted in good faith to collaborate with Interim Committee members on this rules package. It is troubling that it does not appear we are able to reach an agreement with the Interim Committee on these rules so that the Department can fully execute the laws of our state. The Interim Committee has repeatedly leveraged the objection process without articulated justification, instead imposing its own implementation preferences. Furthermore, it has done so without regard for the Department's repeated explanations of the reasons for the implementation choices made in the rules, its incorporation of legislator feedback, and for the supportive public comments presented by interested Montanans, most of whom are negatively impacted by the unnecessary and harmful delay of a modern, common sense, and long overdue rules package that reduces regulatory burden.

The Department has proposed child care regulations that are in substantial compliance with its statutory authority and obligations; that help expand access to affordable, quality child care; that help ensure Montana remains eligible for vital federal funds; that respect and protect religious liberty; and that are responsive to the over 700 stakeholders who participated in this rulemaking process. For these reasons and more, the Department requests that the Interim Committee withdraw its objection and the Formal Objection Letter, pursuant to § 2-4-406(2), MCA.

Sincerely,

A handwritten signature in blue ink, appearing to read 'C. Brereton', is written over a large, stylized 'C' that also serves as a checkmark.

Charles T. Brereton
Director

Enclosures

BEFORE THE DEPARTMENT OF PUBLIC
HEALTH AND HUMAN SERVICES
OF THE STATE OF MONTANA

In the matter of the adoption of NEW	)	NOTICE OF ADOPTION AND
RULES I through XCVI and the	)	REPEAL
repeal of ARM Title 37, chapter 95)	
pertaining to licensure of day care)	
facilities)	

TO: All Concerned Persons

1. On October 20, 2023, the Department of Public Health and Human Services published MAR Notice No. 37-1044 pertaining to the public hearing on the proposed adoption and repeal of the above-stated rules at page 1297 of the 2023 Montana Administrative Register, Issue Number 20.

2. The department has adopted the following rules as proposed: NEW RULE I (37.96.101), NEW RULE II (37.96.102), NEW RULE III (37.96.103), NEW RULE IV (37.96.106), NEW RULE V (37.96.107), NEW RULE VI (37.96.108), NEW RULE VII (37.96.111), NEW RULE VIII (37.96.112), NEW RULE IX (37.96.113), NEW RULE X (37.96.114), NEW RULE XI (37.96.117), NEW RULE XII (37.96.118), NEW RULE XIII (37.96.121), NEW RULE XIV (37.96.122), NEW RULE XV (37.96.201), NEW RULE XVI (37.96.202), NEW RULE XVII (37.96.205), NEW RULE XVIII (37.96.206), NEW RULE XIX (37.96.301), NEW RULE XX (37.96.302), NEW RULE XXI (37.96.303), NEW RULE XXII (37.96.306), NEW RULE XXIII (37.96.307), NEW RULE XXIV (37.96.308), NEW RULE XXV (37.96.311), NEW RULE XXVI (37.96.312), NEW RULE XXVII (37.96.313), NEW RULE XXVIII (37.96.401), NEW RULE XXIX (37.96.402), NEW RULE XXX (37.96.403), NEW RULE XXXI (37.96.404), NEW RULE XXXII (37.96.407), NEW RULE XXXIII (37.96.408), NEW RULE XXXIV (37.96.409), NEW RULE XXXV (37.96.410), NEW RULE XXXVI (37.96.413), NEW RULE XXXVII (37.96.414), NEW RULE XXXVIII (37.96.415), NEW RULE XXXIX (37.96.501), NEW RULE XL (37.96.502), NEW RULE XLI (37.96.505), NEW RULE XLII (37.96.506), NEW RULE XLIII (37.96.601), NEW RULE XLIV (37.96.602), NEW RULE XLV (37.96.603), NEW RULE XLVI (37.96.604), NEW RULE XLVII (37.96.607), NEW RULE XLVIII (37.96.608), NEW RULE XLIX (37.96.609), NEW RULE L (37.96.612), NEW RULE LI (37.96.613), NEW RULE LII (37.96.614), NEW RULE LIII (37.96.615), NEW RULE LIV (37.96.618), NEW RULE LV (37.96.619), NEW RULE LVI (37.96.620), NEW RULE LVII (37.96.623), NEW RULE LVIII (37.96.624), NEW RULE LIX (37.96.701), NEW RULE LX (37.96.704), NEW RULE LXI (37.96.705), NEW RULE LXII (37.96.708), NEW RULE LXIII (37.96.801), NEW RULE LXIV (37.96.802), NEW RULE LXV (37.96.805), NEW RULE LXVI (37.96.806), NEW RULE LXVII (37.96.809), NEW RULE LXVIII (37.96.810), NEW RULE LXIX (37.96.901), NEW RULE LXX (37.96.902), NEW RULE LXXI (37.96.903), NEW RULE LXXII (37.96.904), NEW RULE LXXIII (37.96.907), NEW RULE LXXIV (37.96.908), NEW RULE LXXV (37.96.909), NEW RULE LXXVI (37.96.910), NEW RULE LXXVII (37.96.913), NEW

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RULE LXXVIII (37.96.914), NEW RULE LXXIX (37.96.915), NEW RULE LXXX (37.96.918), NEW RULE LXXXI (37.96.1001), NEW RULE LXXXII (37.96.1002), NEW RULE LXXXIII (37.96.1003), NEW RULE LXXXIV (37.96.1004), NEW RULE LXXXV (37.96.1005), NEW RULE LXXXVI (37.96.1008), NEW RULE LXXXVII (37.96.1101), NEW RULE LXXXVIII (37.96.1102), NEW RULE LXXXIX (37.96.1103), NEW RULE XC (37.96.1104), NEW RULE XCI (37.96.1107), NEW RULE XCII (37.96.1108), NEW RULE XCIII (37.96.1111), NEW RULE XCIV (37.96.1112), NEW RULE XCV (37.96.1113), and NEW RULE XCVI (37.96.1116).

3. The department has repealed the following rules as proposed: ARM Title 37, chapter 95.

4. The department has thoroughly considered the comments and testimony received. A summary of the comments received, and the department's responses are as follows:

COMMENT 1: A commenter stated a preschool definition should be added to NEW RULE I(4)(d), including hours per week a preschool can be open to not be licensed.

RESPONSE 1: The department will keep current proposed text. The proposed rule is consistent with 52-2-703(4)(b), MCA, which excludes from the definition of day-care facility "any group facility established chiefly for educational purposes that limits its services to children who are 3 years of age or older." Since preschools likely fall into this exclusion, contained in NEW RULE I(4)(d), the department declines to amend this proposed definition.

COMMENT 2: A commenter stated NEW RULE I(10) should include gender, gender identify, sexual orientation, and pregnancy.

RESPONSE 2: The proposed definition is consistent with Montana state law and federal Child Care and Development Fund (CCDF) requirements. (See 49-1-102, MCA; 45 CFR § 98.48). Accordingly, the department declines to add any additional language.

COMMENT 3: A commenter stated NEW RULE I(12) reads that the only reason a family child care provider would become registered is to receive subsidy payments and does not list Child and Adult Food Program (CACFP) or STARS to Quality.

RESPONSE 3: The department appreciates the comment. The proposed definition is illustrative, and does not serve as an exhaustive list of the benefits that come with being a registered facility. The department believes the proposed language provides clarity without being dispositive.

COMMENT 4: A commenter stated NEW RULE I(20)(b) should only refer to child care centers, since they are the only provider type licensed.

RESPONSE 4: The department agrees that child care centers are required to be licensed. However, school-age and drop-in care facilities may choose to be licensed. Accordingly, it is appropriate not to limit NEW RULE I(20)(b) to child care centers. Proposed NEW RULE I(20)(b) specifically defines a condition that may be placed on a facility's license, regardless of whether the license is required or voluntary. The department believes proposed NEW RULE I(20)(b) is accurate and applies only to licensing.

COMMENT 5: A commenter requested clarification on whether a homeschooled child would be included in the total counted children in a child care home setting under NEW RULE III.

RESPONSE 5: Likely yes. If a homeschooled child is the child of the owner of the facility or a staff member, and is present in the child care space during child care hours, that child would be counted in the applicable child-to-staff-ratios. The exception in (2)(a) allows some flexibility in child-to-staff ratios when an owner's child, who attends school full time, is present in the facility before or after school hours.

COMMENT 6: A commenter stated it was unclear how Family, Friend, and Neighbor (FFN) and Relative Care Exempt (RCE) providers would be approved for registration if they were not subject to a pre-inspection and cannot get a provisional registration in NEW RULE VII(1) and (2).

RESPONSE 6: The department would issue a registration once the FFN or RCE provider meets the requirements outlined in NEW RULE VI.

COMMENT 7: A commenter voiced support for the emphasis on FFN and RCE providers because it will allow more access to the Best Beginnings Child Care Scholarship.

RESPONSE 7: The department thanks the commenter for their support.

COMMENT 8: Many commenters voiced support for the school-age licensing track, commenting that the proposed new license will allow a variety of programs to become licensed, and that the proposal aligns with school-age children's needs.

RESPONSE 8: The department thanks commenters for their support. The department believes the school-age licensing track will make it easier for facilities serving school-age children to meet health and safety requirements without needless regulatory burden.

COMMENT 9: A commenter stated the school-age licensing track will allow more school-age programs to open, thus, opening child care slots for younger children in child care centers and in home-based facilities.

RESPONSE 9: The department appreciates the support. Throughout this process, the department has striven to propose regulations that will increase access to child care without sacrificing quality.

COMMENT 10: A commenter stated that the school-age licensing track will allow them to pursue licensing and accept the Best Beginnings Child Care Scholarship.

RESPONSE 10: The department encourages the school-age programs becoming licensed. Once licensed, a school-age provider would be eligible to enroll children whose families receive Best Beginnings Child Care Scholarships. The department hopes that such licenses will provide access to care to more Montana children, and steady enrollment for providers.

COMMENT 11: A commenter requested clarification on NEW RULE XVI(1)(a) on passive and active learning experiences.

RESPONSE 11: The department reviewed the current proposed text, and does not believe that a change to the regulatory text is needed. The department clarifies that NEW RULE XVI(1) outlines that a licensed or registered child care provider must have a written plan of daily activities and routines, and should include both passive and active learning experiences. The new rule designates activities by age group and indicates all age groups should have dedicated outdoor time. The department believes these minimum requirements help ensure children participate in quality activities during the day, but without imposing undue regulatory burden on providers.

COMMENT 12: A commenter suggested adding a requirement for a consistent child care staff in NEW RULE XVII.

RESPONSE 12: The department's role is to set health and safety standards for child care facilities. This does not require that the same child care staff work with children each day. The department helps ensure children receive safe and quality care without needless regulatory burden on providers. NEW RULE XVII sets forth required routines and activities if providers care for infants and toddlers. However, within the child-to-staff ratios under NEW RULE IV, the staffing decisions necessary for the delivery of the required care remain at the discretion of each individual provider.

COMMENT 13: A commenter suggested adding any conversation within the child's hearing should not involve humiliation, shaming, or insulting in NEW RULE XVIII(1)(b).

RESPONSE 13: The department believes the commenter's suggestion is encompassed in NEW RULE XVIII(1)(b).

COMMENT 14: A commenter supported the list of required documents listed in NEW RULE XXII(3).

RESPONSE 14: The department thanks the commenter for their support.

COMMENT 15: A commenter requested clarification on whether the special dietary instructions listed NEW RULE XXIV(3)(f) replaces the infant feeding schedule.

RESPONSE 15: No, the requirements for infant feeding and the infant feeding schedule are outlined in NEW RULE LXI. The special dietary instructions in NEW RULE XXIV(3)(f) would apply to any child older than an infant. The special dietary needs of infants are addressed in NEW RULE LXI.

COMMENT 16: A commenter requested clarification on what constitutes a mental health emergency in NEW RULE XXVII(3)(f).

RESPONSE 16: The department believes that the proposed list of required notifications in NEW RULE XXVIII(3), read as a whole, is instructive to the commenter: situations that require emergency services or affect the physical or mental health, welfare, or safety of children in care must be reported to the department.

COMMENT 17: A commenter suggested adding language to NEW RULE XXXI(4)(c) to list the department instead of authorized persons.

RESPONSE 17: The department thanks the commenter, but will keep current proposed text. As is clear from the text, department representatives may not be the only authorized persons who may need to access child care facilities.

COMMENT 18: A commenter suggested adding a specific number to NEW RULE XXXII(4) when referencing spacing between children.

RESPONSE 18: The department appreciates the commenter's input, but will keep current proposed text. The department recognizes that every child care facility is configured differently. The proposed rule text allows for customization depending on the layout of a particular facility, while still requiring safe sleeping spaces be maintained for each child.

COMMENT 19: A commenter requested clarification on how the department will monitor if problems occur during an emergency drill if NEW RULE XXXV does not require these problems to be documented.

RESPONSE 19: NEW RULE XXXV provides that, while a child care provider does not need to document if there is a problem during a drill, the child care provider "should identify problems that occurred during a drill and take corrective actions." The department will monitor if the required number of yearly drills are being conducted in each facility. Requiring drills will help ensure providers are practicing, assessing, and adjusting their emergency responses.

COMMENT 20: A commenter suggested removing pacifiers and other attachments to NEW RULE XXXVIII(2)(a)(iv) for a sleeping infant.

RESPONSE 20: The department will keep current proposed text. Under the proposed new rule, the only item allowed in the crib with an infant is a pacifier that does not include a string. This proposed rule recognizes that parents may choose a pacifier as their infant's comfort item during naps or sleep time.

COMMENT 21: A commenter suggested adding language in NEW RULE XLII allowing children under six months old to wear clothing designed to protect from UV rays as an alternative to sunscreen.

RESPONSE 21: NEW RULE XLII(2) requires child care staff to take appropriate precautions to minimize the risk of any child suffering sunburn or suffering heat stroke, and that children under six months old should be kept out of direct sunlight. NEW RULE XLII(2)(a) states that sunscreen must be applied to children over six months old when outdoor conditions dictate. NEW RULE XLII does not require sunscreen use for children under six months old.

COMMENT 22: A commenter supported the addition of NEW RULE X to support child care providers.

RESPONSE 22: The department thanks the commenter for their support.

COMMENT 23: Numerous commenters voiced opposition to NEW RULE LXV, which would exempt children from receiving required vaccinations, in certain circumstances, before enrolling in licensed or registered child care. Commenters gave varying reasons for opposition: personal experience, personal religious views, professional opinion, and parental choice.

RESPONSE 23: The department disagrees. After the conclusion of the 2021 Legislative Session, the department assessed the child care vaccination requirements, in light of the enactment of Senate Bill 215, the Montana Religious Freedom Restoration Act (RFRA), codified at 27-33-101 through 27-33-105, MCA, with which the department is obligated to comply. Montana RFRA prohibits state action that substantially burdens a person's exercise of religion, unless the action is essential to further a compelling state interest and is the least restrictive means of furthering that compelling governmental interest. Many religiously observant families object to certain childhood vaccines on religious grounds because such vaccines were developed using cell lines derived from aborted fetal tissue. Because the child care rules currently provide opportunity for a religious exemption to only one childhood vaccine – while providing for medical exemptions – the department concluded that the failure to provide for a religious exemption for families with a religious objection to any of the required vaccines likely violates Montana RFRA. The proposed rules address this issue, and ensure compliance with Montana RFRA.

COMMENT 24: Numerous commenters voiced support for the religious exemption from immunizations. Commenters gave varying reasons: personal experience, professional opinion, and parental choice.

RESPONSE 24: The department appreciates the support.

COMMENT 25: A commenter requested religion be defined when requesting a religious exemption.

RESPONSE 25: NEW RULE LXV states that an exemption to immunization on religious grounds must be maintained on an Affidavit of Exemption on Religious Grounds Form (HES-113) prescribed by the department for exemptions from school-based immunization requirement. In proposing this rule, the department relied on the statutory requirements for documentation of religious exemptions for school children pursuant to 20-5-405(1), MCA. To help ensure continuity as children transition from child care settings into school, and to avoid imposing any additional burdens, the department declines to impose definitions that are not statutorily required by 20-5-405, MCA.

COMMENT 26: A commenter asked if a child is attending swimming lessons with a swimming instructor, whether the child care facility staff would need to be in the water.

RESPONSE 26: The child care provider would need to comply with the supervision practices for children in and around water as proposed in NEW RULE XXXVI.

COMMENT 27: Commenters stated child care centers should not be required to accept a child with a religious exemption; instead, a child care center should be able to opt out.

RESPONSE 27: The department declines to make the suggested revision. It proposed NEW RULE LXV so a home-based child care provider has the option whether they enroll children who are not vaccinated in accordance with the recommended minimum immunization requirements. (NEW RULE LXIV.) Home-based providers would have to maintain policies and procedures to inform parents and guardians if the child care provider accepts children with exemptions from required vaccines. This proposal would give choice to families with medical or religious exemptions, allow for parental choice in any additional vaccines a parent may choose for their child, and give in-home providers the choice to set policies to align with the needs of their own households.

Under the proposal, child care centers would not have the same flexibility (1) to ensure there are child care settings supporting parents' and guardians' needs and choices regarding vaccinations; and (2) because the concerns that led to the proposal to provide flexibility for in-home providers do not apply to child care centers. Home-based business owners caring for mixed age groups are allowed autonomy in their choice to serve vaccination-exempt children; this will allow home-based providers to make choices for their own health and the health of their family

members and the children in their care, who may not be old enough to be vaccinated. In contrast, child care centers are required to separate children by age group to protect younger children who have not yet had the opportunity to be vaccinated.

The department carefully weighed the needs of children receiving child care, their parents and guardians, and those of providers. It is the position of the department that, consistent with requirements and analyses established by Montana RFRA, NEW RULE LXV balances the medical and religious autonomy of all.

COMMENT 28: Commenters stated a child care center should be required to inform all parents and/or guardians if a child is attending and has a religious exemption.

RESPONSE 28: The department does not support regulations that have the potential to release private medical information about any child receiving child care. A child care center may share a general policy with parents and guardians that the center enrolls children with religious exemptions to immunization requirements. Moreover, the department declines to create notification rules based on the reason for vaccination exemption. Under current child care regulations, a child is not required to have any vaccination which is medically contraindicated. This provision is unchanged in proposed NEW RULE LXV.

COMMENT 29: Commenters stated a child care center will have ages mixing at pick up and drop off or when children are part of a sibling group.

RESPONSE 29: The department recognizes that a sibling group may be mixed at pick up and drop off, like the sibling group mixes when they are at home. Similarly, children of different ages may have incidental contact during pick up and drop off at a child care center. Again, this reflects interactions children have during their daily lives outside of a child care center. Child care centers are required to follow health and safety regulations to minimize the spread of illness, including separating children into age groups.

COMMENT 30: Commenters stated allowing a family or group child care provider to choose to accept a religious exemption was discrimination against religious beliefs.

RESPONSE 30: The department respectfully disagrees. Montana RFRA prohibits state action that substantially burdens a person's exercise of religion, unless the action is essential to further a compelling state interest and is the least restrictive means of furthering that compelling state interest. The department proposed NEW RULE LXV so a home-based child care provider, but not a child care center, has the option whether they enroll children who are not vaccinated in accordance with the recommended minimum immunization requirements (NEW RULE LXIV). Home-based providers would have to maintain policies and procedures to inform parents and guardians if the child care provider accepts children with exemptions from required vaccines. This proposal would give choice to families with medical or religious exemptions, allow for parental choice in any additional vaccines a parent may choose for their child, and give in-home providers the choice to set policies to

align with the needs of their own households. Home-based business owners caring for mixed age groups are allowed autonomy in their choice to serve vaccination-exempt children; this will allow home-based providers to make choices for their own health and the health of their family members and the children in their care, who may not be old enough to be vaccinated. The department heard from some home-based child care providers who have immunocompromised family members that, because of their health concerns, they would be forced to stop providing child care if they had to take unvaccinated children into their homes. This would negatively impact the availability of quality child care in Montana where 60% of Montana counties already qualify as child care deserts. The need to protect the health of vulnerable Montanans and to address the lack of access to quality child care – which prevents many Montanans from working full time – are compelling justifications the department has taken into account in carefully tailoring this rule.

The department carefully weighed the needs of children receiving child care, their parents and guardians, and those of home-based providers. Consistent with the requirements and analyses established by Montana RFRA, proposed NEW RULE LXV balances the medical and religious autonomy of all, and does not unlawfully discriminate against those with religious objections to certain vaccines.

COMMENT 31: A commenter stated the religious exemption from immunizations ignores legislative intent because no religious exemption law was passed.

RESPONSE 31: The department acknowledges that, during the 2023 Legislative Session, Senate Bill 450 (SB 450) proposed a religious and a general, conscience-based exemption to required vaccinations for children attending child care and that the bill ultimately died in committee. The department, however, rejects the idea that the Legislature's consideration of, but failure to adopt, specific legislation on religious exemptions for child care vaccination requirements means that the department is somehow ignoring its statutory obligations or legislative intent. The comment ignores the fact that the Legislature adopted Montana RFRA in 2021, and that the department is obligated to comply with it. Montana RFRA compels the department to adopt a mechanism by which families with a religious objection to certain vaccines can be exempted from the child care vaccination requirement.

Moreover, by the time of the 2023 Legislative Session, the department had already indicated that it had the statutory authority – and the obligation under Montana RFRA – to establish, administratively, a religious exemption from the child care vaccination requirements. The department had twice proposed (and served on the applicable interim committee) rule packages that would have established such an exemption and, in October 2022, it issued guidance on non-enforcement of the vaccination requirements if the failure to comply was a result of a religious objection. In the department's view, no action (or inaction) by the Legislature that does not relieve the department of the obligation to comply with Montana RFRA can undercut the department's need to comply with that statute or constitute binding legislative intent that would preclude the department from establishing a religious exemption from the child care vaccination requirement based on Montana RFRA.

COMMENT 32: A commenter requested clarification of "any state's official parent-maintained immunization record" as defined in NEW RULE LXVI.

RESPONSE 32: The department believes the proposed rule is clear. If any other state in the United States has an official immunization record that can be maintained by a parent or guardian, it may be used as documentation of immunization status for purposes of enrolling a child in Montana child care.

COMMENT 33: A commenter stated a school cannot share immunization records with an after-school program due to FERPA and questioned what would occur in case of an outbreak.

RESPONSE 33: The department proposes a simplified way for immunization records to be maintained when an after-school program is located at a school. If a child care program does not have legal access to immunization records, a parent or guardian would be required to submit immunization records at the time of enrollment in the child care program (or authorize the school to release such records to the child care program).

NEW RULE XLI, Management of Illness, specifies when children must be excluded from child care facilities due to illness, regardless of vaccination status. Licensed or registered child care facilities would be required to adhere to this regulation in the event a child is ill.

COMMENT 34: Commenters stated illnesses will easily be spread to families due to unvaccinated children, causing loss of work time and productivity.

RESPONSE 34: The department notes NEW RULE XLI, Management of Illness, specifies when a child must be excluded due to illness and when a parent or guardian must be notified of symptoms. Additionally, parents and guardians must also exercise their own common sense and judgment on when to keep their children out of child care due to illness.

COMMENT 35: A commenter stated any individual diagnosed with a reportable illness, listed in NEW RULE XLI, Management of Illness, must be excluded until a local health authority clears a person to attend per ARM Title 37, chapter 114.

RESPONSE 35: Proposed NEW RULE XLI would update many exclusion and inclusion criteria (when a child must be sent home because of illness and when they can stay in, or return to, child care) to align with current standards from the American Academy of Pediatrics. It would also align exclusion requirements with House Bill 702 (HB 702) passed in the 2021 Legislative Session, which barred discrimination based on immunization status. HB 702 excludes from the bar on discrimination vaccination requirements set forth for day care facilities pursuant to Title 52, chapter 2, part 7, MCA (Montana Child Care Act). However, other child care rules that do not constitute "vaccination requirements" are subject to HB 702's bar on vaccination status discrimination. Current ARM 37.95.140(8) makes distinctions between people

based on their vaccination status, and the proposed rule would remove this distinction to align with the applicable requirements of HB 702. NEW RULE XLI does not preclude local health authorities from performing their legal duties.

COMMENT 36: A commenter stated local public health authorities must be able to exclude anyone infected with a communicable disease or not entirely immunized from a child care facility when an outbreak occurs.

RESPONSE 36: Please see Response 35.

COMMENT 37: A commenter requested ARM 37.95.140(8) be reinstated, requiring anyone including child care facility staff not immunized to be removed from the child care facility until the outbreak is over.

RESPONSE 37: Current ARM 37.95.140(8) makes distinctions between people based on their vaccination status, and the proposed rules would remove this distinction to align with the applicable requirements of HB 702. For additional analysis, please see Response 35.

COMMENT 38: A commenter stated NEW RULE XLI(3) would require a person be excluded from child care facilities if they are exhibiting any of the listed symptoms, and would also require a health care evaluation before the person could return. The commenter further stated that a person may not seek medical attention if the symptoms are caused by a minor health concern.

RESPONSE 38: The symptoms enumerated in NEW RULE XLI(3) (i.e., uncontrolled coughing, breathing difficulty or wheezing, stiff neck, irritability, persistent crying, poor food or fluid intake, progressive rash with any other symptoms, a seizure, persistent abdominal pain for two or more hours, intermittent abdominal pain associated with fever) are severe and could indicate an illness that both threatens the well-being of the ill child and the other children in care. The proposed changes align with standards from the American Academy of Pediatrics. The department believes proposed NEW RULE XLI(3) helps ensure child care facilities remain healthful without imposing an undue burden on parents and guardians.

COMMENT 39: Commenters disagreed with the removal of written immunization records for child care facility staff.

RESPONSE 39: The department proposes to streamline recordkeeping requirements to decrease the burden on child care programs, to increase the interest in child care staff positions, and to support provider recruitment and retention. Under the current regulations, staff members are required to provide documentation of at least one dose of Tdap vaccine, and for all adults born in or after 1957, one dose of MMR vaccine. The proposed rule change eliminates this minimal staff vaccination documentation requirement. The department found that many would-be child care employees

simply did not have access to this information, which delayed or prevented their hiring. This change would also align child care staff vaccination requirements with staff vaccination requirements applicable in public school settings.

COMMENT 40: A commenter stated registration and license applications should be submitted with a concurrent review by local public health, building, and fire authorities through the Environmental Health Tool Kit.

RESPONSE 40: The department thanks the commenter for the suggestion, but the department will adopt the rule as proposed. The department notes that inspection requirements vary under the proposed rules depending on the facility type. To reduce regulatory burden at the time of license or registration application and renewal, the proposed rules do not apply a one-size-fits-all approach to inspections.

COMMENT 41: A commenter suggested adding language to NEW RULE VII requiring a child care center to obtain a health inspection before licensing.

RESPONSE 41: The department proposes to issue a 90-day provisional license after the pre-inspection is passed. During the 90-day provisional license period, a child care center can get a health inspection. The department believes the issuance of a provisional license allows providers to start caring for children once the department is satisfied that the provider has met baseline safety and quality standards, while still providing time to come into total regulatory compliance. Also, the provisional licensing time gives the department the opportunity to observe the facility in operation during the provisional licensing period.

The department made this proposal recognizing that it takes time to arrange the necessary health inspections; this approach allows facilities to offer needed child care slots while working towards complete licensing compliance. Department oversight and the limited time period during which a facility may operate under the provisional license status help ensure children are safely cared for during this time.

COMMENT 42: A commenter disagreed with moving five-year olds into a category that requires a lower staff-to-child ratio, stating that the change will cause issues for child care providers serving this age group.

RESPONSE 42: The department is required to make this rule change in order to implement House Bill 422 (HB 422) from the 2023 Legislative Session. HB 422 made age-based changes to the child-to-staff ratios for children receiving care in child care centers.

COMMENT 43: A commenter stated HB 422 would lead to staff burnout with higher ratios.

RESPONSE 43: HB 422 determines what the maximum child-to-staff ratio must be. However, nothing in HB 422 or the rule changes that the department is adopting to implement HB 422 would preclude any child care provider from using a lower child-

to-staff ratio if it determines that having more staff per child better suits the needs of their business, employees, and children in care.

COMMENT 44: A commenter requested revised language in NEW RULE XXXVIII(6) to add specific steps of wash, rinse, and sanitize with effective sanitizer.

RESPONSE 44: The department believes the proposed rule is clear and concise.

COMMENT 45: A commenter requested revised language in NEW RULE XXXVIII(8), changing from plastic or canvas to non-absorbent, easily cleanable material.

RESPONSE 45: The department believes the proposed rule is concise and includes the acceptable and safe materials for cot and mat surfaces.

COMMENT 46: A commenter requested NEW RULE XLIV(1)(a) be removed because the school equipment may not be used by a school-age program operating out of the school.

RESPONSE 46: In NEW RULE XLIV(1)(a), a license applicant would indicate if the commercial or public space (which could include a school) that is being used by the facility has already had an annual public health inspection. If so, this inspection record should be provided to the department and no additional annual public health inspection is required. The department places the responsibility on the applicant to provide a copy of the public health inspection, but it also allows an opportunity for an applicant to reduce the burden of multiple public health inspections.

COMMENT 47: A commenter asked who would grant a written plan to waive any environmental health chapter in NEW RULE XLIV(2).

RESPONSE 47: The department's Child Care Licensing Bureau would ultimately approve all regulatory waivers. During the waiver request review process, the department will consult with the appropriate public health authorities on any requested waiver of environmental rules.

COMMENT 48: A commenter requested revised language in NEW RULE XLVII(3) to align with school administrative rules because many child care centers do not have an HVAC system.

RESPONSE 48: This rule is intended to address facilities that use centralized ventilation systems and air filters, and not to impose additional requirements on facilities.

COMMENT 49: A commenter requested revised language in NEW RULE XLIX(3) to specify 100°-120°F is the required temperature for hot water at a hand sink that is supplied with both hot and cold water.

RESPONSE 49: The department believes NEW RULE XLIX(3) is clear and concise because it states hand sinks in all licensed and registered facilities must maintain water at a temperature of at least 100°F and not more than 120°F. This would include all hand sinks, so it is unnecessary to specify that hand sinks must be supplied by both hot and cold water with hot water meeting the 100°-120°F temperature requirement.

COMMENT 50: A commenter requested revised language in NEW RULE XLIX to require soap and towels at sinks.

RESPONSE 50: NEW RULE XLVII(2) requires soap and towels at sinks. To keep the proposed rules as concise and nonduplicative as possible, identical requirements will not appear in multiple rules.

COMMENT 51: A commenter suggested adding language in NEW RULE XLIX to include a mandatory bathing area.

RESPONSE 51: NEW RULE LIV outlines requirements if a child care facility chooses to have a bathing area. The department notes that there are other ways of cleaning children that do not require a dedicated bathing facility. This proposed rule outlines minimum requirements for bathing facilities in child care settings that choose to have a bathing area without imposing regulatory requirements that may not be feasible or desirable for those that do not have a dedicated bathing area.

COMMENT 52: A commenter asked if there would be approval for a sanitizer other than bleach.

RESPONSE 52: Unscented household bleach is readily available and inexpensive. The instructions outlined in NEW RULE LII(1)(b) (sanitation as it relates to cleaning and sanitizing toys), NEW RULE LVII (swimming pool sanitation), and NEW RULE LIII (cleaning surfaces used for diapering) are easy to understand and utilize. The department believes these proposed rules outline easily attainable practices without having to imagine every possible variation of available sanitizers.

COMMENT 53: A commenter requested revised language in NEW RULE LI(2) to include the steps to handle laundry outlined in current ARM 37.111.121.

RESPONSE 53: The department believes the proposed rule is clear and concise. The proposed rule is focused on the desired outcome, which is clean laundry that is not contaminated by soiled laundry and which does not present a health hazard to children. This rule decreases the current regulatory burden on child care providers while still establishing minimum safety requirements regarding soiled laundry.

COMMENT 54: A commenter requested revised language in NEW RULE LII(1)(b), adding additional requirements for adequate sanitation, how often toys should be washed, to add a step to air dry, and to add a requirement to use chemical strips for any sanitizers used.

RESPONSE 54: NEW RULE LII(1)(b) contains instructions on how to clean toys in a bleach and water solution, then in the sanitizing cycle of a dish washer or rinsed with clean hot water, then air dried. The process is easy to follow. The addition of a chemical test strip is unnecessary if the process outlined in NEW RULE LII(1)(b) is followed.

COMMENT 55: A commenter stated supervision could be difficult if the diapering area is separate from play areas at registered child care facilities.

RESPONSE 55: NEW RULE LIII(1)(a) requires the diaper changing area be separate from food preparation and play areas. The department believes this is a minimally intrusive requirement that helps ensure there is not contamination between diapering and eating and playing areas.

COMMENT 56: A commenter suggested changing "wash basin" to "hand sink" in NEW RULE LIII(1)(b).

RESPONSE 56: The department will keep current proposed text. A diapering area may not contain a hand sink, so NEW RULE LIII(1)(b) would allow a child care provider to use a wash basin for diapering needs. This allows for flexibility in meeting the health and safety requirements while protecting sanitation standards.

COMMENT 57: A commenter suggested revised language in NEW RULE LIII(1)(h) to specify sanitizer concentration and use of test strips.

RESPONSE 57: The department will keep current proposed rule text. NEW RULE LIII(1)(h) contains instructions on how to sanitize the diapering area with a bleach to water solution, then rinse with clean water, and finally to air dry. The process is easy to follow. The addition of a chemical test strip is unnecessary if the process outlined in NEW RULE LIII(1)(b) is followed.

COMMENT 58: A commenter suggested revised language in NEW RULE LIII(1)(k) to include mandatory handwashing, and to specify where the diapering station and hand sink should be located.

RESPONSE 58: The department will keep the current proposed text. NEW RULE XLVIII outlines that staff, volunteers, and children at licensed and registered child care facilities must learn and follow good handwashing practices. The proposed rule further requires soap and towels or hand-drying devices at all hand washing sinks. Since the location and layout of child care facilities vary, the department has only proposed requirements on what is required at a hand washing sink, not where hand sinks must be located. NEW RULE LIII(1)(k) requires the hands of a diapered child be washed after changing, but it does not require a hand sink be located in a specific place.

COMMENT 59: A commenter suggested revised language in NEW RULE LVIII(2) to change the water sampling from January and June to once between April-June and once between September-October.

RESPONSE 59: The department retained the same water source testing requirements in ARM 37.95.225(1)(b) for NEW RULE LV(2)(a). The department has been utilizing testing in January and June since 2006 and has found no issues with the timing of required testing.

COMMENT 60: A commenter suggested adding language in NEW RULE LV(2)(c) that a corrective action plan would be sent to the local public health authority.

RESPONSE 60: The department will keep current proposed text. The department will notify the local public health authority if there is a public health concern regarding a child care facility's water supply.

COMMENT 61: A commenter suggested adding a required food safety course to NEW RULE LVIII.

RESPONSE 61: NEW RULE LVIII outlines minimum food safety requirements to meet licensing and registration standards. The department believes that the proposed rule helps reduce the risk of foodborne illness, without overburdening providers, especially home-based providers, with unduly prescriptive regulations.

COMMENT 62: A commenter suggested adding language in NEW RULE LVIII(1)(e) to dictate the steps for proper handwashing.

RESPONSE 62: The department will keep current proposed text. NEW RULE XLVIII requires child care facilities, except RCEs, to learn and follow good handwashing practices. Additionally, the same rule requires these facilities to post handwashing signs in certain areas as reminders of good hygiene practice. The department believes these regulations are sufficient.

COMMENT 63: A commenter requested clarification on language in NEW RULE LVIII(2)(a) that a registered child care provider can serve home-canned food so long as the provider is not participating in the Child and Adult Care Food Program (CACFP).

RESPONSE 63: The rule change would prohibit a registered child care facility from serving home-canned food to children, regardless of the facility's participation in CACFP. The department has no way of ensuring home-canned foods were prepared or maintained safely.

COMMENT 64: A commenter suggested adding instructions in NEW RULE LVIII(2)(c) on how to cool down and reheat food.

RESPONSE 64: The department will keep current proposed rule text. NEW RULE LVIII specifies a desired outcome—that is, reducing the risk of foodborne illnesses in child care facilities. The department is setting the desired outcome and granting facilities needed flexibility when determining how to meet these regulatory guidelines.

COMMENT 65: A commenter suggested adding a requirement in NEW RULE LVIII on where to store and how to use chemicals, a requirement to fit all dirty dishes in a dishwasher at one time, a requirement that food should be protected from cross contamination, and clarification that household refrigerators may be used in child care centers.

RESPONSE 65: NEW RULE XXIX outlines where and how cleaning products can be stored. The department is setting the desired outcome for each step, and allowing child care facilities and their staff to determine how the requirement will be met. It is the department's position that other proposed rules being adopted in this adoption notice adequately address this commenter's concerns without being duplicative, unduly prescriptive, or overly burdensome. For example, NEW RULE LVIII(4) specifies that a domestic style dishwasher must use the heat option to dry dishes, and NEW RULE LVIII(5)(a) outlines how dishes must be hand washed. The rules address good dishwashing practices.

NEW RULE LVIII(2)(b) requires food served family-style to be disposed of after a meal service, and NEW RULE LVIII(2)(c)(ii) does not allow new and old food to be mixed. The department proposes to meet health and safety standards for food stored in a refrigerator in NEW RULE LVIII(2)(c). The department's position is that these proposed rules are adequate to help ensure healthy facilities.

The proposed rules do not prohibit the use of household, or non-commercial, refrigerators in child care centers. Again, the department intends the food preparation and handling regulations to provide minimum standards necessary to reduce the risk of foodborne illnesses. Individual providers have the flexibility and autonomy to decide how these standards are met based on their individual facilities.

COMMENT 66: A commenter requested clarification on language in NEW RULE LX on who will determine compliance with Child and Adult Care Food Program (CACFP) food guidelines.

RESPONSE 66: Child care providers participating or interested in participating in CACFP should refer questions to their sponsor organization.

COMMENT 67: A commenter suggested if a child is in a choking incident the parent or guardian should be notified in NEW RULE XXIX.

RESPONSE 67: NEW RULE XXI(1)(e) requires a child care provider to have written policies on calling parents or guardians when a child is injured. The department believes this proposed new rule addresses notification requirements in the event of a choking event.

COMMENT 68: A commenter suggested adding language to NEW RULE XXIX(2) to include any material labeled keep out of reach of children.

RESPONSE 68: The department appreciates the comment. The items enumerated in NEW RULE XXIX(2) are in addition to NEW RULE XXIX(1), which states providers are responsible for keeping hazardous materials and objects inaccessible to children in care. The department believes that these safety provisions are adequate to encompass materials that need to be kept out of reach of children. Providers are also expected to use common sense when identifying potentially hazardous materials and not rely solely on labeling.

COMMENT 69: A commenter requested clarification on who would test lead paint in NEW RULE XXIX(4)(f).

RESPONSE 69: To provide appropriate flexibility, the department has chosen to identify the requirement, but declines to prescribe the person(s) or organization(s) that can conduct these tests for providers.

COMMENT 70: A commenter disagreed with NEW RULE XXIX(5) not prohibiting guns from being stored on a child care facility's premise.

RESPONSE 70: Child care facilities can be located in both commercial and residential property. The department's role is to adopt and enforce health and safety standards for children in care, so as to ensure their health, safety, and well-being, not to restrict gun ownership on the part of child care providers. NEW RULE XXIX(5) helps ensure children in child care do not have access to guns or ammunition, while not impermissibly limiting legal access to guns.

COMMENT 71: A commenter suggested adding language to NEW RULE XXIX(8)(a) to increase the diameter of toys and objects from one inch to 1.25 inches.

RESPONSE 71: The department has retained the same standards for diameter of objects in ARM 37.95.121(8) for NEW RULE XXIX(8)(a). These standards have been in place since 2018, and it is the department's position that this regulation best protects children from the hazard of choking.

COMMENT 72: Commenters supported the option to hire a 16-year-old as outlined in NEW RULE LXXII(3)(b) and NEW RULE LXXV(1)(b).

RESPONSE 72: The department thanks commenters for their support.

COMMENT 73: A commenter stated home-based family and group child care providers should be licensed, not registered.

RESPONSE 73: Section 52-2-703(12), MCA, provides that family day-care homes and group day-care homes shall be registered. The department's rules must be in compliance with this statutory provision.

COMMENT 74: A commenter supported child care staff being called Early Childhood Teachers.

RESPONSE 74: The department thanks the commenter for their support.

5. In the event that the Children, Families, Health, and Human Services Interim Committee withdraws its written objection pursuant to 2-4-406(2), MCA, the effective date is April 13, 2024. In the event that the Children, Families, Health, and Human Services Interim Committee does not withdraw its written objection pursuant to 2-4-406(2), MCA, the effective date is the day after final adjournment of the regular session of the 69th Legislature. The department will publish a notice confirming the effective date.

/s/ Heidi Sanders

Heidi Sanders
Rule Reviewer

/s/ Charles T. Brereton

Charles T. Brereton, Director
Department of Public Health and Human
Services

Certified to the Secretary of State April 2, 2024

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