

MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 18

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 The Proposal Notice Section contains state agencies' proposed new, amended, or repealed rules; the rationale for the change; date and address of public hearing; and where written comments may be submitted.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 print 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) 444-2055.

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BEFORE THE DEPARTMENT OF AGRICULTURE  
OF THE STATE OF MONTANA

In the matter of the adoption of New )  
Rules I and II, and amendment of ARM )  
4.12.102, 4.12.106, 4.12.108, 4.12.110, )  
and 4.12.111, relating to Apiculture )

NOTICE OF PUBLIC HEARING ON  
PROPOSED ADOPTION AND  
AMENDMENT

TO: All Concerned Persons

1. On October 19, 2010, at 10:00 a.m. the Montana Department of Agriculture will hold a public hearing in Room 225 of the Scott Hart Building, 303 N. Roberts at Helena, Montana, to consider the proposed adoption and amendment of the above-stated rules.

2. The Department of Agriculture will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process and need an alternative accessible format of this notice. If you require an accommodation, contact the Department of Agriculture no later than 5:00 p.m. on October 7, 2010, to advise us of the nature of the accommodation that you need. Please contact Cort Jensen at the Montana Department of Agriculture, 303 North Roberts, P.O. Box 200201, Helena, MT 59620-0201; phone: (406) 444-3144; fax: (406) 444-5409; or e-mail: agr@mt.gov.

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

NEW RULE I DEFINITIONS (1) "Beekeeper without a valid Montana Certificate of Health" means any beekeeper that has not been inspected within the last four years by either a Montana Department of Agriculture inspector or by appropriate authorities in another state that is recognized as able to issue a certificate of health by the Montana Department of Agriculture.

(2) "Interstate Inspection" means the inspection of an operation that does not have a valid Montana certificate of health or proof of inspection from an originating state.

(3) "Landowner Notice to Change Apiarist" means the cancellation of a registered site upon notice to the department by a landowner that an apiarist is no longer allowed access to their property or to have bees on their property.

(4) "Montana Department of Agriculture Inspection" means a health inspection of a business that includes counting hives, checking for proof of ownership, and opening hives. Minimally, an inspection will include examination of at least one frame of brood for regulated diseases and pests as specified in ARM 4.12.111.

(5) "Registered Beekeeper" means a beekeeper who has paid and maintained registration of at least one apiary site with the Montana Department of Agriculture.

(6) "Registered Site" means a site that has been registered with the Montana Department of Agriculture. A registered site is not a property interest in the land and

does not in and of itself allow an apiarist to have bees at a location. A separate agreement from the landowner or an easement is still required to use and access the location.

(7) "Site Registration" means the legal ability, as defined by the department, to have and maintain bees on a site.

(8) "Unregistered Beekeeper" means any beekeeper not registered with the Montana Department of Agriculture, including hobbyist beekeepers, landowners, or general beekeepers.

(9) "Valid Certificate of Health" means proof of an inspection by either the Montana Department of Agriculture or an apiary inspection or proof of an inspection by an official inspector in another state with an inspection program recognized by the Montana Department of Agriculture.

AUTH: 80-6-101, MCA

IMP: 80-6-101, MCA

REASON: To provide clarification for terms used within the program for beekeepers, landowners, and inspectors.

FINANCIAL IMPACT: There will be no fiscal impact for this rule.

#### NEW RULE II REGISTRATION AND CERTIFICATION FEES-APIARY FEES

(1) The application fee for owners or applicants not currently registered in the department's apiary database is \$10. The new application fee is due at the time the owner or applicant submits a registration for an apiary site. The application fee is in addition to all apiary site registration fees due annually. Site registration will not be issued until the new application and site registration fees are paid.

(2) The registration or reregistration fee for an apiary site is \$15 per site.

(3) The fee for issuance of a certificate of health (certificate of inspection) is \$125. The fee for a certificate of health must be paid at the time of the request for a certificate of health.

AUTH: 80-6-102, 80-6-106, 80-6-202, MCA

IMP: 80-6-102, 80-6-106, 80-6-202, MCA

REASON: Registration and certification fee ranges are set by statute and the department sets fees within those ranges by administrative rule. Fees identified here are based on the recommendation of the Montana State Beekeepers Association, as discussed during the October 2009 association meeting as being reasonable fees to support the work of the program.

ECONOMIC IMPACT: The department estimates that there will be 42 new applications that are not already registered in the department's database. Impact to the individual beekeeper is \$10, while the impact of all new applicants is expected to be \$420 (42 applications x \$10 per application). The registration/reregistration fee would change from \$11 per site to \$15 per site. The department registers 5,192 sites each year. Impact to individual beekeepers will be \$4 per registered site. The

total, however, will vary depending on the number of sites that are registered. Change in revenue is expected to be \$20,768 (5,192 sites x \$4/site (difference between \$11 and \$15) per site registration cost). The cost of issuing a certificate of health currently is \$75 (within the range of \$50 to \$100). Legislative changes during the 2009 session changed the range's upper limit to \$150. This administrative rule will set the fee at \$125. There are approximately 40 certificates of health issued each year. The changes will generate an additional \$50 in revenue for each certificate issued or \$2,000. Total impact of these fee changes is estimated to be \$23,188.

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

4.12.102 APIARY, LOCATED BY PERMISSION (1) Persons registering a new location for the first time must have the approval signature of the landowner or manager ~~thereof~~ indicating that the beekeeper has obtained the permission to place an apiary on the landowner's property. When a registered site is transferred to another beekeeper, landowner or manager signature must be obtained and filed with the department.

(2) Upon notice from a landowner or land manager that a beekeeper is no longer allowed access to their property or allowed to maintain bees on the property, the department will cancel the registration and notify the beekeeper.

(3) Once a site registration has been cancelled, any placement of new bees on the site must first be registered with the department. A new site registration will only be granted if the site registration does not conflict with an existing registered site within a three mile radius.

AUTH: 80-6-102, ~~80-6-301~~, MCA

IMP: 80-6-102, 80-6-103, MCA

REASON: The department finds that landowners have not always been notified of change of apiary ownership and do not, therefore, know whose bees are on their property. The correct Authorization law is 80-6-102, MCA and needs to be added to fully follow the rule's purpose. Section 80-6-301, MCA was cited incorrectly in original rule.

ECONOMIC IMPACT: The department estimates there will be 50 transfers of sites per year. There is no fee associated with obtaining landowner signature approval of apiary sites. Costs that may be associated with any site registration may include postage costs or travel costs to obtain the signature on the form and mail to the department. Travel costs cannot be estimated since distance between the beekeeper and landowner will vary and gas mileage is dependent upon the vehicle used. It is estimated that if the beekeeper uses mail to obtain approval signatures, two stamps and two envelopes will be needed at an approximate cost of \$0.98 (\$0.44 stamp and \$0.05 envelope x 2). Estimated total cost would be \$49 (50 sale/transfers x \$0.98/sale or transfer).

4.12.106 INSPECTION OF APIARY EQUIPMENT (1) through (5) remain the same.

(6) Intention to bring into Montana used beekeeping equipment, including nucs, and feed honey, ~~also and~~ refuse for rendering; must be registered with the ~~plant industry~~ Agricultural Sciences Division, Department of Agriculture at least ten ~~(10)~~ days prior to the time of movement. A permit to enter will then be issued by the Department of Agriculture. This permit, along with a copy of the clean bill of health from the state of origin, must accompany the load of bees or equipment entering Montana. Each load of used equipment, honey, or nucs; is automatically quarantined until said quarantine is lifted by the Montana state inspector.

AUTH: ~~80-6-102~~, 80-6-202, MCA

IMP: ~~80-6-102~~, 80-6-202, MCA

REASON: During a department reorganization in 1994, the Plant Industry Division and Agricultural Biological Sciences Division were combined into one division and named the Agricultural Sciences Division. This change represents a housekeeping change. Section 80-6-102, MCA should be added to follow the full extent of the rule.

ECONOMIC IMPACT: This is a housekeeping change and does not affect beekeepers. There is not an economic impact associated with this change.

4.12.108 HOURLY INSPECTION FEE (1) The hourly inspection fee authorized in 80-6-202, MCA shall be \$~~20~~ 42 per hour for actual inspection time. The fee shall be charged from the time the inspection begins on site until the inspection is completed at the final site. Travel time shall not be included except for that between apiary sites.

(2) The hourly inspection fee for interstate inspections authorized in 80-6-202 (4)(b)(iii), MCA shall be \$50 per hour for actual inspection time. Actual inspection time includes travel to, between, and return from the inspection site.

AUTH: ~~80-6-101, 80-6-201, 80-6-202~~, MCA

IMP: ~~80-6-101, 80-6-201, 80-6-202~~, MCA

REASON: The hourly inspection fee, as listed in the current administrative rules, were adopted in 1991 and has not been changed since that time (19 years). The current hourly fee does not cover the actual hourly cost of inspectors conducting inspections. During the 2009 legislative session, the Apiary Act was revised. In 80-6-202(4)(b)(iii), MCA, the range for the hourly rate for interstate inspections was established at \$50 to \$150, with adjustments within the range set by department administrative rule. The new rule establishes the rate at \$50/hr.

In changing the interstate inspection fee, the 2009 Legislature changes to the Apiary Act are implemented. Interstate inspections carry more risk, therefore the cost of hourly fees for inspection are higher.

Sections 80-6-101 and 80-6-201, MCA were removed as they are incorrectly included.

ECONOMIC IMPACT: For (1), hourly fee, it should be noted in the current ARM 4.12.108, that the department does not charge for all time associated with an inspection. The administrative rules state "The fee shall be charged from the time inspection begins on site until inspection is completed at the final site. Travel time shall not be included except for that between apiary sites." For the economic impact, only those hours that conform to the administrative rule were used. In FY09, 87.25 hours were spent conducting apiary inspections. Average estimated cost to all beekeepers would be \$1,919.50 (87.25 hours x \$22/hour (difference between \$20/hour and \$42/hour)).

For (2), the department anticipates conducting three interstate inspections (those beekeepers without an acceptable inspection from the originating state). It is estimated that each inspection will take, on average, three hours. Past charges were at regular inspection hourly fee of \$20/hour. The average estimated cost to each beekeeper would be \$90 (3 hours x \$30/hour (difference between \$20/hour and \$50/hour)) or \$270 in total.

4.12.110 CIVIL PENALTIES – MATRIX

<u>Type of Violation</u>	<u>1st Offense</u>	<u>2nd Offense</u>	<u>Subsequent Offense</u>
Failure to register an apiary after notification of requirement. Each unregistered apiary may be considered a separate offense.	<del>\$300</del> <u>500</u>	<del>\$600</del> <u>800</u>	\$1,000
Falsifying or misrepresenting information submitted with apiary registration application.	<del>\$300</del> <u>500</u>	<del>\$600</del> <u>800</u>	\$1,000
Failure to move an illegally placed apiary to a registered or registrable site after <del>due process notification</del> <u>notice</u> . Each apiary may be considered a separate offense.	<del>\$500</del> <u>800</u>	<del>\$750</del> <u>1,000</u>	\$1,000
Failure to abate bee diseases or pests pursuant to 80-6-201, MCA after <del>legal notification</del> <u>notice</u> .	<del>\$500</del> <u>800</u>	<del>\$750</del> <u>1,000</u>	\$1,000
Failure to meet bee hive importation requirements specified in 80-6-202, MCA.	<del>\$500</del> <u>5,000</u>	<del>\$750</del> <u>7,500</u>	<del>\$1,000</del> <u>10,000</u>

AUTH: 80-6-201, 80-6-303, MCA  
 IMP: 80-6-303, MCA

REASON: The apiary industry has asked for stronger penalties to deter violations. During the 2009 legislative session, 80-6-303, MCA was revised, increasing the civil penalty amount from "not more than \$1,000" to "not more than \$10,000" for violations of 80-6-202, MCA. Added 80-6-303, MCA because it is the correct authorization and was left out in original rule.

ECONOMIC IMPACT: It is estimated that there might be two violations for failing to register an apiary site, zero violations for falsifying apiary registration applications, two violations for failure to move an illegally placed yard to a registered/registrable site, zero violations for failure to abate bee diseases or pests, and two violations for failure to meet bee hive importation requirements. The expected impact to an apiarist for a first offense could be \$400 for failure to register a site or falsifying/misrepresenting registration application information (2 x \$200), \$600 for failure to move an illegally placed yard to a registered or registrable site or failure to abate bee diseases or pests (2 x \$300), and \$9,000 for failure to meet bee hive importation requirements (2 x \$4,500). Actual civil penalty amounts depend on the number of sites involved, length of time in violation, mitigating factors such as history and cooperation, and gravity of the violation.

4.12.111 REGULATED BEE DISEASES (1) Bee diseases and pests regulated under Title 80, chapter 6, parts 1 through 3, MCA, are as follows:

(a) American Foulbrood (*Bacillus larvae*);

(b) Africanized bees (*Apis mellifera scutellata*);

(c) Cape bees (*Apis mellifera capensis*);

(d) Tropilaelaps mites (*Tropilaelaps clareae*, *T. koenigerum*, *T. thaii*, and *T. mercedesae*); and

(e) Small-hive beetle (*Aethina tumida*).

(2) remains the same.

AUTH: 80-6-101, 80-6-201, MCA

IMP: 80-6-101, 80-6-201, MCA

REASON: Changes the language to add pests in addition to diseases so it accurately reflects the threats to the apiary industry. The proposed rule adds new, regulated bee pests of significance that are important to the health and safety of the apiary industry. Section 80-6-201, MCA needs to be added to reflect the true extent of the rule.

ECONOMIC IMPACT: Africanized bees, Cape bees, small-hive beetle, and Tropilaelaps mites represent invasive species that are a significant threat to Montana's beekeeping industry. We do not yet have these pests. There is no cost associated with the pests of regulatory significance that the department inspects for. If detected however, it would require destruction of the hive as there is not a successful treatment option. Destruction of hives for other diseases and pests costs on average \$200 per hive and would be expected to be the same for the proposed new pests. Actual producer economic impact can't be estimated because the expense would be based on the number of hives that might be affected by the pest.

5. Concerned persons may submit their data, views, or arguments concerning the proposed action either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to: Cort Jensen at the Montana Department of Agriculture, 303 North Roberts, P.O. Box 200201, Helena, MT 59620-

0201; telephone (406) 444-3144; fax: (406) 444-5409; or e-mail: agr@mt.gov and must be received no later than October 21, 2010.

6. The Department of Agriculture 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, e-mail, and mailing address of the person 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 Montana Department of Agriculture, 303 North Roberts, P.O. Box 200201, Helena, MT 59620-0201; fax: (406) 444-5409; or e-mail: agr@mt.gov or may be made by completing a request form at any rules hearing held by the Department of Agriculture.

7. An electronic copy of this Notice of Proposed Amendment is available through the department's web site at [www.agr.mt.gov](http://www.agr.mt.gov), under the Administrative Rules section. The department strives to make the electronic copy of the notice conform to the official version of the notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the notice and the electronic version of the notice, only the official printed text will be considered. In addition, although the department strives to keep its web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems.

8. The bill sponsor contact requirements of 2-4-302, MCA, apply and have been fulfilled. The primary bill sponsor was contacted by regular mail, e-mail, and phone on September 13, 2010. For previous rule projects involving the same bill, the primary sponsor was given appropriate notice.

DEPARTMENT OF AGRICULTURE

/s/ Ron de Yong  
Ron de Yong, Director

/s/ Cort Jensen  
Cort Jensen, Rule Reviewer

Certified to the Secretary of State, September 13, 2010.

BEFORE THE DEPARTMENT OF LABOR AND INDUSTRY  
STATE OF MONTANA

In the matter of the adoption of NEW	)	NOTICE OF PUBLIC HEARING ON
RULES I through IV, and the	)	PROPOSED ADOPTION AND
amendment of ARM 24.29.1401,	)	AMENDMENT
24.29.1401A, 24.29.1402,	)	
24.29.1406, 24.29.1407, 24.29.1416,	)	
24.29.1501, 24.29.1513, 24.29.1515,	)	
24.29.1517, 24.29.1519, 24.29.1526,	)	
24.29.1575, 24.29.1586, 24.29.2002,	)	
and 24.29.2003, pertaining to	)	
implementing utilization and	)	
treatment guidelines and medical	)	
services rules for workers'	)	
compensation matters	)	

TO: All Concerned Persons

1. On October 15, 2010, at 10:00 a.m., the Department of Labor and Industry (department) will hold a public hearing to be held in the the auditorium of the DPHHS Building, 111 North Sanders, Helena, Montana, to consider the proposed adoption and amendment of the above-stated rules.

2. The department 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, contact the department no later than 5:00 p.m., on October 12, 2010, to advise us of the nature of the accommodation that you need. Please contact the Employment Relations Division, Department of Labor and Industry, Attn: Keith Messmer, P.O. Box 8011, Helena, MT 59604-8011; telephone (406) 444-6541; fax (406) 444-7710; TDD (406) 444-5549; or e-mail [kmessmer@mt.gov](mailto:kmessmer@mt.gov).

3. GENERAL STATEMENT OF REASONABLE NECESSITY: There is reasonable necessity to adopt rules to implement Chapter 330, Section 1, Laws of 2007 (House Bill 738) and Chapter 117, Section 6, Laws of 2007 (Senate Bill 108), put into place by the 2007 Legislature, which provides that the Montana Department of Labor and Industry may adopt by rule evidence-based utilization and treatment guidelines for primary and secondary medical services. The 2009 Legislature, in Senate Joint Resolution 30, directed the Legislative Council and the Labor-Management Advisory Council (LMAC) to study the use of utilization and treatment guidelines and their effectiveness in other jurisdictions. Consequently, in an effort to meet the legislative directive given to the LMAC, a group was formed through the Employment Relations Division, Department of Labor and Industry, under the project name "Utilization and Treatment Guidelines". The utilization and treatment (U&T) project team implemented a project charter in May of 2009, with the purpose to engage the various stakeholders in the process in order to identify and evaluate

different U&T guidelines and choose and implement the most appropriate U&T guideline.

Under the U&T project charter, the department established a stakeholder committee of treatment providers from around Montana called the "Medical Provider Group" that was assigned to evaluate and make a recommendation to the department on what U&T guidelines would be appropriate for injured workers in Montana. The following proposed administrative rules identify the recommended and selected U&T guidelines and set forth an implementation process for the selected U&T guidelines.

The Medical Provider Group met seven times in open meetings from August 2009 through February 2010 and reviewed four U&T guidelines: Washington State Treatment Guidelines, Colorado State Treatment Guidelines, Work-loss Data Institute Occupational Disability Guidelines (ODG) and American College of Occupational and Environmental Medicine (ACOEM) guidelines. The Medical Provider Group was to make a recommendation concerning the U&T guidelines that would meet the following objectives: most improve outcomes of medical benefits to injured workers; improve speed of access to medical benefits; have a positive or neutral effect on the cost of work compensation medical benefits for injured workers; be evidenced-based, peer-reviewed, and recognized standards of care; and promote standardization of utilization management.

In its review of the four U&T guidelines, the Medical Provider Group rated each guideline on both ease of use and content. After extensive review, discussion, and presentations concerning the four U&T guidelines, the Medical Provider Group voted and recommended that the State of Montana have guidelines which combine the State of Colorado's Medical Treatment Guidelines (Colorado Guidelines) as the primary source of guidelines for treating injured workers in Montana. The Medical Provider Group then voted and recommended that the department look to adopt either ODG or ACOEM for those areas not covered by the Colorado Guideline.

Based on the recommendation the Medical Provider Group made to the department, the U&T project team prepared and conducted a Request for Proposal (RFP) process through the Department of Administration's Procurement Office. The purpose of the RFP was to find vendors that would develop an online system for implementing U&T guidelines in Montana, with Colorado Treatment Guidelines as the primary source and either ODG or ACOEM as the secondary source. Through the RFP process, the successful vendor was ACOEM. The department is contracting with ACOEM for the license to use portions of ACOEM for those areas not covered in the Colorado Guidelines and to host the online product that ACOEM is developing for implementation of the U&T guidelines. The department intends for the online product to be the "Montana Guidelines" and be an online system of seamless integration between Colorado Treatment Guidelines and ACOEM guidelines. The department will make the online Montana Guidelines available to all users and will make a hardcopy of the online data available as well.

The department intends that the online Montana Guidelines will be user friendly and a tool to implement use of the U&T guidelines that are proposed to be adopted by the department. The online Montana Guidelines may include recommended payment codes and a list of codes that are intended to assist the parties by providing routine procedure codes that are usually recommended in either Colorado Treatment Guidelines or ACOEM guidelines, which may be automatically approved, subject to the exceptions and contingencies provided in the U&T guidelines.

The department is proposing to adopt four new rules for the implementation of U&T guidelines for treating injured workers in Montana for primary and secondary medical services. Under the proposed New Rule I "Utilization and Treatment Guidelines", the rule outlines the specific U&T guidelines the department has chosen to adopt, Colorado Guidelines and ACOEM, and the online tool the department is proposing to implement for a seamless integration of the U&T guidelines which will be the Montana Guidelines for users. As provided by 39-71-704, MCA, there is a rebuttable presumption that the U&T guidelines adopted by the department are correct medical treatment for primary and secondary medical services for the injured worker. Since the U&T guidelines are presumed correct, the proposed New Rule II for "Prior Authorization" outlines a process for those treatment(s) or procedure(s) not addressed or recommended by the Montana Guidelines. Section 39-71-704, MCA, also allows the department to adopt an independent medical review process for when treatment is denied. The proposed New Rule III for "Independent Medical Review Process" specifies and defines a review process by a designated Medical Director for when treatment(s) or procedure(s) are denied and a process that treatment providers, insurers, and injured workers may utilize for dispute resolution in an effort to provide prompt and appropriate care. Proposed New Rule IV explains that the U&T guidelines are applicable to managed care organizations and preferred provider organizations that contract with workers' compensation insurers and self-insured employers to provide medical care to injured workers.

There is reasonable necessity to amend 15 existing administrative rules under ARM Title 24, chapter 29, subchapter 14, "General Medical Rules and Facility Service Rules", and ARM Title 24, chapter 29, subchapter 15, "Nonfacility Service Rules and Utilization Rules" to coordinate with the proposed new rules and ensure that otherwise inconsistent provisions are removed. The U&T guidelines proposed for adoption by the department are applicable for all treatment services, both primary and secondary, including chiropractic services and occupational and physical therapy services, provided to the injured worker under the Montana Workers' Compensation Act, regardless of the date of injury.

The department proposes to make the proposed adoptions and amendments effective as of December 1, 2010, but the U&T guidelines and the related amendments will not be applied to any medical services rendered before April 1, 2011. The department believes that it is reasonably necessary to provide a four-month period for the affected parties (injured workers, medical providers, and insurers) during which medical providers and insurers can be trained in the

application of the U&T guidelines and the use of the new rules, and can work out any kinks in their systems prior to implementation.

This general statement of reasonable necessity applies to all of the rules proposed for adoption and amendment and will be supplemented as necessary for any given rule.

4. The proposed new rules provide as follows:

NEW RULE I UTILIZATION AND TREATMENT GUIDELINES (1) As authorized by 39-71-704, MCA, the department adopts and incorporates by reference the 2010 edition of the "Montana Utilization and Treatment Guidelines" (the Montana Guidelines).

(a) The Montana Guidelines consist of:

(i) the State of Colorado's Medical Treatment Guidelines (the Colorado Guidelines), found at 7 Code of Colorado Regulations 1101-3, Rule 17, as they exist on September 23, 2010; and

(ii) for those areas of the body not covered by the Colorado Guidelines, the American College of Occupational and Environmental Medicine (ACOEM) publication, "Occupational Medicine Practice Guidelines, Second Edition", as supplemented and updated as of September 23, 2010.

(b) The Montana Guidelines incorporated by reference in (1) set forth the level and type of care for primary and secondary medical services that are considered reasonable and appropriate for most injured workers. The department recognizes that medical practices may include deviations from the Montana Guidelines as individual cases dictate. For cases in which the provider requests care that is not specifically addressed or recommended by the Montana Guidelines, the provider or interested party shall follow the procedure for prior authorization under [New Rule II].

(c) The Montana Guidelines adopted by reference in (1) may be obtained from the Montana Department of Labor and Industry as follows:

(i) an electronic copy is available at the web site: <http://erd.dli.mt.gov>; or

(ii) a printed copy may be obtained for the cost of reproduction from the Employment Relations Division, Department of Labor and Industry, P.O. Box 8011, Helena, MT 59604-8011; telephone (406) 444-6541; fax (406) 444-7710; TDD (406) 444-5549.

(2) When providing treatment for primary and secondary medical services to an injured worker, all health care providers shall use the Montana Guidelines adopted by reference in (1).

(a) In cases where treatment(s) or procedure(s) are recommended by the Montana Guidelines, prior authorization is unnecessary unless the Montana Guidelines specify otherwise, or [New Rule II] applies.

(b) If prior authorization is required by the Montana Guidelines or an interested party requests prior authorization, then the procedure for requesting prior authorization is under [New Rule II].

(3) As provided by 39-71-704, MCA, there is a rebuttable presumption that the Montana Guidelines are correct medical treatment for primary and secondary medical services for the injured worker.

(4) All insurers and payers shall routinely and regularly review claims to ensure that care is consistent with the Montana Guidelines adopted by reference in (1).

(5) An insurer or payer is not responsible or liable for treatment(s) or procedure(s) that are not specifically addressed or recommended by the Montana Guidelines unless:

(a) prior authorization is obtained from the insurer pursuant to 39-71-704, MCA, and in accordance with [New Rule II]; or

(b) the treatment(s) or procedure(s) were provided in a medical emergency.

(6) The provisions of this rule and the Montana Guidelines incorporated by reference in (1) apply to medical services provided on or after April 1, 2011.

AUTH: 39-71-203, 39-71-704, MCA

IMP: 39-71-704, MCA

NEW RULE II PRIOR AUTHORIZATION (1) In cases where treatment(s) or procedure(s) are not specifically addressed or recommended by the Montana Guidelines, prior authorization must be obtained unless the treatment(s) or procedure(s) were provided in a medical emergency.

(2) When prior authorization is required, the interested party must submit to the insurer or payer documentation to support the request and justification for medical treatment(s) or procedure(s) not specifically addressed or recommended by the Montana Guidelines. Documentation must consist of a preponderance of credible medical evidence to rebut the Montana Guidelines, and must include an explanation of medical reasons or documentation of medical evidence literature. Supplemental information may include any of the following; however, the supplemental information might not be sufficient standing alone to rebut the guidelines:

(a) an explanation or documentation of how the patient is different from the examples used in the studies cited by the Montana Guidelines that may have resulted in a negative recommendation or exclusion;

(b) an explanation or documentation of objective findings and functional improvements that would be the expected result of the treatment(s) or procedure(s), either from past experience or from an explanation about the mechanism of injury and the effect of the treatment(s) or procedure(s), and where improvement can be measured;

(c) an explanation or documentation of objective signs of functional restoration for treatment conducted thus far;

(d) an explanation or documentation of measurable goals and progress points expected from additional treatment;

(e) a statement of how the request will benefit both a short-term and long-term treatment plan; or

(f) any additional evidence-based utilization and treatment guidelines considered to support the provider's case.

(3) All prior authorization requests, whether in written, telephone, email, or facsimile (fax) form, must be made at least 14 days prior to the date the service is scheduled to be performed. The request must include justification for medical treatment(s) or procedure(s) that are not specifically addressed or recommended by the Montana Guidelines as noted in (2). If the prior authorization request was made by telephone, the burden of proof for showing that the request was made rests with the interested party who made the request.

(a) Authorization is presumed to be given by the insurer or payer if there is no written denial sent by the insurer or payer to the interested party within 14 days of either the date the verbal prior authorization request was made or the date the written prior authorization request was mailed.

(b) An insurer or payer may notify the interested party of authorization by written confirmation, telephone, email, or facsimile (fax). If an insurer or payer provides authorization by telephone, the burden of proof for showing that authorization was granted rests with the interested party. The interested party shall promptly send the insurer or payer written confirmation of any verbal authorization made by the insurer or payer. Such written confirmation shall refer to the name of the claimant, the claim number, the treatment(s) or procedure(s) authorized, and the name of the person giving the authorization and the date the authorization was given.

(4) If the insurer or payer denies the prior authorization request, the denial must be in writing and must contain an explanation of the reason(s) for the denial.

(a) The reason(s) for the denial shall not be based solely on the fact that the medical treatment(s) or procedure(s) are not specifically addressed or recommended by the Montana Guidelines.

(b) If the written denial is five or fewer days before the expiration of the 14-day response period, the insurer or payer must also notify the interested party of the denial by e-mail or facsimile (fax).

(5) When an insurer or payer denies liability for an injury or occupational disease, and the insurer or payer then later assumes liability for a particular condition, the insurer or payer may not deny payment for the medical services provided for that condition during the period of denial based solely on failure to obtain prior authorization.

(6) The provisions of this rule apply to medical services provided, or proposed to be provided, on or after April 1, 2011.

AUTH: 39-71-203, 39-71-704, MCA

IMP: 39-71-704, MCA

REASON: Since 39-71-704, MCA, provides that the Montana Guidelines establish a rebuttable presumption, there is reasonable necessity to define the level and type of evidence the guidelines may be rebutted by. The proposed rule establishes that in order to rebut the guidelines, documentation amount to a preponderance of credible medical evidence. The rule also provides that the evidence must include, at a minimum, a written explanation of the medical basis for varying from the guidelines. The rule also proposes additional types of evidence that may be provided.

NEW RULE III INDEPENDENT MEDICAL REVIEW PROCESS (1) Prior to mediation under 39-71-2401, MCA, an interested party, who has requested and has been denied authorization by the insurer for treatment(s) or procedure(s) that are not specifically addressed or recommended by the Montana Guidelines, may request an independent medical review by a medical director designated by the department to review the medical records of the injured worker and issue a recommendation.

(2) The interested party must submit to the department with its request for review a copy of the documentation previously provided to the insurer and must also notify the insurer of the request for review. The interested party and the insurer may also submit additional information to the department, if the information falls within the categories outlined in [New Rule II].

(3) The medical director shall, within five days of receipt of the request for review, issue a written recommendation to the interested party by mail, facsimile, or e-mail, or issue a notice that additional information or time is required to tender a recommendation along with an approximate date the recommendation will be issued, not to exceed 14 days from the date the request for review was made.

(4) The medical director's files and records are closed to all persons but the parties.

(5) The medical director's review and recommendation is an informal alternative dispute resolution process without administrative or judicial authority and is not binding on the parties.

(a) The medical director may not be called to testify in any proceeding concerning the issues discussed in the independent medical review process.

(b) The medical director's recommendation and any of the information contained in the recommendation is not admissible as evidence in any action subsequently brought in any court of law.

(6) The insurer shall, within five days of receipt of the recommendation, notify the interested party if the previously denied treatment(s) or procedure(s) is authorized based on the medical director's recommendation.

(7) If the insurer or payer denies authorization, the interested party may file for mediation with the department pursuant to 39-71-2401, MCA.

(8) For the purposes of this rule, the medical director is the specific individual designated by the department to serve as a medical director with respect to a given set of disputed treatments or procedures.

(9) The provisions of this rule apply to medical services provided, or proposed to be provided, on or after April 1, 2011.

AUTH: 39-71-203, 39-71-704, MCA

IMP: 39-71-224, 39-71-704, 39-71-2401, MCA

NEW RULE IV APPLICABILITY OF UTILIZATION AND TREATMENT GUIDELINES FOR MANAGED CARE ORGANIZATIONS OR PREFERRED PROVIDER ORGANIZATIONS (1) Managed care organizations or preferred

provider organizations providing any treatment for primary and secondary medical services to an injured worker shall use the Montana Guidelines. This rule does not alter or change how managed care organizations or preferred provider organizations are paid pursuant to 39-71-704, MCA.

(2) The provisions of this rule apply to medical services provided, or proposed to be provided, on or after April 1, 2011.

AUTH: 39-71-203, 39-71-704, MCA

IMP: 39-71-704, MCA

REASON: There is reasonable necessity to propose New Rule IV to specify that utilization and treatment guidelines adopted by the department do not affect payment and reimbursement agreements made between Managed Care Organizations and Preferred Provider Organizations and insurers.

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

24.29.1401 INITIAL LIABILITY (1) through (4) remain the same.

(5) With respect to medical services provided on or after April 1, 2011, an insurer or payer is not responsible or liable for treatment(s) or procedure(s) that are not specifically addressed or recommended by the Montana Guidelines unless:

(a) the interested party obtains prior authorization from the insurer pursuant to 39-71-704, MCA, and in accordance with [New Rule II]; or

(b) the treatment(s) or procedure(s) were provided in a medical emergency.

AUTH: 39-71-203, 39-71-704, MCA

IMP: 39-71-510, 39-71-704, 39-71-743, MCA

REASON: There is reasonable necessity to amend ARM 24.29.1401 to clarify that as of April 1, 2011, the insurer or payer is not liable to cover payment for certain treatment(s) or procedure(s) that are not addressed by or recommended by the utilization and treatment guidelines adopted by the department, unless prior authorization is obtained or the treatment(s) or procedure(s) were provided in a medical emergency.

24.29.1401A DEFINITIONS As used in subchapters 14 and 15, the following definitions apply:

(1) through (8) remain the same.

(9) "Department" means the Montana Department of Labor and Industry.

(9) and (10) remain the same but are renumbered (10) and (11).

(12) "Evidence-based" means use of the best evidence available in making decisions about the care of the individual patient, gained from the scientific method of medical decision making and includes evidence of the risks and benefits of treatments (including lack of treatment) and use of techniques from science, engineering, and statistics, such as meta-analysis of medical literature, risk-benefit analysis, randomized controlled trials (RCTs), or integration of individual clinical expertise with the best available external clinical evidence from systematic research.

(11) through (16) remain the same but are renumbered (13) through (18).

(19) "Insurer" has the same meaning as provided by 39-71-116, MCA.

(20) "Interested party" means the "physician" or "provider" as defined by this rule and the "claimant" or "injured worker" and their representative.

(21) "Maintenance care" has the same meaning as provided by 39 -71-116, MCA.

(22) "Medical director" means a person who is an employee of, or contractor to, the department, and who is responsible for the independent medical review of requests for treatment(s) or procedure(s) that are not specifically addressed or recommended by the Montana Guidelines when those requests are denied and whose responsibility will also include other areas to be determined by the department. A person serving as a medical director must be a physician licensed by the state of Montana under Title 37, chapter 3, MCA.

(23) "Medical stability", "maximum healing", or "maximum medical healing" has the same meaning as provided by 39 -71-116, MCA.

(17) through (20) remain the same but are renumbered (24) through (27).

(28) "Palliative care" has the same meaning as provided by 39 -71-116, MCA.

(21) remains the same but is renumbered (29).

(30) "Primary medical services" has the same meaning as provided by 39 -71-116, MCA.

(22)(31) "Prior authorization" means:

(a) with respect to services provided on or before March 31, 2011, that for those matters identified by ARM 24.29.1517 the provider receives (either verbally or in writing) authorization from the insurer to perform a specific procedure or series of related procedures, prior to performing that procedure; and

(b) with respect to services provided on or after April 1, 2011, that for those cases identified by [New Rule II], the interested party receives authorization from the insurer to perform treatment(s) or procedure(s) that are not specifically addressed or recommended by the Montana Guidelines.

(23) and (24) remain the same but are renumbered (32) and (33).

(34) "Rebuttable presumption" means that the Montana Guidelines, as adopted in [New Rule I], can be rebutted by a preponderance of credible medical evidenced-based material and medical reasons to justify that the medical treatment(s) or procedure(s) that is not specifically addressed or recommended by the Montana Guidelines is reasonable and necessary care for the injured worker.

(25) and (26) remain the same but are renumbered (35) and (36).

(37) "Secondary medical services" has the same meaning as provided by 39-71-116, MCA.

(27) through (29) remain the same but are renumbered (38) through (40).

(30)(41) "Treatment plan" means a written outline of how the provider intends to treat a specific condition or complaint.

(a) With respect to services provided on or before March 31, 2011, the The treatment plan must include a diagnosis of the condition, the specific type(s) of treatment, procedure, or modalities that will be employed, a timetable for the implementation and duration of the treatment, and the goal(s) or expected outcome of the treatment. Treatment, as used in this definition, may consist of diagnostic procedures that are reasonably necessary to refine or confirm a diagnosis. The treating physician may indicate that treatment is to be performed by a provider in a

different field or specialty, and defer to the professional judgment of that provider in the selection of the most appropriate method of treatment; however, the treating physician must identify the scope of the referral in the treatment plan and provide guidance to the provider concerning the nature of the injury or occupational disease.

(b) With respect to services provided on or after April 1, 2011, the treatment plan must be made in accordance with the Montana Guidelines adopted in [New Rule I] and made in accordance with any insurer authorized treatment(s) or procedure(s).

AUTH: 39-71-203, MCA

IMP: 39-71-116, 39-71-704, MCA

REASON: There is reasonable necessity to amend the definitions rule applicable to ARM Title 24, chapter 29, subchapter 14 for General Medical Rules and Facility Service Rules and subchapter 15 for Nonfacility Service Rules and Utilization Rules to define common medical terms used in utilization and treatment guidelines for primary and secondary medical services for the injured worker, such as: "Evidence-Based"; "Maintenance Care"; "Medical stability", "maximum healing", or "maximum medical healing"; "Palliative Care"; "Primary Medical Services"; and "Secondary Medical Services". There is reasonable necessity to define the term "Medical Director" to clarify that this individual is a physician licensed by the state of Montana and to clarify the role of the individual in independent medical review of disputes concerning utilization and treatment guidelines. There is reasonable necessity to define the term: "Rebuttable Presumption" to clarify the intended meaning of this term as used in the utilization and treatment guidelines adopted by the department. There is also reasonable necessity to amend the definition of "Prior Authorization" and "Treatment Plan" due to the implementation of New Rules I and II. Finally, there is reasonable necessity to clarify that various terms have the meaning specified in statute.

24.29.1402 PAYMENT OF MEDICAL CLAIMS (1) Payment of medical claims must be made in accordance with the schedule of facility and nonfacility medical fees adopted by the department.

(a) Charges submitted by providers must be the usual and customary charge billed for nonworkers' compensation patients.

(2) remains the same.

(3) For services provided on or after April 1, 2011, payment of medical claims must also be made in accordance with the utilization and treatment guidelines adopted by the department in [New Rule I].

(3) through (7) remain the same but are renumbered (4) through (8).

AUTH: 39-71-203, MCA

IMP: 39-71-203, 39-71-510, 39-71-704, MCA

REASON: There is reasonable necessity to amend this rule to eliminate confusion by clarifying that medical claims are paid according to the fee schedule, but medical providers need to bill their usual and customary charges. There is reasonable

necessity to also clarify that payment of medical claims must be made in accordance with the implementation of New Rule I.

24.29.1406 FACILITY BILLS (1) remains the same.

~~(2) To the extent possible, electronic billing must be utilized by both providers and payers in the billing and reimbursement process to facilitate the rapid transmission of data, lessen the opportunity for errors, and lessen system costs.~~  
The providers and payers shall use when possible, electronic billing for the billing and reimbursement process in order to facilitate rapid transmission of data, lessen the opportunity for errors, and lessen system costs.

(3) through (5) remain the same.

AUTH: 39-71-203, MCA

IMP: 39-71-105, 39-71-107, 39-71-203, 39-71-704, MCA

REASON: There is reasonable necessity to amend ARM 24.29.1406 at the same time as other medical service rules are being amended in order to clarify and emphasize the need to use electronic billing systems.

24.29.1407 PROSTHETIC APPLIANCES (1) remains the same.

(2) For services provided on or after April 1, 2011, claims must be paid in accordance with the utilization and treatment guidelines adopted by the department in [New Rule I].

AUTH: 39-71-203, MCA

IMP: ~~39-71-203~~, 39-71-704, MCA

24.29.1416 APPLICABILITY OF DATE OF INJURY, DATE OF SERVICE

(1) and (2) remain the same.

(3) The utilization and treatment guidelines adopted by the department in [New Rule I] apply to services provided on or after April 1, 2011, regardless of the date of injury.

AUTH: 39-71-203, MCA

IMP: 39-71-704, 39-71-727, MCA

REASON: There is reasonable necessity to amend this rule to clarify that the utilization and treatment guidelines adopted by the department must be used on the date of service, regardless of the date of injury, to help ensure that the injured worker receives the most current, evidence-based treatment available at the time of service.

24.29.1501 PURPOSE (1) remains the same.

(2) The purpose of evidence-based utilization and treatment guidelines is to assist injured workers in receiving prompt and appropriate care, assist injured workers in stay-at-work/return-to-work options, assist clinicians in making decisions for specific conditions, and help payers make reimbursement determinations.

Utilization and treatment guidelines should not be used as sole evidence for an absolute standard of care and they cannot take into account the unique circumstances of every patient and every provider and what treatments have worked for them.

AUTH: 39-71-203, MCA

IMP: 39-71-704, MCA

REASON: There is reasonable necessity to amend ARM 24.29.1501 to provide a more detailed statement regarding evidence-based utilization and treatment guidelines and to clarify that the guidelines are not absolute because every injured worker is unique.

24.29.1513 DOCUMENTATION REQUIREMENTS (1) through (3) remain the same.

~~(4)(a)~~ With respect to services provided on or before March 31, 2011, certain ~~Certain~~ treatment plans may require services be obtained from a vendor that is outside the tradition of being a professional health care provider. Under that circumstance, the treating physician has the obligation to include the need for the service in the treatment plan and furnish improvement status as appropriate. The vendor, however, is responsible for furnishing documentation.

~~(b)(a)~~ The following are examples of services that are contemplated as falling within the meaning of this section:

(i) and (ii) remain the same.

(5) With respect to services provided on or after April 1, 2011, in cases where treatment(s) or procedure(s) are not specifically addressed or recommended by the Montana Guidelines, prior authorization must be obtained with documentation in accordance with [New Rule II].

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

AUTH: 39-71-203, MCA

IMP: 39-71-704, MCA

REASON: There is reasonable necessity to amend ARM 24.29.1513 to clarify how the rule applies to services provided on or before March 31, 2011, and how the rule applies to services provided on or after April 1, 2011, to avoid any inconsistencies that may arise from the application of the Montana Guidelines provided in New Rule I and the prior authorization provisions of New Rule II.

24.29.1515 IMPROVEMENT STATUS FOR SERVICES PROVIDED ON OR BEFORE MARCH 31, 2011 (1) and (2) remain the same.

(3) This rule applies to services provided on or before March 31, 2011.

AUTH: 39-71-203, MCA

IMP: 39-71-704, MCA

REASON: There is reasonable necessity to amend ARM 24.29.1515 to clarify that the rule only applies to services provided on or before March 31, 2011, to avoid any inconsistencies that may arise from the application of the Montana Guidelines provided in New Rule I.

24.29.1517 PRIOR AUTHORIZATION FOR SERVICES PROVIDED ON OR BEFORE MARCH 31, 2011 (1) through (8) remain the same.

(9) This rule applies to services provided on or before March 31, 2011.

AUTH: 39-71-203, MCA  
IMP: 39-71-704, 39-71-743, MCA

REASON: There is reasonable necessity to amend ARM 24.29.1517 to clarify that the rule only applies to services provided on or before March 31, 2011, to avoid any inconsistencies that may arise from the application of the Montana Guidelines provided in New Rule I and the prior authorization provisions of New Rule II.

24.29.1519 SECOND OPINIONS (1) With respect to services provided on or before March 31, 2011, the ~~The~~ insurer may request a second opinion from a qualified provider as to whether the following services or procedures are reasonable, necessary, or well-advised:

(a) through (c) remain the same.

(2) With respect to services provided on or after April 1, 2011, the insurer may request a second opinion from a qualified provider as to whether treatment(s) or procedure(s) that are not specifically addressed or recommended by the Montana Guidelines, adopted by the department in [New Rule I], are reasonable, necessary, or well-advised.

(2) and (3) remain the same, but are renumbered (3) and (4).

AUTH: 39-71-203, MCA  
IMP: 39-71-704, MCA

REASON: There is reasonable necessity to amend ARM 24.29.1519 to clarify that the rule only applies to services provided on or before March 31, 2011, to avoid any inconsistencies that may arise from the application of the Montana Guidelines provided in New Rule I and the prior authorization provisions of New Rule II.

24.29.1526 DISALLOWED PROCEDURES FOR SERVICES PROVIDED ON OR BEFORE MARCH 31, 2011 (1) through (3) remain the same.

(4) This rule applies to services provided on or before March 31, 2011.

AUTH: 39-71-203, MCA  
IMP: 39-71-704, MCA

REASON: There is reasonable necessity to amend ARM 24.29.1526 to clarify that the rule only applies to services provided on or before March 31, 2011, to avoid any

inconsistencies that may arise from the application of the Montana Guidelines provided in New Rule I.

24.29.1575 CHIROPRACTIC -- PRIOR AUTHORIZATION AND BILLING LIMITATIONS FOR SERVICES PROVIDED ON OR AFTER FROM JANUARY 1, 2008, THROUGH MARCH 31, 2011 (1) This rule applies to services that are provided ~~on or after from~~ from January 1, 2008, through March 31, 2011.

(2) through (12) remain the same.

AUTH: 39-71-203, MCA

IMP: 39-71-704, MCA

REASON: There is reasonable necessity to amend ARM 24.29.1575 to clarify that the rule only applies to services provided on or before March 31, 2011, to avoid any inconsistencies that may arise from the application of the Montana Guidelines provided in New Rule I and the prior authorization provisions of New Rule II.

24.29.1586 OCCUPATIONAL AND PHYSICAL THERAPISTS -- PRIOR AUTHORIZATION AND BILLING LIMITATIONS FOR SERVICES PROVIDED ON OR AFTER FROM JANUARY 1, 2008, THROUGH MARCH 31, 2011 (1) This rule applies to services that are provided ~~on or after from~~ from January 1, 2008, through March 31, 2011.

(2) through (11) remain the same.

AUTH: 39-71-203, MCA

IMP: 39-71-704, MCA

REASON: There is reasonable necessity to amend ARM 24.29.1586 to clarify that the rule only applies to services provided on or before March 31, 2011, to avoid any inconsistencies that may arise from the application of the Montana Guidelines provided in New Rule I and the prior authorization provisions of New Rule II.

24.29.2002 STANDARDS FOR DIAGNOSIS FOR SERVICES PROVIDED ON OR BEFORE MARCH 31, 2011 (1) through (4) remain the same.

(5) This rule applies to services provided on or before March 31, 2011.

AUTH: 39-71-203, MCA

IMP: 39-71-203, 39-71-704, MCA

REASON: There is reasonable necessity to amend ARM 24.29.2002 to clarify that the rule only applies to services provided on or before March 31, 2011, to avoid any inconsistencies that may arise from the application of the Montana Guidelines provided in New Rule I.

24.29.2003 WORKERS' COMPENSATION DOES PAY FOR CERTAIN SERVICES PROVIDED ON OR BEFORE MARCH 31, 2011 (1) and (2) remain the same.

(3) This rule applies to services provided on or before March 31, 2011.

AUTH: 39-71-203, MCA

IMP: 39-71-203, 39-71-704, MCA

REASON: There is reasonable necessity to amend ARM 24.29.2003 to clarify that the rule only applies to services provided on or before March 31, 2011, to avoid any inconsistencies that may arise from the application of the Montana Guidelines provided in New Rule I.

6. Concerned persons may present their data, views, or arguments, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted to: Keith Messmer, Bureau Chief, Employment Relations Division, Department of Labor and Industry, P.O. Box 8011, Helena, Montana 59604-8011; by facsimile to (406) 444-7710; or by e-mail to [kmessmer@mt.gov](mailto:kmessmer@mt.gov), and must be received no later than 5:00 p.m., October 22, 2010.

7. An electronic copy of this Notice of Public Hearing is available through the department's web site at <http://dli.mt.gov/events/calendar.asp>, under the Calendar of Events, Administrative Rules Hearings Section. The department strives to make the electronic copy of this Notice of Public Hearing conform to the official version of the notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the notice and the electronic version of the notice, only the official printed text will be considered. In addition, although the department strives to keep its web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems, and that a person's difficulties in sending an e-mail do not excuse late submission of comments.

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, which includes the name and e-mail or mailing address of the person to receive notices, and specifies the particular subject matter or matters regarding which the person wishes to receive notices. Such written request may be mailed or delivered to the Department of Labor and Industry, attention: Mark Cadwallader, 1327 Lockey Avenue, P.O. Box 1728, Helena, Montana 59624-1728, faxed to the department at (406) 444-1394, e-mailed to [mcadwallader@mt.gov](mailto:mcadwallader@mt.gov), or may be made by completing a request form at any rules hearing held by the agency.

9. The bill sponsor contact requirements of 2-4-302, MCA, apply and have been fulfilled. The department attempted to contact the primary sponsor of House Bill 738 by telephone and e-mail on November 19, 2009, and by regular mail on November 30, 2009. The department contacted the primary sponsor of Senate Bill 108 via telephone on or about November 19, 2009, and has had numerous in-

person discussions and meetings with that former legislator since that date regarding the proposed rule changes.

10. As noted in paragraph 3, the general statement of reasonable necessity, the department proposes to make the adoptions and amendments effective December 1, 2010, although the new rules and substantive amendments will apply only to medical services rendered on or after April 1, 2011. The department reserves the right to make the adoptions and amendments effective at a later date, or not at all. The department reserves the right to adopt or amend only some of the rules identified in this notice.

11. The department's Hearings Bureau has been designated to preside over and conduct this hearing.

/s/ MARK CADWALLADER  
Mark Cadwallader  
Alternate Rule Reviewer

/s/ KEITH KELLY  
Keith Kelly, Commissioner  
DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State September 13, 2010

BEFORE THE BOARD OF PHARMACY  
DEPARTMENT OF LABOR AND INDUSTRY  
STATE OF MONTANA

In the matter of the amendment of	)	NOTICE OF PUBLIC HEARING ON
ARM 24.174.401 fee schedule,	)	PROPOSED AMENDMENT AND
24.174.403 change in address,	)	ADOPTION
24.174.805 change of pharmacist-in-	)	
charge, 24.174.813 class IV facility,	)	
24.174.1003 identification of	)	
pharmacist-in-charge, 24.174.1201	)	
wholesale drug distributor,	)	
24.174.1302 telepharmacy	)	
operations, 24.174.1412 dangerous	)	
drugs, and the adoption of NEW	)	
RULES I through X cancer drug	)	
repository, and NEW RULES XI	)	
through XIV clinical pharmacist	)	
practitioner	)	

TO: All Concerned Persons

1. On October 14, 2010, at 9:00 a.m., a public hearing will be held in room B-07, 301 South Park Avenue, Helena, Montana, to consider the proposed amendment and adoption of the above-stated rules.

2. The Department of Labor and Industry (department) 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, contact the Board of Pharmacy (board) no later than 5:00 p.m., on October 8, 2010, to advise us of the nature of the accommodation that you need. Please contact Ronald Klein, RPh, Board of Pharmacy, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; telephone (406) 841-2371; Montana Relay 1 (800) 253-4091; TDD (406) 444-2978; facsimile (406) 841-2305; e-mail dlibsdp@mt.gov.

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

24.174.401 FEE SCHEDULE

(1) through (3) remain the same.

(4) Original registration for clinical pharmacist practitioner 25

(5) Clinical pharmacist practitioner annual renewal fee 25

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

~~(6)~~ (8) Class IV Family planning limited pharmacy facility,  
certified pharmacy license, (original and renewal) 75

(7) through (21) remain the same, but are renumbered (9) through (23).

AUTH: 37-1-134, 37-7-201, 50-32-314, MCA

IMP: 37-1-134, 37-7-201, 37-7-302, 37-7-306, 37-7-321, 37-7-604, 37-7-605, 37-7-703, 50-32-314, MCA

REASON: In conjunction with the adoption of New Rules XI through XIV to implement Senate Bill 174, the board is amending this rule to establish application and renewal fees for the newly created class of clinical pharmacist practitioner. The board estimates the original and renewal registration fees will affect ten clinical pharmacist practitioners a year and generate approximately \$250 in annual revenue. The board is amending renumbered (8) to rename class IV pharmacies to mirror proposed amendments to ARM 24.174.813 within this notice.

24.174.403 CHANGE IN ADDRESS AND/OR EMPLOYMENT (1) All licensees shall notify the board in writing within ~~ten~~ 30 days of any change in employment and/or any change of business or personal address.

AUTH: 37-7-201, MCA

IMP: 37-7-201, MCA

REASON: The board is amending this rule to expand licensees' notice period from ten days to thirty days to afford licensees ample time to report updates to the board and for consistency among similar rules with reporting requirements.

24.174.805 CHANGE OF PHARMACIST-IN-CHARGE (1) When the pharmacist-in-charge of a pharmacy ~~leaves the employment of such pharmacy ceases to be the pharmacist-in-charge~~, the pharmacist will be held responsible for ~~the proper notification to~~ notifying the board in writing of such termination of services.

(2) Within 72 hours of termination of services of the pharmacist-in-charge, a new pharmacist-in-charge must be designated ~~and an affidavit~~ in writing on the appropriate board-approved form and filed with the board. ~~The license will then be updated to indicate the name of the new pharmacist-in-charge.~~

AUTH: 37-7-201, MCA

IMP: 37-7-201, 37-7-321, MCA

REASON: The board determined it is reasonably necessary to amend this rule to address a situation that came before the board's screening panel. The panel discovered that the current language of (1) does not require someone who ceases to be the pharmacist-in-charge, but remains a pharmacist at the same pharmacy, to report such a change to the board, but only requires the reporting of someone who leaves the pharmacy entirely. The board is amending this rule because it is in the public's best interest for the board to know of every pharmacist-in-charge change as there is no reason for this distinction. The board is also clarifying that such notification must be in writing for consistency with other reporting requirements.

The board is amending (2) to require that the designation of a new pharmacist-in-charge must be in writing on a board-approved form and removing the requirement of an affidavit. The board determined that an affidavit is not necessary for the reporting and written notice is sufficient for the board's record keeping. The board is also striking the unnecessary statement that the license will be updated, as it is standard practice for board staff to update licenses upon receipt of current information from licensees. Implementation cites are being amended to accurately reflect all statutes implemented through the rule.

24.174.813 CLASS IV FAMILY PLANNING LIMITED PHARMACY FACILITY

(1) A Class IV family planning limited pharmacy facility shall be administered in compliance with the following standards:

~~(a) that any~~ Any legend drugs, controlled by federal law and required to bear the legend "federal law prohibits dispensing without a prescription," dispensed shall first have been packaged, labeled, and otherwise prepared by a registered pharmacist holding a current license in Montana. ~~The pharmacist is to be recorded with the board and the board shall be notified of any change of the pharmacist in charge.~~

~~(i) a legend drug is defined as one that is controlled by federal law and carries the legend "Federal Law Prohibits Dispensing Without a Prescription".~~

(b) The pharmacist-in-charge serving at a family planning limited pharmacy must be identified to the board and the family planning limited pharmacy shall, within 30 days, notify the board of any change of the pharmacist-in-charge.

~~(b) (c) that the~~ The registered pharmacist-in-charge shall provide this service to said facility at regular periods and ~~that these periods be posted at said the~~ facility.

~~(c) (d) that adequate~~ Adequate locked storage must be provided for all drugs referred to in these rules. ~~Only the pharmacist may have access to the legend drug stock. However, the person in charge, or his or her designee, may obtain a product that has been properly prepared by the pharmacist for delivery to the recipient.~~

(e) Only the pharmacist may have access to the legend drug stock; however an authorized person may obtain a product that has been properly prepared by the pharmacist for delivery to the recipient.

~~(d) that records for all legend drugs dispensed and to whom be kept at the facility for the purpose of accounting for these drugs. These records would include present stock and all shipments received thereafter.~~

(f) All appropriate records shall be maintained onsite at the facility.

~~(e) that these drugs be delivered to the recipient at no cost for the drug.~~

(g) The facility may not charge the recipient for the cost of the drug.

~~(f) (h) that the dispensing~~ Dispensing of drugs by M.D.'s medical practitioners may not be restricted, except as defined in 37-2-104 and 37-7-103, MCA.

~~(g) (i) that nothing~~ Nothing in these rules authorizes the dispensing of any drugs and devices other than the following:

(i) oral contraceptives, injectable long-term contraceptives, progestational drugs, diaphragms, contraceptive jellies, creams, and foams, IUD's, condoms, vaginal creams, ointments, and suppositories used in the routine treatment of vaginal disorders;

(ii) oral antibiotics used to treat Chlamydia, both patient and partner; and

(iii) oral antibiotics used to treat Gonorrhea, both patient and partner.

~~(h) that all nonlegend contraceptive devices and products be dispensed in accordance with the contraceptive drug or device law, Title 45, chapter 8, 45-8-204, MCA.~~

~~(i) that each~~ Each family planning center must apply for a license from the board and submit the required fee for a Class IV family planning limited pharmacy facility. This license is to be displayed in a conspicuous place at the facility.

(k) Each family planning limited pharmacy facility will be inspected on a routine basis by the pharmacy inspector/compliance officer or other individuals appointed by the Board of Pharmacy and also may be inspected as necessary for cause.

AUTH: 37-7-201, MCA

IMP: 37-7-201, 37-7-321, MCA

REASON: It is reasonable and necessary to amend this rule throughout for clarity, ease of use, and to comply with ARM numbering and formatting standards. The board is amending the facility name for clarity and to align with previous rule amendments that eliminated facility classes I through III, leaving only class IV.

The board is amending (1)(e) to use the term "authorized person" and avoid confusion between the use of "person in charge" in ARM 24.174.1202, regarding wholesale drug distributors. The board is amending (1)(h) to address additional medical practitioners with prescriptive authority, as defined at 37-2-101, MCA.

It is reasonably necessary to amend (1)(i) to allow a family planning limited pharmacy to dispense oral antibiotic medication to better provide for the timely treatment of patients with certain sexually transmitted diseases. Montana's chief medical officer requested that the board amend the rules to address this serious public health concern.

The board is striking former (1)(h) as the referenced contraceptive drug or device law was repealed in 1989. The board is adding (1)(k) to provide for the timely inspection of such facilities by the pharmacy inspector/compliance officer. The board concluded that inspection is necessary to ensure the public's safety as these facilities maintain legend drugs and may be located in remote areas of the state.

24.174.1003 IDENTIFICATION OF PHARMACIST-IN-CHARGE OF DISPENSING TO MONTANA (1) through (1)(b) remain the same.

(c) comply with all applicable Montana laws and rules; and

(d) notify the Montana board promptly in writing of any ~~relevant~~ changes in ~~employment or address, etc.;~~ the licensure status of the pharmacist-in-charge and any disciplinary actions initiated and/or finalized against the pharmacist's license.

~~(e) notify the Montana board promptly of any disciplinary actions initiated and/or finalized against the pharmacist's license.~~

(2) When the pharmacist-in-charge of an out-of-state mail service pharmacy ceases to be the pharmacist-in-charge, the pharmacist will be held responsible for notifying the board in writing of such termination of services.

(3) Within 72 hours of termination of services of the pharmacist-in-charge, a new pharmacist-in-charge must be designated in writing on the appropriate board-approved form and filed with the board.

AUTH: 37-7-712, MCA  
IMP: 37-7-703, MCA

REASON: The board is amending this rule to set forth the specific changes that must be reported to the board regarding pharmacists-in-charge to address a recent increase in the number of mail service pharmacies that failed to notify the board when there was a change in their pharmacist-in-charge. The board concluded that it is in the public's best interest for the board to know of every pharmacist-in-charge change, and that such notification must be in writing. The board determined these amendments are also necessary to remain consistent with requirements for in-state pharmacies in ARM 24.174.805.

24.174.1201 WHOLESALE DRUG DISTRIBUTOR LICENSING (1) Every person engaged in manufacturing, wholesale distribution, which includes reverse wholesale distribution, or selling of drugs, medicines, chemicals, poisons for medicinal purposes, medical gases, or legend devices other than to the consuming public or patient, in the state of Montana, shall be licensed annually by the board. Each applicant shall:

(a) through (6) remain the same.

AUTH: 37-7-201, 37-7-610, MCA  
IMP: 37-7-603, 37-7-604, 37-7-605, 37-7-606, MCA

REASON: The board determined it is reasonably necessary to amend this rule to specify that wholesale drug distribution includes a relatively new business practice of reverse distribution of prescription drugs. The board notes that wholesale distributors remove outdated and unusable drugs from inventory for proper disposal and has concluded that this process is included in the regulated practice of wholesale drug distribution.

24.174.1302 TELEPHARMACY OPERATIONS (1) through (4)(b)(ii) remain the same.

(iii) have at least six months of active experience as a pharmacy technician or experience deemed as equivalent by the board.

(c) through (z) remain the same.

AUTH: 37-7-201, MCA  
IMP: 37-7-101, 37-7-201, 37-7-321, MCA

REASON: It is reasonable and necessary to amend this rule to allow the board discretion in the operation of a telepharmacy. This rule change will allow the board to examine the credentials of a pharmacy technician and deem those credentials

sufficient. This rule will allow telepharmacy operations to hire qualified and experienced individuals in a timely and cost effective manner.

24.174.1412 ADDITIONS, DELETIONS, AND RESCHEDULING OF DANGEROUS DRUGS (1) The Board of Pharmacy hereby adopts the most current schedule of dangerous drugs as defined in 21 CFR 1308, et. seq. April 1, ~~1999~~ 2009. Copies are available from the Board of Pharmacy, 301 South Park Avenue, P.O. Box 200513, Helena, MT 59620-0513.

AUTH: 50-32-103, 50-32-203, MCA  
IMP: 50-32-103, 50-32-202, 50-32-203, 50-32-209, 50-32-222, 50-32-223, 50-32-224, 50-32-225, 50-32-226, 50-32-228, 50-32-229, 50-32-231, 50-32-232, MCA

REASON: It is reasonable and necessary to amend this rule to reflect the most current and applicable federal regulations.

4. The proposed new rules provide as follows:

NEW RULE I PARTICIPATION (1) A pharmacy or facility may fully participate in the cancer drug repository program by accepting, storing and dispensing, or administering donated drugs and supplies, or may limit its participation to only accepting and storing donated drugs and supplies. If a pharmacy or facility chooses to limit its participation, the pharmacy or facility shall distribute any donated drugs to a fully participating repository.

(2) A pharmacy or facility may withdraw from participation in the cancer drug repository program at any time, upon notification to the board. A notice to withdraw shall be in writing.

(3) Any patient who is diagnosed with cancer is eligible to receive drugs or supplies under the cancer drug repository program.

(4) Cancer drugs may be donated to a pharmacy or facility.

(5) Participation in the program is voluntary.

(6) There is no limitation on the number of doses that can be donated to the program as long as the donated drugs meet the requirements of these regulations.

AUTH: 37-7-1401, MCA  
IMP: 37-7-1401, 37-7-1403, MCA

REASON: The 2009 Montana Legislature enacted Chapter 299, Laws of 2009 (House Bill 409), an act establishing a cancer drug repository program and participant registry. The bill was signed by the Governor on April 18, 2009, and became effective October 1, 2009. The board is adopting New Rules I through X to establish the repository program and further implement the legislation.

NEW RULE II DONATION OF CANCER DRUGS (1) Any person or entity may donate cancer drugs to the program. Any person or entity who donates to the program must contact a pharmacy or facility to obtain a form on which the donor

must specify the cancer drug to be donated. The board will supply the form to be used which will include:

- (a) name of the cancer drug;
- (b) quantity of the cancer drug;
- (c) the name of the person to whom the cancer drug was originally prescribed;
- (d) the relationship between the person or entity donating the cancer drug and the person to whom the drug was prescribed;
- (e) signature of the person donating the cancer drug; and
- (f) date the form was signed.

AUTH: 37-7-1401, MCA

IMP: 37-7-1401, 37-7-1403, MCA

NEW RULE III ACCEPTABLE CANCER DRUGS (1) The following categories of drugs are acceptable for dispensing or distribution under the program:

- (a) a cancer drug that is in its original, unopened, sealed, and tamper-evident packaging;
- (b) a cancer drug packaged in single unit doses if the outside packaging is opened, but the single unit dose packaging is unopened;
- (c) a cancer drug that does not require refrigeration, freezing, or other special temperature requirements beyond controlled room temperature; and
- (d) an injectable cancer drug if it does not have temperature requirements other than controlled room temperature.

(2) Any cancer drug donated to the program must have at least six months remaining before its expiration date occurs.

AUTH: 37-7-1401, MCA

IMP: 37-7-1401, 37-7-1404, 37-7-1405, MCA

NEW RULE IV NONACCEPTABLE CANCER DRUGS (1) The following categories of drugs are not acceptable for dispensing or distribution under the program, because the effectiveness and safety of the cancer drug cannot be ensured or is otherwise prohibited:

- (a) a cancer drug that is adulterated or misbranded;
- (b) a cancer drug in packaging that has been opened, unsealed, or tampered with, or that is no longer in its original container;
- (c) a cancer drug packaged in single unit doses if the outside packaging is opened and the single unit dose packaging is also opened;
- (d) a cancer drug that requires refrigeration, freezing, or other special temperature requirements beyond controlled room temperature;
- (e) controlled substances; and
- (f) a cancer drug that has expired before dispensing to the patient.

AUTH: 37-7-1401, MCA

IMP: 37-7-1401, 37-7-1404, 37-7-1405, MCA

NEW RULE V DISPENSING AND DISTRIBUTION OF CANCER DRUGS

(1) A pharmacy or facility must comply with all applicable provisions of state and federal law relating to the storage, distribution, and dispensing of donated cancer drugs.

(2) A pharmacy or facility must inspect all such drugs prior to dispensing or distributing to determine if they are adulterated, misbranded, or expired.

(3) The following are authorized to dispense drugs:

- (a) practitioners with prescriptive authority; and
- (b) licensed pharmacists.

(4) Cancer drugs may only be dispensed pursuant to a prescription issued by a prescribing practitioner. Cancer drugs may be:

- (a) dispensed to an ultimate user of the cancer drug; or
- (b) distributed to another pharmacy or facility for dispensing.

(5) Cancer drugs donated under the program may not be resold.

(6) Patients for whom cancer drugs are dispensed under the program must be notified by the prescribing practitioner that the cancer drugs they received were originally dispensed to another patient and were returned for redispensing through the program.

AUTH: 37-7-1401, MCA

IMP: 37-7-1401, 37-7-1405, MCA

NEW RULE VI STORAGE REQUIREMENTS (1) The pharmacy or facility

that receives donated cancer drugs for dispensing or distribution must:

(a) provide equipment for the storage of cancer drugs donated to the program at controlled room temperature;

(b) maintain the inventory of donated cancer drugs separate from all other drug inventory of the pharmacy or facility; and

(c) establish a secure location for the storage of the donated cancer drugs.

AUTH: 37-7-1401, MCA

IMP: 37-7-1401, 37-7-1404, MCA

NEW RULE VII RECORD-KEEPING REQUIREMENTS (1) A pharmacy or

facility must maintain a perpetual inventory log book of all cancer drugs received, dispensed, or distributed.

(2) The perpetual inventory log book must contain the following information regarding all cancer drugs received, dispensed, or distributed:

- (a) name of the cancer drug;
- (b) quantity of the cancer drug;
- (c) expiration date of the cancer drug;
- (d) lot number of the cancer drug;
- (e) name of pharmacy or facility;
- (f) name of person who donated the cancer drug;
- (g) name of the person to whom the cancer drug was dispensed;
- (h) date the cancer drug was dispensed;

- (i) name of the prescribing practitioner who wrote the prescription for the cancer drug to be dispensed under the program;
- (j) name of the pharmacy or facility which the cancer drug was distributed;
- (k) date the cancer drug was distributed to another pharmacy or facility;
- (l) date of destruction of the expired cancer drug; and
- (m) the amount of the handling fee charged, if any.

AUTH: 37-7-1401, MCA

IMP: 37-7-1401, 37-7-1405, MCA

NEW RULE VIII HANDLING FEE (1) A pharmacy or facility that receives donated cancer drugs may charge a handling fee to the patient for dispensing or distribution of cancer drugs under the program.

(2) The handling fee must not exceed the applicable Medicaid dispensing fee.

AUTH: 37-7-1401, MCA

IMP: 37-7-1401, 37-7-1405, MCA

NEW RULE IX PHARMACY OR FACILITY REGISTRY (1) The board shall establish and maintain a pharmacy or facility registry for the program.

(2) The pharmacy or facility registry shall include:

- (a) pharmacy's or facility's name;
- (b) pharmacy's or facility's address;
- (c) pharmacy's or facility's telephone number; and
- (d) whether the pharmacy or facility is in a practitioner's office, a pharmacy, a clinic, or a hospital.

(3) It is the responsibility of the pharmacy or facility to:

- (a) notify the board of the desire to participate in the program; and
- (b) provide the required registry information to the board.

(4) Any pharmacy or facility in the program will be entered on the pharmacy or facility registry by the board.

(5) It is the responsibility of the pharmacy or facility to notify the board:

- (a) of any change of name, address, telephone number; and
- (b) when it no longer wants to participate in the program.

(6) The board will make the pharmacy or facility registry information available to any person or entity wishing to donate cancer drugs to the program.

(7) The board will provide public access to the pharmacy or facility registry information on the board web site, or by contacting the board office.

AUTH: 37-7-1401, MCA

IMP: 37-7-1401, 37-7-1403, MCA

NEW RULE X INSPECTIONS AND TERMINATION FROM PROGRAM

(1) The board may, in its discretion, inspect pharmacy or facilities in the program for compliance with the storage and record-keeping requirements of this subchapter.

(2) In the event of noncompliance with the storage and record-keeping requirements of this subchapter, the board may terminate the pharmacy's or facility's participation in the program.

AUTH: 37-7-1401, MCA

IMP: 37-7-1401, MCA

NEW RULE XI DEFINITIONS (1) "Board of Pharmaceutical Specialties" (BPS) means an independent nongovernmental certification body that provides recognition of persons involved in the advanced practice of pharmacy specialties through development and administration, a certification process that is consistent with public policy regarding the credentialing of healthcare professionals.

(2) "Clinical practice experience" means working in a pharmacy practice setting which includes at least 50 percent of time spent in:

(a) communication with healthcare professionals and patients regarding drug therapy, wellness, and health promotion;

(b) designing, implementing, monitoring, evaluating, and modifying or recommending modifications in drug therapy to optimize patient care;

(c) identifying, assessing, and solving medication-related problems and providing a clinical judgment as to the continuing effectiveness of the therapeutic plan;

(d) conducting physical assessment applicable to the area of practice, evaluating patient problems, ordering and monitoring medications, and/or laboratory tests in accordance with established standards of practice;

(e) referring patients to other healthcare professionals as appropriate;

(f) integrating relevant diet, exercise, and other non-drug therapy with pharmaceutical care;

(g) retrieving, evaluating, utilizing, and managing data and professional resources;

(h) documenting interventions and evaluating outcomes; and

(i) integrating national standards for the quality of healthcare.

(3) "Collaborative practice agreement" is defined as set forth in ARM 24.174.524.

AUTH: 37-7-201, MCA

IMP: 37-7-201, 37-7-306, MCA

REASON: The 2009 Montana Legislature enacted Chapter 293, Laws of 2009 (Senate Bill 174), an act creating the professional classification of clinical pharmacist practitioner. The bill was signed by the Governor on April 17, 2009, and became effective October 1, 2009. The board is adopting New Rules XI through XIV to establish definitions, qualifications, and requirements for clinical pharmacist practitioners and further implement the legislation.

NEW RULE XII REQUIREMENTS TO BECOME A CLINICAL PHARMACIST PRACTITIONER (1) An applicant for a clinical pharmacist practitioner registration shall:

- (a) submit an application on a form prescribed by the board;
  - (b) pay a registration fee as prescribed by the board;
  - (c) hold an active, unrestricted Montana pharmacist license;
  - (d) have completed five years of clinical practice experience or have completed a pharmacy residency and two years clinical practice experience and hold one of the following active certifications:
    - (i) BPS certification; or
    - (ii) nationally recognized certification in an area of practice as approved by the board and Board of Medical Examiners (BME).
  - (e) submit a signed collaborative practice agreement to the board that includes a description of the type of supervision the collaborating physician will exercise over the clinical pharmacist practitioner;
  - (f) following approval of the board, submit the application and collaborative practice agreement to the BME for approval; and
  - (g) appear before the board and/or BME if requested.
- (2) Within ten days of discontinuing work under an approved collaborative drug therapy agreement, the pharmacist shall notify the board and the clinical pharmacist practitioner's registration shall be inactive, until such time as a new application is approved.

AUTH: 37-7-201, MCA

IMP: 37-7-201, 37-7-306, MCA

NEW RULE XIII REQUIREMENTS TO MAINTAIN CLINICAL PHARMACIST PRACTITIONER REGISTRATION (1) In addition to completing the annual renewal requirements for a pharmacist's license, a clinical pharmacist practitioner must pay a clinical pharmacist practitioner annual renewal fee to the board.

(2) The board shall randomly select renewal notice forms of clinical pharmacist practitioners for audit of current certification and requirements for continued registration.

AUTH: 37-7-201, MCA

IMP: 37-7-201, 37-7-306, MCA

NEW RULE XIV UNPROFESSIONAL CONDUCT (1) A clinical pharmacist practitioner's registration may be disciplined by the board for unprofessional conduct as defined by the board in ARM 24.174.2301.

(2) The BME may take appropriate action for the unlicensed practice of medicine under 37-3-101 and 37-1-317, MCA, if a clinical pharmacist practitioner exceeds the scope of practice as defined in 37-7-306, MCA.

AUTH: 37-1-319, 37-7-201, MCA

IMP: 37-1-316, 37-7-306, MCA

5. Concerned persons may present their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to the Board of Pharmacy, 301 South Park Avenue, P.O. Box 200513,

Helena, Montana 59620-0513, by facsimile to (406) 841-2305, or by e-mail to [dlibsdp@mt.gov](mailto:dlibsdp@mt.gov), and must be received no later than 5:00 p.m., October 22, 2010.

6. An electronic copy of this Notice of Public Hearing is available through the department and board's site on the World Wide Web at [www.pharmacy.mt.gov](http://www.pharmacy.mt.gov). The department strives to make the electronic copy of this notice conform to the official version of the notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the notice and the electronic version of the notice, only the official printed text will be considered. In addition, although the department strives to keep its web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems, and that technical difficulties in accessing or posting to the e-mail address do not excuse late submission of comments.

7. The board maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this board. 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 the person wishes to receive notices regarding all board administrative rulemaking proceedings or other administrative proceedings. The request must indicate whether e-mail or standard mail is preferred. Such written request may be sent or delivered to the Board of Pharmacy, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; faxed to the office at (406) 841-2305; e-mailed to [dlibsdp@mt.gov](mailto:dlibsdp@mt.gov); or made by completing a request form at any rules hearing held by the agency.

8. The bill sponsor contact requirements of 2-4-302, MCA, apply and have been fulfilled. The primary bill sponsor was contacted on February 24, 2010, by electronic mail.

9. Mike Fanning, attorney, has been designated to preside over and conduct this hearing.

BOARD OF PHARMACY  
WILLIAM BURTON, RPH, PRESIDENT

/s/ DARCEE L. MOE  
Darcee L. Moe  
Alternate Rule Reviewer

/s/ KEITH KELLY  
Keith Kelly, Commissioner  
DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State September 13, 2010

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

In the matter of the adoption of New )  
Rules I through XXI and repeal of )  
ARM 37.27.128, 37.27.129, )  
37.27.130, and 37.27.135 pertaining )  
to emergency care, inpatient, and )  
transitional living chemical )  
dependency programs )

NOTICE OF PUBLIC HEARING ON  
PROPOSED ADOPTION AND  
REPEAL

TO: All Concerned Persons

1. On October 15, 2010, at 10:30 a.m., the Department of Public Health and Human Services 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 adoption and repeal of the above-stated rules.

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 Department of Public Health and Human Services no later than 5:00 p.m. on October 6, 2010, to advise us of the nature of the accommodation that you need. Please contact Rhonda Lesofski, 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 dphhslegal@mt.gov.

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

NEW RULE I PURPOSE (1) This subchapter establishes the licensing requirements for acute inpatient chemical dependency facilities, residential inpatient community-based chemical dependency facilities, and low and medium intensity residential halfway house treatment facility services.

(2) If the rules in this subchapter conflict with ARM Title 37, chapter 106, subchapter 3, the requirements of this subchapter will apply.

(3) This subchapter is applicable to treatment levels of care classified as ASAM Level:

- (a) III.1 Clinically Managed Low-Intensity Residential Treatment;
- (b) III.3 Clinically Managed Medium-Intensity Residential Treatment;
- (c) III.5 Clinically Managed High-Intensity Residential Treatment; and
- (d) III.7 Medically Monitored Inpatient Treatment.

(4) [NEW RULE I through XXI] are applicable to all community-based substance use disorder inpatient and residential halfway house treatment facilities.

AUTH: 50-5-103, 53-24-208, MCA

IMP: 50-5-101, 50-5-103, 53-24-208, 76-2-411, MCA

NEW RULE II DEFINITIONS In addition to the terms defined in 53-24-103, MCA, the following definitions shall apply in the interpretation and enforcement of the rules in this subchapter:

(1) "Administrator" means the person in charge, care, or control of treatment and responsible for operation of the agency providing such services.

(2) "Admission" means specific tasks necessary to admit a person to community-based substance use disorder treatment services. Tasks include but are not limited to:

- (a) completion of admission forms;
- (b) notification of client rights and confidentiality regulations;
- (c) explanation of the general nature and goals of services;
- (d) review of the intake policies and procedures of the service program;
- (e) orientation to the service structure; and
- (f) financial determination for services.

(3) "Adult" means a person 21 years of age or older for purposes of services in community-based substance use disorder inpatient and residential halfway house treatment.

(4) "American Society of Addiction Medicine Patient Placement Criteria 2R (ASAM PPC-2R) or (ASAM)" establishes the level of care for substance use disorder treatment and is required to be used by all licensed community-based substance use disorder inpatient and residential halfway house treatment facility providers. The department adopts and incorporates by reference the American Society of Addiction Medicine Patient Placement Criteria, Second Edition-Revised; Copyright 2001 by the American Society of Addiction Medicine, Inc.; ISBN 1-880425-06-8, which sets forth the level of care for substance use disorder treatment. A copy of ASAM PPC-2R may be obtained from American Society of Addiction Medicine, 4601 N. Park Avenue, Upper Arcade #101, Chevy Chase, MD 20815; phone (301) 656-3920; fax (301) 656 3815; or email@asam.org.

(5) "Biopsychosocial assessment" means an assessment of a person's medical (biological), psychological, and social history based on the six dimensions of ASAM. The six assessment dimensions include:

- (a) acute intoxication and/or withdrawal potential;
- (b) biomedical conditions and complications;
- (c) emotional, behavioral, or cognitive conditions and complications;
- (d) readiness to change;
- (e) relapse, continued use or continued problem potential; and
- (f) recovery/living environment.

(6) "Child or adolescent" means a person under 21 years of age for purposes of services in community-based substance use disorder inpatient and residential halfway house treatment.

(7) "Client" means a person being treated for a substance use disorder who is formally admitted to services within the admission criteria set by the program.

(8) "Confidentiality" means a program requirement concerning client information, including client records. The disclosure of any information related to an individual client shall be governed by requirements of the Health Insurance

Portability and Accountability Act of 1996 (HIPAA) and the requirements of Title 42 Part 2.22 (a)(1) and (2) of the Code of Federal Regulations (CFR).

(9) "Continuing care plan" means a written plan outlining anticipated therapeutic interventions to move a client along the continuum of care, which may include the level of treatment, clinical needs, and rationale for moving from one level of care to another.

(10) "Co-occurring" means an individual has at least one mental disorder and a substance use disorder.

(11) "Detoxification (detox)" means care and treatment of a person while the person recovers from the transitory effects of acute or chronic intoxication or withdrawal from alcohol or other drugs.

(12) "Diagnostic and Statistical Manual of Mental Disorders (DSM-IV) or (DSM)" establishes criteria for diagnosing an individual with a substance use or dependence disorder and is published by the American Psychiatric Association. The department adopts and incorporates by reference the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV), Fourth Edition, (ISBN 0-89042-061-0 (hardback) or ISBN 0-89042-062-9 (paperback), which sets forth criteria for diagnosing an individual with a substance use or dependence disorder. A copy of the DSM-IV may be obtained from American Psychiatric Publishing, Inc., 1000 Wilson Boulevard, Suite 1825, Arlington, VA 22209; phone (703) 907-7322 or (800) 368-5777; fax (703) 907-1091; or e-mail [appi@psych.org](mailto:appi@psych.org).

(13) "Dual diagnosis capable (DDC)" means treatment programs address co-occurring mental and substance-related disorders in their policies and procedures, assessment, treatment planning, program content, and discharge planning are described as "dual diagnosis capable". Such programs have arrangements in place for coordination and collaboration with mental health services. They also can provide psychopharmacologic monitoring and psychological assessment and consultation, either on-site or through coordination consultation with off-site providers. Program staff is able to address the interaction between mental and substance-related disorders and their effect on the patient's readiness to change, as well as relapse and recovery environment issues, through individual and group content. Nevertheless, the primary focus of DDC programs is the treatment of substance-related disorders.

(14) "Dual diagnosis enhanced (DDE)" describes treatment programs that incorporate policies, procedures, assessments, treatment, and discharge planning processes that accommodate patients who have co-occurring mental and substance-related disorders. Mental health symptom management groups are incorporated into addiction treatment. Motivational enhancement therapies specifically designed for those with co-occurring mental and substance-related disorders are more likely available (particularly in outpatient settings) and, ideally, there is close collaboration or integration with a mental health program that provides crises back-up services and access to mental health case management and continuing care. In contrast to dual diagnosis capable services, dual diagnosis enhanced services place their primary focus on the integration of services for mental and substance-related disorders in their staffing, services, and program content.

(15) "Eligible licensed addiction counselor (ELAC)" means an individual who meets requirements set forth in 37-35-202, MCA, and ARM 24.154.407 to provide

addiction counseling services under supervision of a licensed addiction counselor. References in this subchapter to licensed addiction counselor or LAC include an eligible licensed addiction counselor or ELAC providing addiction counseling services within the scope of this supervision.

(16) "First aid" means emergency treatment by someone who has received appropriate training. The provider and all staff must complete required training and hold current certification in first aid and cardiopulmonary resuscitation (CPR).

(17) "Halfway house" means a community residential facility for treatment of substance use disorders.

(18) "Licensed addiction counselor (LAC)" means an individual who meets the requirements set forth in 37-35-202, MCA, and ARM Title 24, chapter 154, rules implementing 37-35-202, MCA, to provide addiction counseling.

(19) "Licensure bureau" means the area of the department responsible for licensing chemical dependency facilities.

(20) "Medication administration" means the direct application of a medication or device by ingestion, inhalation, injection, or any other means, whether self-administered by a resident, or administered by a parent or guardian (for a minor), or an authorized health care provider.

(21) "Parent" means the individual who has legal custody of the child.

(22) "Program" means a community-based substance use disorder inpatient and residential facility.

(23) "Treatment plan" means a written document identifying the clinical needs, goals, objectives, and interventions the client agrees to follow to help the client understand and meet these treatment objectives.

AUTH: 50-5-103, 53-24-208, 53-24-301, MCA

IMP: 50-5-101, 50-5-103, 53-24-208, 76-2-411, MCA

### NEW RULE III POLICY AND PROCEDURE MANUAL REQUIREMENTS

(1) Each service provider must develop and implement a policy and procedure manual that includes:

(a) the philosophy of the program;

(b) the program goals;

(c) a description of the population the facility is able to serve;

(d) procedures governing the treatment and care of adolescents, if served in the program;

(e) a delineation of all of the services to be provided;

(f) identification or a description of critical populations and mechanisms to address their needs;

(g) admission criteria which shall include at a minimum:

(i) how admissions will be prioritized;

(ii) program limitations and exclusions;

(iii) methods to be followed when a person is found ineligible for services;

and

(iv) steps to follow for a wait list that includes how interim services will be provided when appropriate.

- (h) procedures outlining how facilities and services shall provide for privacy and separation by gender;
- (i) organizational chart showing:
  - (i) the lines and delegation of authority with supervisory responsibility clearly identified; and
  - (ii) responsibilities, structure, and reporting relationships explicitly stated and all staff positions delineated and functions identified.
- (j) implementation process of state and federal regulations on client confidentiality, including at a minimum:
  - (i) providing written summary and verbal confidentiality notification at the time of admission or as soon thereafter as the client is capable of rational communication. The minimum required elements of the written summary must include but are not limited to the following:
    - (A) a general description of the limited circumstances under which a program may acknowledge that an individual is present at a facility or disclose outside the program information identifying a patient as an alcohol or drug abuser;
    - (B) a statement that information related to a patient's commission of a crime on the premises of the program or against personnel of the program is not protected; and
    - (C) a statement that reports of suspected child abuse or neglect made under state law to appropriate state or local authorities are not protected.
  - (k) a client grievance process;
  - (l) reporting requirements to notify the department within 24 hours by e-mail or fax; of a client, staff, volunteer, or visitor death where the death occurs on-site or in service related activities;
  - (m) reporting requirements to notify the department within 24 hours or next business day of any fire, accident, or other incident resulting in significant damage to the service site;
  - (n) reporting any suspected abuse or neglect in accordance with 41-3-201 or 52-3-811, MCA, to the state child abuse hotline at (866) 820-5437;
  - (o) notification of the department's licensing bureau in writing within 24 hours of any allegations of client abuse including child abuse or neglect and elder abuse or neglect:
    - (i) the provider must indicate in writing that the proper authorities have been contacted and the abuse or neglect reported.
  - (p) steps to ensure smoking is not permitted per the Montana Clean Indoor Air Act;
  - (q) the management, storage, and disposal of prescription and over the counter drugs if applicable; and
  - (r) client transportation, if provided by facility.

AUTH: 50-5-103, 53-24-208, MCA

IMP: 50-5-101, 50-5-103, 53-24-207, 53-24-208, 53-24-306, 76-2-411, MCA

NEW RULE IV AGENCY ADMINISTRATOR RESPONSIBILITIES (1) The agency administrator is responsible for and must be familiar with daily operation of the facility.

AUTH: 50-5-103, 53-24-208, MCA  
IMP: 50-5-101, 50-5-103, 53-24-301, MCA

NEW RULE V REQUIREMENTS FOR THE PERSONNEL MANUAL (1) The program shall have written personal policies including the following:

- (a) selection, training, and supervision of all personnel;
- (b) maintaining a current job description for each position. For contract staff, formal agreements or personnel contracts, which describe the nature and extent of client care services, may be substituted for job descriptions;
- (c) maintaining a process governing volunteer (if utilized) activities and establishing appropriate training requirements;
- (d) assuring annual performance reviews for all staff;
- (e) actions to be taken if staff members misuse alcohol or other drugs;
- (f) assuring staff orientation prior to assumption of duties including but not limited to:
  - (i) defining staff ethical standards and conduct, including reporting of unprofessional conduct to appropriate authorities;
  - (ii) staff grievance procedures;
  - (iii) the facility disaster/evacuation plan;
  - (iv) review of policy and procedure manual; and
  - (v) review of client rights as defined in [NEW RULE IX].

AUTH: 50-5-103, 53-24-208, MCA  
IMP: 50-5-101, 50-5-103, 53-24-208, MCA

NEW RULE VI PERSONNEL FILE REQUIREMENTS (1) The administrator or designee must ensure there is a current secured personnel file for each employee, trainee, student, and volunteer, and for each contract staff person who provides or supervises client care. The file must include:

- (a) the results of a tuberculin test upon employment and annually thereafter;
- (b) a criminal justice information network (CJIN) background information check on each staff person having direct contact with clients;
- (c) evidence that all staff have current and valid certification in cardio-pulmonary resuscitation (CPR) and in first aid techniques;
- (d) an annual performance review that is:
  - (i) conducted by the appropriate supervisor of each staff member; and
  - (ii) signed and dated by the employee and supervisor.
- (e) copies of registration or licensure applicable to employee's job duties;
- (f) evidence of an independent contractor status and contractual agreements for interns and contracted personal;
- (g) a signed statement acknowledging the employee has been oriented and agrees to abide by confidentiality requirement to maintain confidentiality of client information;
- (h) resume or job application;
- (i) disciplinary actions and grievances; and

(j) a copy of a current job description, signed and dated by the employee and supervisor which includes:

- (i) job title;
- (ii) minimum qualifications for the position; and
- (iii) summary of duties and responsibilities.

AUTH: 50-5-103, 53-24-208, MCA

IMP: 50-5-101, 50-5-103, 53-24-208, MCA

NEW RULE VII REQUIREMENTS FOR TRAINING OR VOLUNTEER PROGRAMS (1) If programs participate in a trainee/intern practicum or have volunteers, they must have the following:

- (a) policies and practices assuring the safety of clients;
- (b) a description of the program and any limitations;
- (c) a description of how supervision will be provided;
- (d) policies and practices to assure volunteers meet the qualifications of the position to which the person is assigned; and
- (e) a written agreement with each educational institution using the treatment agency as a setting for student practice to include but not limited to:
  - (i) a description of the nature and scope of student activity at the treatment settings; and
  - (ii) a plan for supervision of student activities.

AUTH: 50-5-103, 53-24-208, MCA

IMP: 50-5-101, 50-5-103, 53-24-208, MCA

NEW RULE VIII CLINICAL REQUIREMENTS (1) At a minimum, the program is required to have written policies and procedures including supporting evidence of implementation on each of the following areas:

- (a) staffing requirements to include assurance there is an identified clinical supervisor who is a licensed addiction counselor and oversees the implementation of services to assure quality and appropriateness of care rendered to clients;
- (b) critical population requirements to include how pregnant woman resources and referral options will be made available so staff can make referrals as indicated by client needs including:
  - (i) ensuring a pregnant woman who is not seen by a private physician, physician assistant-certified, nurse practitioner, or advanced practice registered nurse is referred to one of these providers for determination of prenatal care needs; and
  - (ii) discussing pregnancy specific issues and resources.
- (c) therapy service requirements to include but not limited to:
  - (i) ensuring utilization of the DSM and the ASAM admission, continued stay, and discharge criteria for patient placement decisions in the initial and the ongoing assessment of the client throughout the course of treatment;
  - (ii) ensuring a person needing detoxification will be immediately referred to a detoxification provider, if available, unless the person needs acute care in a hospital; and

- (iii) limitations and requirements of group counseling sessions to include client/staff appropriate for the level of care being rendered.
- (d) clinical policies addressing:
  - (i) the assignment of work to a client by a licensed addiction counselor when the assignment is part of the treatment program and has therapeutic value;
  - (ii) the use of self-help groups;
  - (iii) arranging for medical consultation when clinically needed;
  - (iv) arranging for psychiatric consultation when clinically indicated;
  - (v) how laboratory testing is to be done including but not limited to:
    - (A) testing methods (urine, saliva, blood, breath, etc.); and
    - (B) collection and storage.
  - (vi) how drug and alcohol screening testing is to be done including but not limited to:
    - (A) a guide how testing is used as part of the therapeutic process in a nonpunitive manner;
    - (B) requirements to ensure the use of drug testing becomes part of the clients treatment plan; and
    - (C) client refusal to submit for testing and confirmation testing.
  - (e) policies addressing a facility's ability to provide dual diagnosis services to include at a minimum the following:
    - (i) mental health screening; and
    - (ii) procedures to assure mental health treatment if identified as a co-occurring client.
    - (f) a description of services showing there are arrangements in place for coordination and collaboration to provide services with the following, at a minimum, if not provided on-site:
      - (i) mental health services;
      - (ii) pregnancy services;
      - (iii) human immunodeficiency virus (HIV)/acquired immune deficiency syndrome (AIDS) services;
      - (iv) tuberculosis (TB) services;
      - (v) Hepatitis B and C services; and
      - (vi) sexually transmitted diseases treatment services.
    - (g) case management services policies and procedures provided in conjunction with or as part of the client's substance use disorder treatment and recovery;
    - (h) treatment planning process policies and procedures including but not limited to:
      - (i) how a treatment plan will be jointly developed with the client and the staff who has responsibility for the client;
      - (ii) assurance the treatment plan is initiated by the third contact visit for outpatient services and within three days of admission for residential services;
      - (iii) a provision for review and signature by the client and the staff person providing treatment services to the client;
      - (iv) documentation of regular reviews of the treatment plan with the client in the progress notes;

- (v) having measurable objectives and therapeutic interventions with target dates appropriate to the client's clinical needs;
- (vi) the clinical problems identified in the client's biopsychosocial assessment;
- (vii) when clinically appropriate, implementing a targeted case management plan;
- (viii) the engagement or disengagement and documentation of family members and significant others involvement and participation in the treatment process including but not limited to:
  - (A) offering family sessions and regularly scheduled group and educational activities for family members and significant others; and
  - (B) how clinical decisions are made and documented regarding the need to involve or not to involve the family and significant others in the treatment process.
- (ix) how the facility will conduct reviews as part of a multidisciplinary staffing and how documentation in the client record will reflect all staff who participated in the review;
- (x) documenting patient response to treatment and achievement of the treatment plan objectives in the progress notes; and
- (xi) a policy to assure the client has a continuing care plan prior to discharge which at a minimum addresses:
  - (A) support group recommendations;
  - (B) continuing care service provider's contact name, contact number, and initial appointment;
  - (C) healthcare and/or medication follow-up; and
  - (D) goals for continuing care.

AUTH: 50-5-103, 53-24-208, MCA

IMP: 50-5-101, 50-5-103, 53-24-207, 53-24-208, 76-2-411, MCA

NEW RULE IX CLIENT RIGHTS POLICIES AND PROCEDURES (1) At a minimum the program is required to have written policies and procedures including supporting evidence of implementation of each of the following items:

- (a) clients are admitted to treatment without regard to race, color, creed, national origin, religion, sex, sexual orientation, age, or disability, except for bona fide program criteria;
- (b) clients are reasonably accommodated in case of sensory or physical disability, limited ability to communicate, limited English proficiency, or cultural differences;
- (c) clients are treated in a manner sensitive to individual needs and which promote dignity and self-respect;
- (d) all clinical and personal information is treated in accordance with state and federal confidentiality regulations;
- (e) clients have the opportunity to review their own treatment records in the presence of the administrator or designee;
- (f) clients are fully informed of fees charged, including fees for copying records to verify treatment and methods of payment available;

(g) clients are protected from abuse, harassment, and exploitation by staff or from other clients who are on agency premises;

(h) clients will receive a copy of client grievance procedures describing the submission and disposition of complaints by client and right to appeal without threat of reprisal;

(i) client consent must be obtained for each release of information to any other person or entity. This consent for release of information must include:

(i) name of the consenting client;

(ii) name or designation of the provider authorized to make the disclosure;

(iii) name of the person or organization to whom the information is to be released;

(iv) nature and limits of the information to be released;

(v) purpose of the disclosure, as specific as possible;

(vi) specification of the date or event on which the consent expires;

(vii) statement that the consent can be revoked at any time, except to the extent that action has been taken in reliance on it;

(viii) signature of the client or parent, guardian, or authorized representative, when required, and the date; and

(ix) a statement prohibiting further disclosure unless expressly permitted by the written consent of the person to whom it pertains.

(j) in the event of a program closure or treatment service cancellation, each client must be:

(i) given 30 days notice;

(ii) assisted with relocation into similar treatment services;

(iii) given refunds to which the person is entitled; and

(iv) advised how to access records to which the person is entitled.

(k) the provider must post a copy of clients' rights in a conspicuous place in the facility accessible to clients and staff; and

(l) client orientation to program rules, responsibilities, and any sanctions that may be imposed for failure to comply with the program's rules.

AUTH: 50-5-103, 53-24-208, MCA

IMP: 50-5-101, 50-5-103, 53-24-306, 76-2-411, MCA

NEW RULE X CLIENT RECORD MAINTENANCE AND SYSTEM REQUIREMENTS (1) Each service provider must have a comprehensive client record system maintained in accord with recognized principles of health record management. The service provider must ensure:

(a) a designated individual is responsible for the record system;

(b) a secure storage system which protects active and inactive files from damage;

(c) client record policies and procedures addressing:

(i) who has access to records;

(ii) content of active and inactive client records;

(iii) a systematic method of identifying and filing individual client records so each can be readily retrieved;

- (iv) assurance each client record is complete and authenticated by the person providing the observation, evaluation, or service;
- (v) retention of client records for a minimum of six years three months after the discharge or transfer of the client; and
- (vi) procedures for destruction of client records.
- (d) procedures for maintaining electronic client records (if applicable).
- (2) In case of an agency closure, the provider closing its treatment agency must arrange for continued management of all client records. The closing provider must notify the department in writing of the mailing and street address where records will be stored and specify the person managing the records. The closing provider may:
  - (a) continue to manage records and give assurance they will respond to authorized requests for copies of client records within a reasonable period of time;
  - (b) transfer records of clients who have given written consent to another certified provider;
  - (c) enter into a service organization agreement with a state approved chemical dependency provider to store and manage records, when the outgoing provider will no longer be a business and provide a copy of the agreement to the department.

AUTH: 50-5-103, 53-24-208, MCA

IMP: 50-5-101, 50-5-103, 53-24-306, 76-2-411, MCA

- NEW RULE XI CLIENT RECORD CONTENT REQUIREMENTS (1) The service provider must ensure client record content includes:
- (a) demographic information;
  - (b) a substance related disorder diagnosis and supporting documentation for diagnosis;
  - (c) biopsychosocial assessment including diagnosis showing the rationale for admission;
  - (d) documentation the client was informed of federal confidentiality requirements and received a copy of the client notice;
  - (e) assurance all clients have an orientation to the program's treatment services, infectious disease information, and disaster plan;
  - (f) voluntary consent to treatment signed and dated by the client or legal guardian;
  - (g) treatment plan;
  - (h) progress notes;
  - (i) discharge summary;
  - (j) medication records, if applicable;
  - (k) laboratory reports, if applicable;
  - (l) properly completed authorizations for release of information;
  - (m) copies of all correspondence related to the client, including any court orders and reports of noncompliance; and
  - (n) documentation showing client received a copy of client grievance policies and procedures.

AUTH: 50-5-103, 53-24-208, MCA

IMP: 50-5-101, 50-5-103, 53-24-208, 53-24-209, 76-2-411, MCA

NEW RULE XII QUALITY MANAGEMENT REQUIREMENTS (1) The program shall have a quality management committee representative of administration and staff.

(2) The quality management committee is responsible for:

- (a) developing a written plan for a continuous quality improvement program organization wide;
- (b) implementing the quality improvement plan and monitoring the quality and appropriateness of services;
- (c) meeting at least on a quarterly basis;
- (d) identifying problems, taking corrective action as indicated, and monitoring results of those actions; and
- (e) at least annually, reviewing and updating the quality improvement plan.

(3) The quality improvement program must at a minimum include but not be limited to:

- (a) administrative processes;
- (b) fiscal processes;
- (c) clinical services; and
- (d) client outcomes.

AUTH: 53-24-208, MCA

IMP: 50-5-101, 50-5-103, 53-24-208, 76-2-411, MCA

NEW RULE XIII REQUIRED OUTCOME MEASURES (1) At a minimum, the quality management committee must monitor:

- (a) services to critical populations including priority in the following order:
  - (i) pregnant injecting drug users;
  - (ii) pregnant substance abusers.
- (b) injecting drug users and those individuals infected with the etiologic agent for AIDS;
- (c) women with dependent children;
- (d) clients receiving Supplemental Security Income (SSI) or Social Security Disability Insurance (SSDI);
- (e) homeless clients; and
- (f) aging clients.

(2) Outcome evaluations shall include but not be limited to the following measures:

- (a) abstinence and reduction of the use of alcohol and other drugs;
- (b) decreased involvement with the criminal justice system;
- (c) stable employment, school, or training;
- (d) safe stable housing;
- (e) social connectedness and supports;
- (f) retention in treatment and early unplanned discharges;
- (g) increased access to treatment services;
- (h) clients perception of care;

- (i) cost effectiveness of the program; and
- (j) use of evidence-based practices.
- (3) Programs must collect outcome data at:
  - (a) admission and discharge; and
  - (b) six months and one year after discharge.
  - (i) If unsuccessful in follow up for the six-month and one-year measurement, documentation must be provided as to reason for no follow up data.

AUTH: 50-5-103, 53-24-208, MCA

IMP: 50-5-101, 50-5-103, 53-24-208, 76-2-411, MCA

NEW RULE XIV FACILITY REQUIREMENTS (1) The administrator is responsible for the overall management of the program facility(s).

(2) Building requirements include but are not limited to the following:

(a) facilities must be accessible to a person with a physical disability. If a facility is unable to provide access to an individual with a physical disability, the program must make arrangements for a referral or other accommodations to assure the person receives appropriate services;

(b) facilities must meet all applicable building and fire codes and be approved by the authority having jurisdiction to determine if the appropriate building and fire codes are met;

(c) a patient or resident may not be admitted, housed, treated, or cared for in an addition or altered area until the area is inspected and approved by the department or in new construction until licensed by the department;

(d) facilities must be constructed and maintained in a manner to prevent entrance and infestation by rats, mice, insects, flies, or other vermin; and

(e) providers must ensure each facility, exterior grounds, and component parts such as but not limited to fences, equipments, outbuildings, and landscape items are safe, free of hazards, clean, and maintained in good repair.

(3) Water supply, sewage, and waste disposal requirements include but are not limited to the following:

(a) facilities must meet water and sewer system requirements of the municipality or jurisdiction in which it is located;

(b) hot water temperatures supplied to hand washing and bathing facilities must not exceed 120°F;

(c) garbage and refuse must be kept in durable, easily cleanable, insect and rodent proof containers that do not leak and do not absorb liquids. Plastic bags and wet strength paper bags may be used to line these containers;

(d) refuse and recycling containers stored outside the residence, dumpsters, compactors, and compactor systems must be easily cleanable, must be provided with tight-fitting lids, doors, or covers, and shall be kept covered when not in actual use;

(e) containers designed with drains must have drain plugs in place at all times, except during cleaning; and

(f) garbage and refuse must be disposed of daily and removed from the property at least weekly to prevent the development of odor and attraction of insects and rodents.

- (4) Physical environmental requirements include but are not limited to the following:
  - (a) deodorants may not be used for odor control in lieu of proper ventilation;
  - (b) all operable windows must have a screen in good repair;
  - (c) a minimum of 10 foot-candles of light must be available in all hallways and bathrooms;
  - (d) each room or area occupied by children under age five or residents with unsafe behaviors must have tamper resistant electrical outlets;
  - (e) facilities must have adequate private space for personal consultation with a client, staff charting, and therapeutic and social activities, as appropriate;
  - (f) all electrical, mechanical, plumbing, fire protection, heating, and sewage disposal systems must be kept in operational condition;
  - (g) each facility must have an annual inspection by the local fire authority;
  - (h) each facility must have floors covered with an easily cleanable surface;and
  - (i) all walls and ceilings, including doors, windows, skylights, and similar closures must be maintained in good repair.
- (5) Laundry requirements include but are not limited to the following:
  - (a) the program must ensure that laundry facilities, equipment, and laundry handling and processes will ensure linen and laundered items provided to residents are clean, in good repair, and adequate to meet the needs of residents.
- (6) Bedding and linen requirements include but are not limited to the following:
  - (a) the program must ensure bedding and linen provided to residents are clean, in good repair, and adequate to meet the needs of residents including but not limited to:
    - (i) assuring each resident has a bed, a moisture-proof mattress cover, and mattress pad in good condition; and
    - (ii) assuring the facility or resident keep a supply of:
      - (A) clean bed linen on hand sufficient to change beds often enough to keep them clean, dry, and free from odors;
      - (B) clean individual towels and washcloths; and
      - (C) adequate blankets for each resident to maintain warmth while sleeping.
- (7) Bathroom requirements include but are not limited to the following:
  - (a) the provider must ensure private or common-use toilet rooms and bathrooms are available to residents including the provision for:
    - (i) a minimum of one toilet and hand washing sink for every four residents, or fraction thereof;
    - (ii) a sink is located in or immediately accessible to each toilet room;
    - (iii) a minimum of one bathing fixture for every six residents;
    - (iv) hand cleansing soap or detergent must be available at each lavatory in the facility. The use of a communal bar soap is prohibited;
    - (v) provision for individual towels must be available at each lavatory; and
    - (vi) a waste receptacle must be located near each lavatory.
- (8) Bedroom requirements include but are not limited to the following:

(a) the program shall ensure residents have an accessible, clean, well-maintained room with sufficient space and light for sleeping and personal activities including but not limited to ensuring:

(i) bedrooms are at least 60 square feet per person in a multiple person room except where construction or cost would be prohibitive;

(ii) direct access to a hallway, living room, lounge, the outside, or other common use area without going through a laundry or utility area, a bath or toilet room, or another resident's bedroom;

(iii) each bedroom has one operable outside window with visual privacy; and

(iv) each bedroom is equipped with:

(A) a bed;

(B) one or more noncombustible waste containers; and

(C) a wardrobe or dresser for storing a reasonable amount of clothing.

(9) Disaster plan requirements include but are not limited to the following:

(a) each facility must have an evacuation and disaster plan;

(b) there must be a fire evacuation plan for use in the event of a fire, addressing:

(i) a procedure for accounting for all residents and staff during and after the emergency and the meeting location after evacuation; and

(ii) making provisions for emergency medications, food, water, clothing, shelter, heat, and power.

(c) the posting of evacuation routes on the premises where services are being provided in a place where they can be easily viewed by clients, participants, and staff; and

(d) the program must conduct and document a drill of the fire and evacuation plan at least once a year.

(10) Infectious disease prevention and control requirements include but are not limited to the following:

(a) a program shall develop and follow a written infection control plan for both staff and clients, including but not limited to:

(i) implementation of universal precautions for communicable diseases; and

(ii) provision for patient and staff education necessary to implement infection control policies and procedures.

(11) Emergency procedure requirements include but are not limited to the following:

(a) facilities must have written procedures to be followed in the event of a medical or other emergency;

(b) poison control and emergency contacts must be posted at the telephone; and

(c) facilities must have a first aid kit readily available.

(12) Facility maintenance requirements include but are not limited to the following:

(a) each facility shall have evidence of a maintenance program and procedures that are utilized to keep the building and equipment in good repair and free from hazards;

(b) facilities must assure adequate housekeeping services, procedures, and or supplies are available to assure a clean, safe, and sanitary environment in all areas of the facility;

(c) facilities must be kept clean and free of odors; and

(d) facilities must use a dishwasher or use hot soapy water for hand washed utensils, dishes, and equipment.

(13) Pest control requirements include but are not limited to the following:

(a) effective measures intended to minimize the presence of rodents, flies, cockroaches, and other vermin on the premises;

(b) measures to ensure containers of poisonous and toxic materials be stored safely and bear a legible manufactures label or Material Safety Data (MSD) sheets; and

(c) maintenance and cleaning tools must be maintained and stored in a safe and orderly manner.

(14) Food and nutrition requirements include but are not limited to the following:

(a) the program must ensure resident food preparation, handling, and storage is adequate to meet the needs of residents including but not limited to the following:

(i) food must be stored in a clean, dry location where it is not exposed to contamination;

(ii) conveniently located refrigeration facilities or effectively insulated facilities must be provided to assure maintenance of potentially hazardous food;

(iii) food that isn't stored in original containers must be dated, labeled, and covered;

(iv) food cannot be stored on the floor;

(v) refrigerated foods must be maintained at a temperature of 41 to 44°F;

(vi) frozen foods must be kept frozen;

(vii) raw fruits and vegetables must be thoroughly washed in potable water to remove soil and other contaminants before being cut, combined with other ingredients, cooked, served, or offered for human consumption in ready-to-eat form;

(viii) all home canned products are prohibited;

(ix) sinks used for preparation of foods must be cleaned and sanitized;

(x) food preparers shall wash their hands before engaging in food preparation, and during preparation as often as necessary to remove soil and contamination, and to prevent cross contamination when changing tasks; and

(xi) food preparers and other authorized persons shall maintain a high degree of personal cleanliness and shall conform to good hygiene practices during food preparation.

(15) Pet management requirements include but are not limited to the following:

(a) facilities are allowed to have pets in residence based upon facility policy and ensuring all animals are current on vaccinations.

AUTH: 50-5-103, 53-24-208, MCA

IMP: 50-5-101, 50-5-103, 53-24-208, 76-2-411, MCA

NEW RULE XV INPATIENT SERVICE REQUIREMENTS (1) To be licensed to provide freestanding adult and adolescent medically monitored intensive inpatient ASAM Level III.7 substance related disorders treatment services, a provider must meet the following:

(a) staffing requirements include but are not limited to the following:

(i) a physician, nurse practitioner, or physician assistant licensed under Title 37, MCA, to conduct a physical examination and screening of a client within 24 hours of the person's admission to a service to identify health problems and screen for communicable diseases;

(ii) a nurse licensed under Title 37, MCA, on-site or on call 24 hours a day, seven days a week; and

(iii) a physician licensed under Title 37, MCA, available to provide medical consultation either as an employee of the service or through written agreement.

(b) service requirements include but are not limited to the following:

(i) family services are made available;

(ii) direct affiliation with an acute care hospital; and

(iii) daily scheduled professional services; such services must include and are not limited to medical services and medication management, individual, group, family, and educational services.

(c) if community-based day treatment services as defined in ASAM are provided, there must be access to services provided under ASAM Level III.7.

(2) To be licensed to provide community-based residential program for adults and adolescents with ASAM Level III.5 substance use disorders, a provider must meet the following:

(a) staffing requirements include but are not limited to the following:

(i) a licensed physician, physician assistant, nurse practitioner, or registered nurse as defined as a licensed health care professional in 50-5-101, MCA, to conduct an assessment and evaluation of a client within 72 hours of admission to service; and

(ii) a nurse licensed under Title 37, MCA, on-site, on call, or access to medical services 24 hours a day, seven days a week.

(b) service requirements including the following program policies must address:

(i) how the programs treat persons with substance use disorders and related problems;

(ii) admission criteria to include service limitations; and

(iii) daily scheduled professional services, such services may include but not be limited to medical services, nursing services, individual and group counseling, psychotherapy, family therapy, educational groups, occupational and recreational therapies, art, music, or movement therapies, physical therapy, and vocational rehabilitation activities.

AUTH: 50-5-103, 53-24-208, MCA

IMP: 50-5-101, 50-5-103, 53-24-208, 53-24-209, 76-2-411, MCA

NEW RULE XVI COMMUNITY-BASED SOCIAL DETOXIFICATION PROGRAM REQUIREMENTS (1) The most intensive level of care, outside of an

acute care hospital, is defined as medically monitored care to clients whose withdrawal symptoms are sufficiently severe to require 24-hour inpatient care with observation, monitoring, and treatment available and delivered by a multidisciplinary team including 24-hour nursing care under the supervision of a Montana licensed physician.

(2) To be licensed to provide medically monitored detoxification (ASAM Level III.7), a provider must meet the following:

(a) facility requirements include but are not limited to the following:

(i) the facility shall be equipped for clients who are impaired due to substances and who require safety rails on beds, handrails on showers, and other related equipment to assure the safety of impaired clients; and

(ii) oxygen or other emergency equipment according to the physician-prescribed protocols for responding to client health emergencies.

(b) staffing requirements include but are not limited to the following:

(i) a physician licensed under Title 37, MCA, available on call 24 hours a day, 7 days a week to evaluate clients and prescribe medications;

(ii) staff available in sufficient numbers and trained to respond to substance-related and co-occurring disorders of admitted clients;

(iii) a registered nurse licensed under Title 37, MCA, who is responsible for the supervision of nursing staff and the administration of detox protocols; and

(iv) support staff such as licensed practical nurses, certified nurse assistants, rehabilitation aides etc. in sufficient numbers to assure the safety of clients.

(c) service requirements include but are not limited to the following:

(i) a written agreement with a state approved chemical dependency treatment facility to provide ongoing care following client discharge from the detoxification service;

(ii) there shall be a discharge note that addresses the referral and service needs of the client for follow-up treatment or care;

(iii) medication administration and on-going assessment of the client which are documented in the client record;

(iv) written medication orders specifying the name, dose, and route of administration signed by the prescribing physician;

(v) meals and snacks in sufficient quantities to assure the nutritional needs of the clients are met; and

(vi) written policies and procedures specifying how the facility will provide for the transfer of patients when indicated, to an acute care hospital.

(3) To be licensed to provide community-based social detoxification as defined as ASAM Level III-D, III.2-D, and III.7-D for individuals with substance use disorders as defined by ASAM, a provider must meet the following:

(a) facility requirements include but are not limited to the following:

(i) the facility shall be equipped for clients who are impaired due to substances and who require safety rails on beds, handrails on showers, and other related equipment to assure the safety of impaired clients.

(b) staffing requirements include but are not limited to the following:

(i) physician approved protocols for the monitoring of clients in withdrawal including when and under what circumstances clients should be transferred to a health care facility;

- (ii) a written agreement with the health care facility or physician providing for emergency services when needed;
  - (iii) written procedures specifying how staff will respond to emergencies and for the transfer of medically unstable patients;
  - (iv) sufficient staff on duty trained in CPR and the detox protocols on each shift to be followed to assure clients safe withdrawal from substances; and
  - (v) if medications are provided, there is a current prescription in the client's name and staff are trained in medication administration procedures which are documented in policies and procedures.
- (c) service requirements include but are not limited to the following:
- (i) an initial physical examination by a qualified professional that assures the client can be safely detoxified in a nonmedical setting and documented in the client record;
  - (ii) regular vital signs are taken and recorded by staff trained to recognize symptoms indicating the client is becoming physically unstable;
  - (iii) meals and snacks in sufficient quantities to meet the nutritional needs of the client;
  - (iv) there shall be a written discharge plan that assures necessary referrals and continuing treatment services;
  - (v) all entries in the client record will be signed and dated by staff providing the service; and
  - (vi) a written agreement with an approved addiction treatment provider assuring acceptance of client for treatment upon discharge from the detoxification service.

AUTH: 50-5-103, 53-24-208, MCA

IMP: 50-5-101, 50-5-103, 53-24-208, 53-24-209, 76-2-411, MCA

NEW RULE XVII HALFWAY HOUSE COMMUNITY-BASED RESIDENTIAL PROGRAM REQUIREMENTS (1) Halfway house community-based residential programs consist of the following program settings:

- (a) halfway house community-based parent and children residential homes (ASAM Level III.3 high intensity treatment);
- (b) halfway house community-based single gender homes (ASAM Level III.5 high intensity treatment);
- (c) halfway house community-based single gender residential homes (ASAM Level III.3 medium intensity treatment); and
- (d) halfway house community-based single gender residential homes (ASAM Level III.1 low intensity treatment). This treatment level is also known as sober housing.

AUTH: 53-24-208, MCA

IMP: 50-5-101, 50-5-103, 53-24-208, 53-24-209, 76-2-411, MCA

NEW RULE XVIII HALFWAY HOUSE COMMUNITY-BASED PARENT AND CHILDREN RESIDENTIAL HOMES (ASAM LEVEL III.3 – MEDIUM INTENSITY)

(1) The community-based parent and children residential homes for individuals with substance use disorders serve parent(s) with dependent child(ren) who are in need of 24-hour supportive housing while undergoing on- or off-site treatment services for substance use disorder and life skills training for independent living. To be licensed to provide community-based parent and children residential homes for individuals with substance use disorders ASAM Level III.3 medium intensity treatment, a provider must meet the following:

(a) 24-hour staffing patterns to afford sufficient security to assure the safety of residents, staffing requirements may include but are not limited to:

- (i) licensed addiction counselor (LAC);
- (ii) individuals trained in managing co-occurring disorders;
- (iii) case managers that have a minimum of two years of higher education and orientation to the facilities policies and procedures; and
- (iv) rehabilitation aides that have a minimum of a high school diploma or GED and orientation to the facilities policies and procedures.

(b) service requirements including but not limited to the following program policies must address:

- (i) the delivery of ASAM Level III.3 treatment services either on- or off-site;
- (ii) admission criteria indicating individuals appropriate for these settings;
- (iii) how the treatment needs of both the parent(s) and child(ren) are identified and addressed;
- (iv) how life skills training is provided as part of the daily living regimen and includes a curriculum to address independent living skills, vocational skills, and parenting skills;
- (v) how services are coordinated to meet special needs of this population such as childcare, legal services, medical care, and transportation;
- (vi) how age appropriate services are made available for children as needed;
- (vii) assurance of a single gender of parent will be living at the facility;

and

- (viii) assurance for safe visitation.

AUTH: 50-5-103, 53-24-208, MCA

IMP: 50-5-101, 50-5-103, 53-24-208, 53-24-209, 76-2-411, MCA

NEW RULE XIX HALFWAY HOUSE SINGLE GENDER RESIDENTIAL HOMES (ASAM LEVEL III.5 – HIGH INTENSITY) (1) The community-based single gender residential homes for individuals with substance use disorders serve individuals who are in need of 24-hour supportive housing while undergoing on- or off-site treatment services for substance use disorder and life skills training for independent living. To be licensed to provide community-based single gender residential homes for individuals with substance use disorders ASAM Level III.5 high intensity treatment, a provider must meet the following:

(a) 24-hour staffing patterns to afford sufficient security to assure the safety of residents, staffing requirements may include but are not limited to:

- (i) licensed addiction counselor (LAC);
- (ii) individuals trained in managing co-occurring disorders;

(iii) case managers that have a minimum of two years of higher education and orientation to the facilities policies and procedures; and

(iv) rehabilitation aides that have a minimum of a high school diploma or GED and orientation to the facilities policies and procedures.

(b) service requirements including but not limited to the following program policies must address:

(i) the delivery of ASAM Level III.5 treatment services either on- or off-site;

(ii) admission criteria indicating individuals appropriate for these settings;

(iii) how the treatment needs are identified and addressed;

(iv) how life skills training is provided as part of the daily living regimen and includes a curriculum to address independent living skills and vocational skills;

(v) how services are coordinated to meet special needs of this population such as legal services, medical care, and transportation; and

(vi) assurance for safe visitation.

AUTH: 50-5-103, 53-24-208, MCA

IMP: 50-5-101, 50-5-103, 53-24-208, 53-24-209, 76-2-411, MCA

NEW RULE XX HALFWAY HOUSE SINGLE GENDER COMMUNITY-BASED RESIDENTIAL HOMES (ASAM LEVEL III.3 – MEDIUM INTENSITY)

(1) Community-based single gender residential homes for individuals with substance use disorders may be located in residential neighborhoods, comparable to other homes in the neighborhood, and shall reflect the environment of a home. To be licensed to provide community-based residential homes for individuals with substance use disorders ASAM Level III.3 medium intensity treatment, a provider must meet the following:

(a) staffing or security measures sufficient to assure the safety of residents, staffing requirements may include but are not limited to:

(i) licensed addiction counselor (LAC);

(ii) individuals trained in managing co-occurring disorders;

(iii) case managers that have a minimum of two years of higher education and orientation to the facilities policies and procedures;

(iv) rehabilitation aides that have a minimum of a high school diploma or GED and orientation to the facilities policies and procedures.

(b) service requirements including but not limited to the following program policies must address:

(i) these homes as transitional versus permanent living environments and how they provide interim supports and services for persons with substance use disorders and related problems;

(ii) admission criteria indicating that the individual is appropriate for these settings;

(iii) define the criteria for the length of stay in the facilities;

(iv) how clinical treatment is provided either on- or off-site; and

(v) how life skills training including vocational services is incorporated into daily residential living to prepare residents to assume permanent housing and independent living.

AUTH: 50-5-103, 53-24-208, MCA

IMP: 50-5-101, 50-5-103, 53-24-208, 53-24-209, 76-2-411, MCA

NEW RULE XXI HALFWAY HOUSE COMMUNITY-BASED SINGLE GENDER RESIDENTIAL HOMES (ASAM LEVEL III.1 – LOW INTENSITY) (1) The single gender facility functions as a safe, alcohol and drug-free environment for individuals in early stages of recovery from substance use disorders or individuals who are transitioning to less intensive levels of treatment services and in need of such housing. To be licensed to provide community-based residential sober housing homes for individuals with substance use disorders ASAM Level III.1 low intensity treatment, a provider must meet the following:

(a) staffing or security measures sufficient to assure the safety of residents, staffing requirements may include but are not limited to:

(i) licensed addiction counselor (LAC);

(ii) individuals trained in managing co-occurring disorders;

(iii) case managers that have a minimum of two years of higher education and orientation to the facilities policies and procedures; and

(iv) rehabilitation aides that have a minimum of a high school diploma or GED and orientation to the facilities policies and procedures.

(b) service requirements including but not limited to the following program policies must address:

(i) admission and length of stay criteria defining individuals appropriate for this setting;

(ii) how all treatment and supportive services are generally off-site in community-based agencies; and

(iii) assurance the program is designed and focused on helping individuals with limited life skills and generally focus on helping individuals achieve employment, maintain a daily schedule of work, support group meetings, assigned treatment sessions, and learning how to cooperate and assume responsibility in a community setting.

AUTH: 50-5-103, 53-24-208, MCA

IMP: 50-5-101, 50-5-103, 53-24-208, 53-24-209, 76-2-411, MCA

4. The department proposes to repeal the following rules:

37.27.128 DETOXIFICATION (EMERGENCY CARE) COMPONENT REQUIREMENTS, is found on page 37-5879 of the Administrative Rules of Montana.

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

IMP: 53-24-208, MCA

37.27.129 INPATIENT - HOSPITAL COMPONENT REQUIREMENTS, is found on page 37-5887 of the Administrative Rules of Montana.

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

IMP: 53-24-208, MCA

37.27.130 INPATIENT - FREE STANDING CARE COMPONENT REQUIREMENTS, is found on page 37-5897 of the Administrative Rules of Montana.

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

IMP: 53-24-208, MCA

37.27.135 INTERMEDIATE CARE (TRANSITIONAL LIVING) COMPONENT REQUIREMENTS, is found on page 37-5909 of the Administrative Rules of Montana.

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

IMP: 53-24-208, MCA

5. The Department of Public Health and Human Services (the department) is proposing the adoption of New Rules I through XXI because there are currently no rules addressing the licensing requirements for community-based substance use disorder inpatient and residential halfway house treatment facilities. These proposed new rules were developed through a collaborative effort of the department's Quality Assurance Division and Addictive and Mental Disorders Division, and numerous community-based substance use disorder treatment providers.

The inpatient rules currently found in ARM 37.27.129 and 37.27.130 and the transitional living facility rule in ARM 37.27.135 were written over 25 years ago and are inadequate to address the current level of services needed in halfway house treatment facilities. The group that developed these rules agreed that ARM 37.27.135 did not adequately address all American Society of Addiction Medicine (ASAM) levels of residential treatment, therefore the department is proposing adopting New Rules I through XXI and repealing ARM 37.27.128, 37.27.129, 37.27.130, and 37.27.135.

The department's Addictive and Mental Disorders Division has been and is currently contracting with all types of facilities that provide the services these proposed rules address. Community-based substance use disorder residential house treatment facilities currently have no administrative rules to follow, only contract language to address what rules should address. Therefore, these rules are necessary to direct licensees and the department in providing appropriate regulation for community-based substance use disorder inpatient and residential house the treatment facilities.

Previously, there was one rule to address transitional living facilities located in ARM 37.27.135. It did not give authority for licensure to the appropriate division within department. The proposed adopted new rules would fall under the authority of the health care facility statutes and authority found at 50-5-101(10), 50-5-103(1), and 76-2-411(3), MCA. Section 76-2-411(3), MCA identifies "a halfway house operated

in accordance with regulations of the Department of Public Health and Human Service for the rehabilitation of alcoholics or drug dependent persons" as a community residential facility. This section in conjunction with the previously mentioned sections is the basis for the authority to license these facilities under Title 50, chapter 5.

The proposed new rules are described below.

### New Rule I

Proposed New Rule I describes the purpose of the proposed new subchapter and contains instructions on interpretation when rules in the subchapter are in conflict with general rules on standards for health care facilities.

Proposed New Rule I also provides a current list of ASAM Residential Levels of Care as follows:

- A. Level III.1 Clinically Managed Low-Intensity Residential Treatment
- B. Level III.3 Clinically Managed Medium-Intensity Residential Treatment
- C. Level III.5 Clinically Managed High-Intensity Residential Treatment
- D. Level III.7 Medically Monitored Inpatient Treatment

This is a nationally accepted description and individual determination of treatment need. The proposed new rule identifies the types of facilities that would be able to provide services under these rules in halfway house settings.

### New Rule II

It is necessary to define terms that are used within these rules for purposes of common language and understanding throughout all of these rules. The general public and those providing and receiving treatment need to have a clear understanding of terminology used within the substance use disorder treatment field as well as specific descriptions/meanings of words used throughout these rules.

### New Rule III

This proposed new rule is needed to address general overall operational guidance. Facilities need to clearly define services to be provided, clientele eligibility, and any limitations in the operation of the facility before they can provide daily residential treatment services.

### New Rule III(1)(a) through (h)

These new rules are needed to address general overall operation guidelines for facility treatment and capacity to provide specific types of residential substance use disorder treatment services to those in need. This provides protection for both the

facility and those seeking services because facilities must clearly define daily operations and all services to be provided before being licensed.

New Rule III(1)(i)

The organization chart is important to clearly demonstrate to personnel, clients, and the public there is a structure in place in each facility to address safety, lines of authority and responsibility, and types of services that could be part of that inpatient and residential halfway house treatment facility.

New Rule III(1)(j)

Provisions for client confidentiality are necessary to provide both staff and client guidance to what type of information is protected and procedures to obtain or release client information. These provisions protect the client by not releasing confidential information obtained during the assessment and treatment process. These provisions protect facility staff by providing guidance regarding the client information that can or cannot be disclosed.

New Rule III(1)(k)

The client grievance procedure is necessary to inform clients of their rights while in residential treatment and the process to follow if they believe those rights are violated. This gives the facility the right to manage grievances and termination of services.

New Rule III(1)(l) through (n)

Reporting requirements are necessary to provide the state with adequate information regarding the operational status of the inpatient and residential halfway house treatment facility and any suspected harm clients may have experienced while in residential treatment.

New Rule III(1)(o)

Reporting requirements are necessary to provide the state with adequate information regarding any incident of child neglect or abuse or client abuse to ensure safety and protection of clients living in the inpatient and residential halfway house treatment facility.

New Rule III(1)(p)

The reference to the Montana Clean Indoor Air Act is necessary as many clients in residential treatment for alcohol or other drugs commonly use tobacco as a replacement or coping mechanism to their addiction for which they are being treated. Many residential facilities would not view themselves as a public facility therefore, this provision is necessary.

New Rule III(1)(q)

Addressing the handling of prescription drugs and over the counter drugs within the inpatient and residential halfway house treatment facility is needed to protect all clients. Many individuals addicted to other drugs may have an addiction to prescription drugs/over the counter drugs or may substitute available prescription drugs/over the counter drugs to meet their addiction needs. This requirement will also protect inpatient and residential halfway house treatment facility staff by clearly delineating procedures for handling prescription drug/over the counter drugs within the inpatient and residential halfway house treatment facility.

New Rule III(1)(r)

Transportation needs to be addressed by each inpatient and residential halfway house treatment facility in order to provide conditions to follow when clients can be transported by facility or staff's personal vehicles, when such services are available, and any associated conditions that may apply to the transportation.

New Rule IV

This proposed new rule is necessary because the inpatient and residential halfway house treatment facility may not necessarily have an on-site administrator but falls under the umbrella of a larger organization providing the same types of services. The proposed new rule will ensure the individual inpatient and residential halfway house treatment facility is provided with administrative oversight.

New Rule V

This proposed new rule is necessary to ensure inpatient and residential halfway house treatment facilities have qualified personnel providing services within each inpatient and residential halfway house treatment facility. Qualified and appropriately licensed/certified personnel are needed to protect clients within the facility during treatment services. The facility is also protected because they need to identify the qualified individuals to perform the treatment services within the inpatient and residential halfway house treatment facility.

New Rule VI

Personnel file requirements are necessary for the protection, health, and safety of clients being served within the inpatient and residential halfway house treatment facility. Staff files are protected for the same reasons as clients but additional protection is provided through staff evaluations, clearly delineated job duties, and understanding the facility orientation and rules. Confidentiality and security policy and procedures provide a standard of operating procedures for the facility.

New Rule VII

Many residential treatment facilities will use volunteers and/or individuals in training to become a professional in their field as part of treatment services. These rules provide guidance for residential treatment facilities to allow individuals, other than facility personnel, to appropriately participate in client services or treatment. These rules are needed to protect the health and safety of the clients within the inpatient and residential halfway house treatment facility by ensuring volunteers and/or individuals in training have received orientation and adequate supervision while working with clients. Volunteers and/or individuals in training are protected for the same reasons as clients but additional protection is provided through clearly delineated job duties and understanding the facility orientation and rules.

#### New Rule VIII

Proposed New Rule VIII is necessary to provide policy guidance in the basis of treatment protocols to follow, specific services and limitations of treatment to address, treatment planning process, and how treatment is reviewed for quality and necessity. This will protect the client because policies address the basis and necessity of treatment. The DSM and ASAM provide nationally accepted substance use disorder treatment protocols but the additional guidance provided within this rule addresses services that need to be identified/addressed to ensure a client receives individualized treatment services.

#### New Rule IX

Policies and procedures for client rights are necessary to provide policy guidance to facilities about the need and content for client rights. This proposed new rule identifies what types of rights or responsibilities are available to a client while participating in a treatment facility. When the client understands this information, the client will be able to properly focus on their treatment and be able to actively advocate for themselves if they believe their rights have been violated. This proposed new rule provides guidelines for staff treatment of clients, therefore protecting staff from inappropriately treating clients.

#### New Rule X

Proposed New Rule X provides policy guidance to residential treatment facilities regarding the collection, storage, and retention of client records, therefore protecting them by ensuring proper, secure handling of client documentation. This will protect the client by ensuring residential treatment facilities maintain records in a confidential manner and retain records for reference to treatment previously provided.

#### New Rule XI

Client record content requirements are necessary to provide a minimum standard of what type of information is required to complete a client record. This will protect the

residential facility by ensuring the facility documents treatment provided. The client is protected because the documentation provides a basis for diagnosis and treatment and actual treatment provided.

### New Rule XII

Quality management requirements provide guidance for a minimum amount of oversight and review of services being provided to individuals and facility operations. Continuous quality improvement can provide for a better quality of care. This protects the client because it ensures someone not providing direct treatment is reviewing the client's treatment process for appropriateness and outcomes. Quality improvement is a requirement of many funding sources.

### New Rule XIII

Required outcome measures provide a basis for any individual, department, or agency to review the quality of treatment. This proposed new rule provides the minimum measures for residential treatment facilities to collect, therefore providing documentation on clinical outcomes of each facility. These measures are federal national outcome measures required for any federal funds dedicated to addiction treatment. Federal standards are important as approximately 80% of treatment funding is provided through federal funds.

### New Rule XIV

Proposed New Rule XIV is necessary to ensure residential treatment facilities have physical settings that meet health and safety requirements within each inpatient and residential halfway house treatment facility. A safe and healthy environment is needed for protection of clients to allow him/her to focus on their treatment rather than their health and safety. The facility is also protected as a licensed facility because they must comply with minimum standards to support a safe and healthy environment so treatment services can be safely performed within the inpatient and residential halfway house treatment facility. The listed requirements are standard for any health care facility providing residential treatment services.

An inpatient and residential halfway house treatment facility may be under the jurisdiction of the local planning, zoning, and building codes. The local planning, zoning, and building code requirements are in addition to the requirements of this rule. This is necessary to ensure the safety of clients, staff, and the public by making sure the facility complies with local requirements for which the governing jurisdiction is capable of enforcing and protecting.

### New Rule XV

Inpatient service is a more complex treatment modality for alcohol and drug addictions. This proposed new rule provides minimum standards for required staffing, licensed practitioners, and other standardized procedures used in ASAM

Level III.7 and/or III.5 treatment services. These requirements are nationally accepted throughout the substance abuse treatment field and are prescriptive enough to ensure the protection and individual needs of the client are addressed and provided in a safe manner. Proposed New Rule XV also provides protection for the provider by requiring a minimum level of staffing to safely address the type of treatment needed by clients.

#### New Rule XVI

Community-based social detoxification treatment is focused on individuals who need to be supervised while going through withdrawal from alcohol or other drugs. This is a complex treatment modality used as a step down from a hospital setting. Proposed New Rule XVI provides minimum standards for required staffing, licensed practitioners, and other standardized procedures used in ASAM Level III.7. These requirements are nationally accepted throughout the substance abuse treatment field and are prescriptive enough to ensure the protection and individual needs for the detoxification of the client are addressed and provided in a safe manner. This proposed new rule provides protection to the provider as it outlines the minimum amount of staffing and policies needed to safely address social detoxification outside of a hospital setting.

#### New Rule XVII

Proposed New Rule I identifies the treatment levels of care. Proposed New Rule XVII provides a current list of what will constitute a halfway house community-based residential program. They are as follows:

- A. halfway house community-based parent and children residential homes (ASAM Level III.5)
- B. halfway house community-based single gender homes (ASAM Level III.5 – High Intensity)
- C. halfway house community-based single gender homes (ASAM Level III.3 - Medium Intensity)
- D. halfway house single gender sober housing (ASAM Level III.1 – low intensity)

This is a nationally accepted description and individual determination of treatment need. Proposed New Rule XVII identifies the types of facilities that would be able to provide services under these rules. It is necessary to identify the types of facilities eligible to provide services because it is not always appropriate to mix genders or expose family members to a specific level of care. Therefore, it is appropriate to identify the clientele to be served and the treatment level provided in a rule and then providing further descriptions about each in individual rules. This identifies for providers and clients the types of services and facilities available when accessing treatment.

#### New Rule XVIII

This is a complex treatment modality for alcohol and drug addictions of a parent who still has children usually under the age of 13 living with them. The complexity of treatment is still intensive but not as high as an inpatient setting of an ASAM III.7 or ASAM III.5. Proposed New Rule XVIII provides minimum standards for required staffing, licensed practitioners, and other standardized procedures used in ASAM III.3 treatment services for a parent with children. These requirements are nationally accepted throughout the substance abuse treatment field and are prescriptive enough to ensure the protection and individual needs of the client and his/her children are addressed and provided in a safe manner. This rule also provides protection for the provider by requiring a minimum level of staffing to safely address the type of treatment needed by clients and the children being served.

#### New Rule XIX

This is a complex treatment modality for alcohol and drug addictions of an individual in need of high complexity of treatment modality that is still intensive but not as high as an inpatient setting of an ASAM III.7. Proposed New Rule XIX provides minimum standards for required staffing, licensed practitioners, and other standardized procedures used in ASAM III.5 treatment services for the individual. These requirements are nationally accepted throughout the substance abuse treatment field and are prescriptive enough to ensure the protection and individual needs of the client are addressed and provided in a safe manner. Proposed New Rule XIX also provides protection for the provider by requiring a minimum level of staffing to safely address the type of treatment needed by the client. Evidence-based treatment practices have shown single gender residences are effective in achieving successful alcohol and drug treatment outcomes. Mixed gender residences often cause multiple treatment and safety issues for patients and facilities.

#### New Rule XX

This is a midlevel complex treatment modality for alcohol and drug addictions of an individual in need of a structured living and treatment regimen that is intensive but not as high as an ASAM III.5 home. Proposed New Rule XX provides minimum standards for required staffing, licensed practitioners, and other standardized procedures used in ASAM III.3 treatment services for the individual. These requirements are nationally accepted throughout the substance abuse treatment field and are prescriptive enough to ensure the protection and individual needs of the client are addressed and provided in a safe manner. Proposed New Rule XX also provides protection for the provider by requiring a minimum level of staffing to safely address the type of treatment needed by the client. Evidence-based treatment practices have shown single gender residences are effective in achieving successful alcohol and drug treatment outcomes. Mixed gender residences often cause multiple treatment and safety issues for patients and facilities.

#### New Rule XXI

This is a low-level residential treatment modality for alcohol and drug addictions of an individual in need of a structured treatment and living situation that is still needed for a successful treatment outcome but not as high as an ASAM III.3 home. Proposed New Rule XXI provides minimum standards for required staffing, licensed practitioners, and other standardized procedures used in ASAM III.1 treatment services for the individual. These requirements are nationally accepted throughout the substance abuse treatment field and are prescriptive enough to ensure the protection and individual needs of the client are addressed and provided in a safe manner. Proposed New Rule XXI also provides protection for the provider by requiring a minimum level of staffing to safely address the type of treatment needed by the client. Evidence-based treatment practices have shown single gender residences are effective in achieving successful alcohol and drug treatment outcomes. Mixed gender residences often cause multiple treatment and safety issues for patients and facilities.

The department is proposing to repeal ARM 37.27.128, 37.27.129, 37.27.130, and 37.27.135, because the rules are outdated and do not meet the treatment needs of clients obtaining services in halfway house settings.

The department considered proposing rules that did not incorporate the ASAM treatment levels but rejected this alternative because it would allow community-based substance use disorder inpatient and residential halfway house treatment facilities too much discretion in providing treatment. By using the treatment levels, continuity of care is established and maintained. Modifying existing rules was considered but rejected because the existing rules do not address the level of care requirements necessary for community-based substance use disorder inpatient and residential halfway house treatment facilities. Modifying existing rules would be more confusing to providers.

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: Rhonda Lesofski, 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 [dphhslegal@mt.gov](mailto:dphhslegal@mt.gov), and must be received no later than 5:00 p.m., October 21, 2010.

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 or may be made by completing a request form at any rules hearing held by the department.

9. An electronic copy of this proposal notice is available through the Secretary of State's web site at <http://sos.mt.gov/ARM/Register>. The Secretary of State strives to make the electronic copy of the notice conform to the official version of the notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the notice and the electronic version of the notice, only the official printed text will be considered. In addition, although the Secretary of State works to keep its web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems.

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

/s/ John Koch  
Rule Reviewer

/s/ Ann Whiting Sorrell  
Anna Whiting Sorrell, Director  
Public Health and Human Services

Certified to the Secretary of State September 13, 2010.

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

In the matter of the adoption New	)	NOTICE OF PUBLIC HEARING ON
Rules I through VII, amendment of	)	PROPOSED ADOPTION,
ARM 37.86.2206, 37.86.2207,	)	AMENDMENT, AND REPEAL
37.87.702, 37.87.703, 37.87.901, and	)	
37.87.903, and repeal of ARM	)	
37.86.2219 and 37.86.2221	)	
pertaining to provider requirements	)	
and reimbursement for therapeutic	)	
group homes (TGH), therapeutic	)	
family care (TFC), and therapeutic	)	
foster care (TFOC)	)	

TO: All Concerned Persons

1. On November 3, 2010, at 1:30 p.m., the Department of Public Health and Human Services 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 adoption, amendment, and repeal of the above-stated rules.

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 Department of Public Health and Human Services no later than 5:00 p.m. on October 25, 2010, to advise us of the nature of the accommodation that you need. Please contact Rhonda Lesofski, 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 dphhslegal@mt.gov.

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

NEW RULE I THERAPEUTIC GROUP HOME (TGH), PROVIDER REQUIREMENTS (1) The requirements in this subchapter are in addition to those requirements contained in rules generally applicable to Medicaid providers.

(2) Therapeutic group home (TGH) services may be provided only by a facility which is licensed as a TGH by the department in accordance with the provisions of Title 52, chapter 2, part 6, MCA, and found in [New Rules I through IV].

(3) TGH services must be provided to a youth in accordance with an individualized treatment plan developed and maintained as specified by licensure requirements and this subchapter.

(4) In addition to the clinical records required by TGH licensure rules, the provider must maintain the records required by ARM 37.85.414.

(5) As a condition of enrollment in the Montana Medicaid program, TGH providers must pay direct care workers (DCW) a minimum of \$8.50 per hour.

(a) "Direct care workers (DCW)" means an employee of a Medicaid enrolled provider, who is assigned to work directly with youth or in youth-specific activities for no less than 75% of their hours of employment. A DCW is primarily responsible for the implementation of the treatment goals of the youth. DCW does not include professional staff.

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

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

#### NEW RULE II THERAPEUTIC GROUP HOME (TGH), REIMBURSEMENT

(1) The reimbursement rate for the therapeutic and rehabilitative portion of TGH or TGH with extraordinary needs aide (ENA) services is the lesser of (1)(a) or (b):

(a) the amount specified in the department's Medicaid Mental Health Fee Schedule as adopted in ARM 37.97.901; or

(b) the provider's usual and customary charges.

(2) The therapeutic and rehabilitative portion of TGH services are therapeutic services defined as follows:

(a) "Therapeutic services" means the provision of psychotherapy and rehabilitative remedial services provided by the lead clinical staff acting within the scope of the professional's license or same services provided by an in-training mental health professional in a TGH. The purpose of these services is for maximum reduction of mental disability and restoration of a youth's best possible functional level, to alleviate the emotional disturbances, reverse or change maladaptive patterns of behavior, and encourage personal growth and development. A combination of supportive interactions, cognitive therapy, and behavior modification techniques are used to provide therapeutic change for youth in TGH.

(3) TGHs are reimbursed a daily or patient day rate.

(a) "Patient day" means a whole 24-hour period that a youth is present and receiving TGH services. Even though a youth may not be present for a whole 24-hour period, the day of admission is a patient day. The day of discharge is not a patient day.

(4) TGH providers must use the procedure codes designated by the department, per the fee schedule in (1)(a) to be reimbursed for TGH, TGH with ENA, or TGH therapeutic home visit (THV) services.

(5) Medicaid will not reimburse for room, board, maintenance, or any other nontherapeutic component of TGH services.

(6) Reimbursement will be made to a provider for reserving a TGH bed while the youth is temporarily absent for a THV. A THV is an opportunity to assess the youth's ability to successfully transition to a less restrictive level of care. For reimbursement the following criteria must be met:

(a) the youth's treatment plan must document the medical need for a THV as part of a therapeutic plan to transition the youth to a less restrictive level of care;

(b) the TGH provider clearly documents staff contact and youth achievements or regressions during and following the THV; and

(c) the youth is absent from the provider's facility for no more than three patient days per THV, with a maximum of 14 THV patient days per state fiscal year, unless additional days are prior-authorized by the department.

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

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

NEW RULE III THERAPEUTIC GROUP HOME (TGH), AUTHORIZATION REQUIREMENTS

(1) The therapeutic and rehabilitative portion of medically necessary TGH service is covered if prior-authorized by the department or its designee according to the provisions of the Children's Mental Health Bureau's (CMHB) Provider Manual and Clinical Guidelines for Utilization Management incorporated in ARM 37.87.903 and this subchapter. TGH providers are required to abide by the CMHB Provider Manual and Clinical Guidelines for Utilization Management.

(2) Medicaid reimbursement is not available for TGH services unless the provider submits to the department or its designee in accordance with this subchapter and the CMHB Provider Manual and Clinical Guidelines for Utilization Management a complete and accurate certificate of need (CON) that certifies the level of care needed for the youth with a serious emotional disturbance (SED).

(3) For youth determined Medicaid eligible by the department at the time of admission to the TGH, the CON required under (2) must be:

(a) completed, signed, and dated prior to, but no more than 30 days before, admission; and

(b) written by a team of health care professionals that has competence in diagnosis and treatment of mental illness, and that has knowledge of the youth's situation, including the youth's psychiatric condition. The team must include a physician that has competence in diagnosis and treatment of mental illness, preferably in child psychiatry, and a licensed mental health professional.

(4) For youth determined Medicaid eligible by the department after admission to or discharge from the TGH, the CON required under (2) is waived. A retrospective review to determine the medical necessity of the admission to the program and the treatment provided will be completed by the department or its designee at the request of the department, a provider, or the youth's parent or legal guardian. Request for retrospective review must be:

(a) received within 14 days after the eligibility determination for youth determined eligible following admission, but before discharge from the TGH; or

(b) received within 90 days after the eligibility determination for youth determined eligible after discharge from the TGH.

(5) All CONs required under (2) must be actually and personally signed by a minimum of two team members. Two of the signatures must be:

(a) a physician who has competence in diagnosis and treatment of mental illness, preferably child psychiatry, or a board certified/board eligible psychiatrist; and

(b) a licensed mental health professional as defined in ARM 37.87.102. If a signature stamp is used, the team member must actually and personally initial the document over the signature stamp.

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

NEW RULE IV THERAPEUTIC GROUP HOME (TGH), EXTRAORDINARY NEEDS AIDE (ENA) SERVICES, AND AUTHORIZATION REQUIREMENTS

(1) Extraordinary needs aide (ENA) services are prior-authorized additional one-to-one, face-to-face, intensive short-term behavior management, and stabilization services provided in the TGH by TGH staff, for youth with serious emotional disturbance (SED). Short-term generally means 90 days or less. Additional days may be authorized if the youth continues to meet the criteria specified in (2).

(2) ENA services are provided for youth in a TGH who exhibit extreme behaviors that can not be managed by the TGH staffing required by licensure found in ARM Title 37, chapter 97 and who do not require services in a higher level of care.

(a) Extreme behaviors need to be current, at least, moderately severe, and consist of documented incidents that are symptoms of the youth's SED. These behaviors are either frequent in occurrence, at risk of becoming a serious occurrence, and include one or more of the following:

- (i) harming self or others;
- (ii) destruction of property; or
- (iii) a pattern of frequent extreme physical outbursts.

(3) To request prior authorization of ENA services, the lead clinical staff (LCS) member must complete the department's ENA request form and document the medical need for such services. The LCS is defined in the licensure rule found in ARM Title 37, chapter 97. The form may be obtained from the Department of Public Health and Human Services, Developmental Services Division, Children's Mental Health Bureau, P.O. Box 4210, Helena, MT 59604-4210 or on the department's web site at [www.dphhs.mt.gov/mentalhealth/children/index.shtml](http://www.dphhs.mt.gov/mentalhealth/children/index.shtml).

(a) The ENA request form requires a behavior assessment, and a detailed description of the youth's behavior problems including date(s) of occurrence(s), and frequency of behavior problems to justify the number of ENA hours being requested. The form also requires measurable ENA treatment plan goals and objectives.

(b) If continued prior authorization is requested, a new ENA request form must be completed prior to the end of the authorization period with an updated behavior assessment, plus a description of the behavior problems with new goals and objectives.

(c) ENA requests are reviewed and approved on a case-by-case basis by the department or its designee to determine the medical need for the service and the number of units requested. One unit of ENA service equals one hour.

(d) The dates and frequency of behavior problems must be included on the request form. If the information on the ENA request form is incomplete, the request will not be reviewed.

(4) ENA services must be provided according to measurable goals and objectives identified in the TGH treatment plan.

(5) ENA staff are supervised by the TGH LCS.

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

NEW RULE V THERAPEUTIC FAMILY CARE (TFC) AND THERAPEUTIC FOSTER CARE (TFOC) SERVICES REIMBURSEMENT

(1) Reimbursement for the therapeutic portion of therapeutic family care (TFC) and therapeutic foster care (TFOC) services is the lesser of (1)(a) or (b):

(a) the amount specified in the department's Medicaid Mental Health and Mental Health Services Plan, Individuals Under 18 Years of Age Fee Schedule adopted in ARM 37.87.901; or

(b) the provider's usual and customary charges.

(2) TFC and TFOC providers must use the procedure codes designated by the department, per the fee schedule in (1)(a) to be reimbursed for TFC, TFOC, and TFOC moderate level THV services.

(3) TFC and TFOC providers are reimbursed a daily or patient day rate. Patient day means a whole 24-hour period that a youth is present and receiving TFC or TFOC services. Even though a youth may not be present for a whole 24-hour period, the day of admission is a patient day. The day of discharge is not a patient day.

(4) Reimbursement will be made to a provider for reserving a moderate level TFOC bed while the youth is temporarily absent for a THV if:

(a) the youth's plan of care documents the medical need for THVs as part of a therapeutic plan to transition the youth to a less restrictive level of care;

(b) the youth is temporarily absent on a THV;

(c) the provider clearly documents staff contact and youth achievements or regressions during and following the THV; and

(d) the youth is absent from the moderate level TFOC home for no more than three patient days per THV, unless additional days are authorized by the department.

(5) No more than 14 patient days per youth in each state fiscal year will be allowed for moderate level TFOC THVs.

(6) Medicaid will not reimburse for room, board, maintenance, or any other nontherapeutic component of TFC or TFOC treatment.

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

NEW RULE VI THERAPEUTIC FAMILY CARE (TFC) AND THERAPEUTIC FOSTER CARE (TFOC) SERVICES, AUTHORIZATION REQUIREMENTS AND COVERED SERVICES

(1) The therapeutic and rehabilitative portion of medically necessary TFC and TFOC services is covered if prior-authorized by the department or its designee according to the provisions of the Children's Mental Health Bureau's (CMHB) Provider Manual and Clinical Guidelines for Utilization Management incorporated in ARM 37.87.903 and this subchapter. TFC and TFOC providers are required to abide by the CMHB Provider Manual and Clinical Guidelines for Utilization Management.

(2) Medicaid reimbursement is not available for TFC or TFOC services unless the provider submits to the department or its designee in accordance with this subchapter and the CMHB Provider Manual and Clinical Guidelines for Utilization Management, a complete and accurate CON that certifies the level of care needed for the youth with a serious emotional disturbance (SED).

(3) For youth determined Medicaid eligible by the department at the time of admission to TFC or TFOC services, the CON required under (2) must be:

(a) completed, signed, and dated prior to, but no more than 30 days before, admission; and

(b) written by a team of health care professionals that has competence in diagnosis and treatment of mental illness, and that has knowledge of the youth's situation, including the youth's psychiatric condition. The team must include a physician that has competence in diagnosis and treatment of mental illness, preferably in child psychiatry, and a licensed mental health professional as defined in ARM 37.87.102.

(4) For youth determined Medicaid eligible by the department after admission to or discharge from TFC or TFOC services, the CON required under (2) is waived. A retrospective review to determine the medical necessity of the admission to the program and the treatment provided will be completed by the department or its designee at the request of the department, a provider or the youth's parent or legal guardian. Request for retrospective review must be:

(a) received within 14 days after the eligibility determination for youth determined eligible following admission, but before discharge from TFC or TFOC services; or

(b) received within 90 days after the eligibility determination for youth determined eligible after discharge from TFC or TFOC services.

(5) All CONs required under (2) must actually and personally be signed by a minimum of two team members. Two of the signatures must be:

(a) a physician who has competence in diagnosis and treatment of mental illness, preferably child psychiatry, or a board-certified/board-eligible psychiatrist and;

(b) a licensed mental health professional. If a signature stamp is used, the team member must actually and personally initial the document over the signature stamp.

(6) The therapeutic portion of moderate level TFC or TFOC, as defined in ARM Title 37, chapters 37 and 97, is covered if provided by a TFOC agency licensed by and contracted with the department to provide moderate level TFC or TFOC services.

(7) The therapeutic portion of permanency TFOC treatment, as defined in ARM Title 37, chapters 37 and 97, is covered if provided by a TFOC agency licensed by and contracted with the department to provide permanency TFOC services.

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

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

NEW RULE VII THERAPEUTIC FAMILY CARE (TFC) AND THERAPEUTIC FOSTER CARE (TFOC) SERVICES, DEFINITION OF PERMANENCY TFOC TREATMENT

(1) Permanency TFOC treatment is an intensive level of treatment for youth in a therapeutic foster family placement which is permanent and includes:

- (a) individual, family, and group therapies;
- (b) clinical supervision provided by a licensed psychologist on a 1:20 ratio;
- (c) a treatment manager who is a masters or bachelors level social worker with three years experience, on a 1:6 ratio;
- (d) therapeutic aide services averaging at least ten hours per week;
- (e) respite care at least one weekend per month; and
- (f) additional specialized training for families.

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

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

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

37.86.2206 EARLY AND PERIODIC SCREENING, DIAGNOSTIC AND TREATMENT SERVICES (EPSDT), MEDICAL AND OTHER SERVICES

(1) remains the same.

(2) In addition to the services generally available to Medicaid recipients, the following services are available to EPSDT eligible persons:

(a) through (d) remain the same.

(e) the therapeutic portion of medically necessary therapeutic youth group home (~~TGH~~) treatment as provided in ~~ARM 37.86.2219~~ Title 37, chapter 87;

(f) the therapeutic portion of medically necessary therapeutic family care (~~TFC~~) and therapeutic foster care (TFOC) treatment as provided in ~~ARM 37.86.2224~~ [New Rule VI]; and

(g) school-based health related services as provided in ARM 37.86.2230.

(3) ~~Requests for prior authorization must be made in writing to the Department of Public Health and Human Services, Addictive and Mental Disorders Division, Mental Health Program, 555 Fuller Avenue, P.O. Box 202905, Helena, MT 59620-2905, or to the department's designee. The therapeutic portion of TGH, TFC, and TFOC must be prior-authorized by the department or their designee before services are provided.~~

(a) Review of authorization requests by the department or its designee will be made consistent with Children's Mental Health Bureau's (CMHB) Provider Manual and Clinical Guidelines for Utilization Management dated December 1, 2010 adopted in ARM 37.87.903. A copy of the CMHB Provider Manual and Clinical Guidelines for Utilization Management can be obtained from the department by a request in writing to the Department of Public Health and Human Services, Developmental Services Division, Children's Mental Health Bureau, 111 Sanders, PO Box 4210, Helena MT 59604-4210.

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

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

37.86.2207 EARLY AND PERIODIC SCREENING, DIAGNOSTIC AND TREATMENT (EPSDT) SERVICES, REIMBURSEMENT (1) through (2) remain the same.

~~(3) Reimbursement for the therapeutic portion of therapeutic youth group home treatment services is the lesser of:~~

~~(a) the amount specified in the department's Medicaid Mental Health and Mental Health Services Plan, Individuals Under 18 Years of Age Fee Schedule adopted in ARM 37.87.901 and a direct care wage add-on, if applicable; or~~

~~(b) the provider's usual and customary charges (billed charges).~~

~~(4) Reimbursement for the therapeutic portion of therapeutic family care treatment services is the lesser of:~~

~~(a) the amount specified in the department's Medicaid Mental Health and Mental Health Services Plan, Individuals Under 18 Years of Age Fee Schedule adopted in ARM 37.87.901 and a direct care wage add-on if, applicable; or~~

~~(b) the provider's usual and customary charges (billed charges).~~

~~(5) For purposes of (3) and (4), "patient day" means a whole 24-hour period that a person is present and receiving therapeutic youth group home or therapeutic family care services. Even though a person may not be present for a whole 24-hour period, the day of admission is a patient day. The day of discharge is not a patient day.~~

~~(6) Reimbursement will be made to a provider for reserving a therapeutic youth group home or therapeutic youth family care (other than permanency therapeutic family care) bed while the recipient is temporarily absent for a therapeutic home visit if:~~

~~(a) the recipient's plan of care documents the medical need for therapeutic home visits as part of a therapeutic plan to transition the recipient to a less restrictive level of care;~~

~~(b) the recipient is temporarily absent on a therapeutic home visit;~~

~~(c) the provider clearly documents staff contact and recipient achievements or regressions during and following the therapeutic home visit; and~~

~~(d) the recipient is absent from the provider's facility for no more than three patient days per therapeutic home visit, unless additional days are authorized by the department.~~

~~(7) No more than 14 patient days per recipient in each state fiscal year will be allowed for therapeutic home visits.~~

~~(8) and (9) remain the same but are renumbered (3) and (4).~~

~~(10) The department will not reimburse providers for two services that duplicate one another on the same day according to the Medicaid Mental Health Plan and Mental Health Services Plan for Youth Services Excluded from Simultaneous Reimbursement (Service Matrix) adopted in ARM 37.87.901.~~

~~(11) remains the same but is renumbered (5).~~

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

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

37.87.702 MENTAL HEALTH CENTER SERVICES FOR YOUTH WITH SERIOUS EMOTIONAL DISTURBANCE (SED), DEFINITIONS For purposes of this subchapter, the following definitions apply:

(1) "Community-based psychiatric rehabilitation and support (CBPRS)" means rehabilitation services provided in home, school, and community settings for youth with serious emotional disturbance (SED) who are at risk of out of home or residential placement. CBPRS services are provided for a short period of time, generally 90 days or less, to improve or restore the youth's functioning in one or more of the spheres identified in the SED definition in ARM 37.87.303. Services are provided by trained mental health personnel under the supervision of a licensed mental health professional and according to a rehabilitation plan.

(2) remains the same.

(3) "In-training mental health professional services" are services provided under the supervision of a licensed mental health professional by an individual who has completed all academic requirements for licensure as a psychologist, clinical social worker, or licensed professional counselor and is in the process of completing the supervised experience requirement for licensure, in accordance with ARM Title 24, chapters 189 and 219.

(4) through (11) remain the same.

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

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

37.87.703 MENTAL HEALTH CENTER SERVICES FOR YOUTH WITH SERIOUS EMOTIONAL DISTURBANCE (SED), COVERED SERVICES (1) Mental health center services for youth with serious emotional disturbance include:

(a) Community-based psychiatric rehabilitation and support (CBPRS) services:

(i) are provided on a face-to-face basis primarily with a youth, ~~or~~ and may also include consultation services provided on a face-to-face basis with family members, teachers, employers, or other key individuals in the youth's life when such contacts are clearly necessary to meet goals established in the youth's individual rehabilitation treatment plan;

(ii) may only be provided when the youth is receiving other mental health services; have as their purpose:

~~(A) the maximum attainment of mental functioning;~~

~~(B) the minimization or elimination of deterioration in mental functional status;~~

and

~~(C) the maintenance of mental health functional status of a youth.~~

(iii) ~~must be~~ require prior authorized authorization by the department or its designee ~~to be~~ when provided for a youth in the PRTF waiver during day treatment program hours; in comprehensive school and community treatment programs, day treatment, partial hospitalization, therapeutic group home facilities, therapeutic foster homes, therapeutic family homes, or other residential facilities in accordance with all of the following:

~~(A) youth with extraordinary behavioral needs whose behaviors have not resulted in criminal or status offenses may be eligible for community-based psychiatric rehabilitation and support;~~

~~(B) proposed services must be reviewed on a case-by-case basis by the department or its designee to determine the medical necessity and number of units authorized as defined in (1)(a)(ii); and~~

~~(C) sufficient documentation supporting the medical necessity for the additional services must be provided by the requestor.~~

~~(iv) do not require prior authorization when provided on the same day as CSCT, Day Tx, or partial hospital services, if CBPRS is provided before or after program hours. Documentation of CBPRS must include time in and time out to show that CBPRS was not provided during program hours; excludes the following services except as provided in (1)(a)(iii):~~

~~(A) interventions provided in a hospital, skilled nursing facility, intermediate nursing facility, or psychiatric residential treatment facility;~~

~~(B) case planning activities, including but not limited to, attending meetings, completing paperwork and other documentation requirements, and traveling to and from the youth's home, or other location;~~

~~(C) therapeutic interventions by licensed mental health professionals, regardless of the location of the service;~~

~~(D) activities that are purely recreational in nature;~~

~~(E) services provided within the school classroom that are educational, including but not limited to educational aides;~~

~~(F) habilitation services; and~~

~~(G) services within day treatment, therapeutic group home, therapeutic foster home, therapeutic family home, or other residential facilities solely for the purpose of staff safety.~~

~~(v) are not allowed when the service to be provided is:~~

~~(A) during day treatment program hours unless the youth is in the PRTF waiver and CBPRS services are prior-authorized;~~

~~(B) during CSCT or partial hospital program hours;~~

~~(C) provided by a licensed mental health professional;~~

~~(D) for the purpose of habilitation, academic instruction, recreation, vocational, or pre-vocational training;~~

~~(E) in a shelter care facility, therapeutic group home, hospital, psychiatric residential treatment facility, or other residential facilities;~~

~~(F) case planning activities such as attending meetings, completing paperwork, and other documentation requirements or travel time; and~~

~~(G) solely for the purpose of safety.~~

~~(vi) may not exceed the following limits for group:~~

~~(A) up to a maximum of two hours per day;~~

~~(B) up to a maximum of eight youth per group; and~~

~~(C) up to a staff ratio of four youth to one staff.~~

~~(b) and (c) remain the same.~~

~~(d) In-training mental health professional services as defined in ARM 37.87.702. Such services must be supervised by a Services are subject to the same requirements that apply to licensed mental health professionals in the same field,~~

and, other than licensure, the services are subject to the same requirements that apply to licensed mental health professionals.

(e) Outpatient therapy services such as provided according to an individualized treatment plans and includes:

(i) psychotherapy and related services provided in accordance with the current edition of the American Medical Association's Current Procedural Terminology, Professional Edition, and codes approved by the department. The department adopts and incorporates by reference this manual; by a mental health professional acting within the scope of the professional's license; and

(ii) family therapy, provided with or without the youth present, directed at the eligible youth's mental health needs and their impact on the family dynamics; and if medically necessary for the treatment of the Medicaid eligible youth who is involved in the family therapy:

(A) family therapy may be provided with or without the Medicaid eligible youth present;

(B) adequate documentation must be present to document the direct benefit to the Medicaid eligible youth in accordance with the treatment plan;

(C) (iii) individual and family therapy are targeted at reducing or eliminating symptoms or behaviors related to a youth's mental health diagnosis as specified in the treatment plan;

(D) the mental health professional is required to develop and implement a treatment plan for the youth and family; and

(E) individual therapy includes diagnostic interviews where testing instruments are not used.

(f) Targeted case management services as defined in ARM 37.87.802 in accordance with Title 37, chapter 86, subchapter 37.

(g) Mental health professional services, which include the professional component of physician or psychiatrist services covered in ARM 37.86.101, 37.86.104, and 37.86.105; provided according to mental health center licensing requirements as part of mental health center services.

(i) Mental health professional services are subject to the following limitations:

(i) (A) To the extent otherwise permitted by applicable Medicaid rules, such mental health professional services may be billed by the mental health center either as mental health center services or by the mental health professional under the applicable Medicaid category of service, but may not be billed as both mental health center services and mental health professional services.

(ii) (B) Mental health professional services may be covered and reimbursed by Medicaid only if the mental health professional is enrolled as a provider and the services are provided according to the Medicaid rules and requirements applicable to the mental health professional's category of service and within the scope of practice, including but not limited to medication management.

(iii) Mental health center services covered by the Medicaid program include the medical director component of a physician's services to a mental health center, but do not include the professional component of physician services covered in ARM 37.86.101, 37.86.104, and 37.86.105. The professional component of physician services may be billed according to the provisions of (1)(g)(i) or ARM 37.86.101, 37.86.104, and 37.86.105.

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

37.87.901 MEDICAID MENTAL HEALTH SERVICES FOR YOUTH, REIMBURSEMENT (1) Medicaid reimbursement for mental health services shall be the lowest of:

(a) remains the same.

(b) the rate established in the department's fee schedule. The department adopts and incorporates by reference the department's Medicaid Mental Health and Mental Health Services Plan, Individuals Under 18 Years of Age Fee Schedule dated ~~July~~ November 1, 2010. A copy of the fee schedule may be obtained from the Department of Public Health and Human Services, Developmental Services Division, Children's Mental Health Bureau, 111 Sanders, P.O. Box 4210, Helena, MT 59604 or at [www.mt.medicaid.org](http://www.mt.medicaid.org).

(2) remains the same.

(3) The department will not reimburse providers for two services that duplicate one another on the same day. The department adopts and incorporates by reference the Medicaid Mental Health Plan and Mental Health Services Plan for Youth Services Excluded from Simultaneous Reimbursement (Service Matrix) effective ~~July~~ December 1, 2010. A copy of the service matrix may be obtained from the department or at [www.mt.medicaid.org](http://www.mt.medicaid.org).

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

37.87.903 MEDICAID MENTAL HEALTH SERVICES FOR YOUTH, AUTHORIZATION REQUIREMENTS (1) through (2)(b) remain the same.

(3) Prior authorization and when required continued authorization by the department or its designee is required for the following services:

(a) through (c) remain the same.

(d) ~~therapeutic youth group home services defined ARM 37.86.2207 and extraordinary needs aide services in accordance with [New Rules I through IV];~~

(e) therapeutic family care (TFC) and therapeutic foster care (TFOC) services defined in ARM 37.86.2207 in accordance with [New Rules V through VII] and ARM Title 37, chapter 51;

(f) through (h) remain the same.

(4) The department may waive a requirement for prior authorization or continued authorization when the provider submits documentation that:

(a) remains the same.

(b) a timely request for prior authorization or continued authorization was not possible because of a failure or malfunction of the ~~department~~ department's or its designee's equipment that prevented the transmittal of the request at the required time and the provider submitted a subsequent authorization request within ten business days.

(5) remains the same.

(6) Review of authorization requests by the department or its designee will be made with consideration of the department's clinical management guidelines. The department adopts and incorporates by reference the Children's Mental Health Bureau's Provider Manual and Clinical Guidelines for Utilization Management dated July December 1, 2010. A copy of the manual can be obtained from the department by a request in writing to the Department of Public Health and Human Services, Developmental Services Division, Children's Mental Health Bureau, 111 N. Sanders, P.O. Box 4210, Helena, MT 59604-4210 or at [www.dphhs.mt.gov/mentalhealth/children/index.shtml](http://www.dphhs.mt.gov/mentalhealth/children/index.shtml).

(7) and (8) remain the same.

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

5. The department proposes to repeal the following rules:

37.86.2219 EARLY AND PERIODIC SCREENING, DIAGNOSTIC AND TREATMENT SERVICES (EPSDT), THERAPEUTIC YOUTH GROUP HOME SERVICES, is found on page 37-20321 of the Administrative Rules of Montana.

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

37.86.2221 EARLY AND PERIODIC SCREENING, DIAGNOSTIC AND TREATMENT SERVICES (EPSDT), THERAPEUTIC FAMILY CARE TREATMENT SERVICES, is found on page 3737-20325 of the Administrative Rules of Montana.

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

6. The Department of Public Health and Human Services (the department) is proposing the adoption of New Rules I through VII, amendment of ARM 37.86.2206, 37.86.2207, 37.87.702, 37.87.703, 37.87.901, and 37.87.903, and repeal of ARM 37.86.2219 and 37.86.2221 pertaining to provider requirements and reimbursement for therapeutic group homes (TGH), therapeutic family care (TFC), and therapeutic foster care (TFOC) services.

The department is amending and repealing the TGH rules in the Early and Periodic Screening, Diagnostic, and Treatment Services (EPSDT) rules, ARM 37.86.2207 and 37.86.2219 and proposing to modify and move the provider requirements, reimbursement and authorization requirements into the Children's Mental Health section of ARM Title 37, chapter 87 and in New Rules I through IV.

A new service is being proposed in New Rule IV to replace the use of community based psychiatric rehabilitation and support (CBPRS) for difficult-to-serve youth in a TGH, called extraordinary needs aide (ENA) services. ENA services, when prior-authorized, will be reimbursed at a lower rate than CBPRS. Please see New Rule IV

for fiscal impact. In the proposed TGH rules, there will be only one level of TGH service instead of three.

The department is repealing and amending the TFC rules in the EPSDT rules, ARM 37.86.2207 and 37.86.2221 and proposing to move them into the Children's Mental Health in New Rules V, VI, and VII. The department is proposing to separate TFC from therapeutic foster care (TFOC) by assigning separate modifiers to each service, so that the department can manage the two services separately. Currently TFC and TFOC use the same modifiers for reimbursement. No significant changes are being made to the TFC rules other than using separate modifiers for family versus foster care and not allowing outpatient therapy services for youth receiving permanency level TFOC services. Not allowing outpatient therapy with permanency level TFOC will be indicated on the service matrix. The department sees no alternative for these changes because they are needed for proper management of Medicaid services. There will be a limited fiscal impact to the permanency level TFOC providers also providing outpatient therapy to the same family. Permanency level TFOC already requires individual, group, and family therapy in rule. There will not be a fiscal impact for moving the TFC rules to New Rules V, VI, and VII.

The department is proposing to amend the definition of CBPRS and add certain criteria for group CBPRS in ARM 37.87.703. The group CBPRS criteria will limit the hours that may be billed per day, group size, and the youth-to-staff ratio. Limits are being set to control the significant utilization growth in this service in the last three years. The total amount for individual and group CBPRS for state fiscal year (SFY) 2008 was \$2,397,307 for 1,270 youth served. For SFY 2009, the cost was \$3,501,588 for 1,519 youth served, and the total amount for SFY 2010 to date is already \$3,855,099 for 1,583 youth served. These changes will have a financial impact on providers. Please see ARM 37.87.703 below for information on the fiscal impact.

The department is updating the Medicaid Mental Health and Mental Health Services Plan Individuals Under 18 Years of Age Fee Schedule (fee schedule), the Medicaid Mental Health Plan and Mental Health Services Plan (MHSP) for Youth Services Excluded from Simultaneous Reimbursement (service matrix) in ARM 37.87.901, and the Children's Mental Health's (CMHB) Provider Manual and Clinical Guidelines for Utilization Management in ARM 37.87.903 to reflect the proposed rule changes. One change will be to not allow outpatient therapy on the same day as TGH services. This change will be on the service matrix, but will not take effect until each TGH complies with the new licensure rules that increase the standards for the therapy provided by TGH staff. The department's Licensure Bureau is establishing a time period to comply with the increased standards for therapy. Some TGHs will be in compliance with the new requirements before other TGHs. Another change will eliminate the use of CBPRS during program hours for youth in day treatment (day tx), comprehensive school and community treatment (CSCT), partial hospital programs, and TGHs. A new service, ENA, has been developed to replace CBPRS for youth in a TGH and day treatment. TFC services are being separated into family care and foster care in rule and on the service matrix. Outpatient therapy will not be

allowed for youth in permanency level TFOC on the service matrix to align with the permanency level TFOC rules.

The department does not see an alternative to these changes because they are necessary for proper Medicaid and budget management. The fiscal impact for specific rule changes are addressed in their respective sections below.

The TGH and TFC clinical management guidelines in the EPSDT rules are being repealed because the clinical guidelines are already in the CMHB Provider Manual and Clinical Guidelines for Utilization Management. To have the guidelines in both places would be redundant. The TGH clinical guidelines will be revised, to reflect one level instead of three levels of service, and to include ENA authorization requirements. The TFC clinical guidelines will be revised and separate TFC from TFOC to distinguish foster care from family care services.

The department received a recommendation from providers and provider organizations that having the Children's Mental Health Medicaid and Mental Health Service Plan administrative rules in one location would be less confusing than the current location within EPSDT rules. The alternative was to leave the TGH and TFC rules in ARM Title 37, chapter 86 and not consolidate children's mental health rules in one chapter. The department agrees with provider recommendations and has proposed new rules accordingly. There is no fiscal impact to these changes.

#### New Rule I

TGH provider requirements regarding licensure as a condition of participation were moved to New Rule I from ARM 37.86.2219, which is being repealed. A reference was added to New Rule I for clarity that TGHs have to meet requirements applicable to all Medicaid providers. The definition of direct care worker and the current minimum wage requirement of \$8.50 an hour was added.

The department intends to move all of the children's mental health rules to ARM Title 37, chapter 87 so providers can find them more easily.

#### New Rule II

TGH reimbursement and THV requirements were moved to New Rule II from ARM 37.86.2207. The term "rehabilitative", along with a definition of "therapeutic services", are being added to New Rule II to clarify department reimbursement requirements for TGH services. CMHB Medicaid reimburses providers for rehabilitative and therapeutic services. TGH providers must use procedure codes designated by the department on the fee schedule to be reimbursed for TGH, TGH with ENA and TGH THV services. The department does not see a practical alternative to clarifying TGH services requirements.

#### New Rule III

The prior authorization (PA) and CON-requirements for TGH services were moved to New Rule III. The TGH PA and CON requirements were in ARM 37.86.2219 that is being repealed so that all the children's mental health rules are in one place. The TGH clinical management guidelines in ARM 37.86.2207 were repealed and will not be moved to New Rule III because they are in CMHB Provider Manual and Clinical Guidelines for Utilization Management. The department does not see an alternative to these rule changes. No controversy or fiscal impact is expected as a result of these rule changes.

#### New Rule IV

A new service called Extraordinary Needs Aide or ENA is defined and being proposed in New Rule IV. ENA services, when prior-authorized, would allow all TGHs to add a one-to-one staff person for extremely difficult to serve SED youth. Prior authorization requirements for ENA services are defined in proposed New Rule IV.

CBPRS services were used to add one-to-one staff services for extremely difficult to serve youth until a new service could be developed, and the TGH rule could be updated. The department does not believe that using CBPRS aides in a TGH has been cost effective. CBPRS is a mental health center service and cannot be provided by all TGH providers. After reviewing the cost reports completed by the TGH providers in SFY 2009, the department is proposing to reimburse ENA services at \$14.56 for each one-hour unit based on labor costs.

The methodology for the rate of \$14.56 per unit (1 hour) was calculated by using: a base rate of \$9.50, plus benefits calculated at 25% (state rate used in grant applications), plus an administrative cost of 22.59% (median percentage from TGH Cost Study for the fiscal year ending June 30, 2008).

The fiscal impact of this rule change for TGH providers will come from lowering the one-to-one staffing reimbursement rate from the higher CBPRS rate to the lower ENA rate. Reimbursement for CBPRS for SFY 2008 was \$443,400 for 15 youth, at \$6.49 per 15 minute unit. Use of the ENA service instead of CBPRS in TGHs is expected to decrease department expenditures. If the number of youth receiving ENA services in SFY 2010 doubled, 30 youth would be served at a cost of \$314,496.

Fourteen TGH providers would be affected by this change. Approximately 515 youth received TGHs services in SFY 2008. The department does not expect youth receiving TGH services to see a change in their benefits due to this change. The department does not see an alternative to developing this more cost effective ENA service. This rule is expected to be controversial due to a lower rate and stricter criteria for prior authorization of ENA services.

#### New Rule V

The TFC reimbursement and TFC THV requirements were moved to New Rule V and repealed from ARM 37.86.2207. TFC is separated from TFOC to identify and manage each service better. TFC and TFOC providers must use the procedure codes designated by the department on its fee schedule. Rule V clarifies that reimbursement for reserving a bed while the youth is on a THV is only available in moderate level TFOC. Permanency level TFOC is provided in a permanent foster home and moderate level TFC is provided in the youth's biological or adoptive home. The proposed changes are necessary and the department does not see an alternative. No controversy is expected as a result of these changes. There is no fiscal impact with these rule changes.

#### New Rule VI

The PA and CON requirements for TFC services are moved to New Rule VI. The TFC PA and CON requirements were in ARM 37.86.2221 that is being repealed so all the children's mental health rules will be in one place. The TFC clinical management guidelines in ARM 37.86.2221 were repealed and will not be moved to New Rule VI because they are in the CMHB Provider Manual and Clinical Guidelines for Utilization Management.

TFOC has been separated from TFC to allow the department to distinguish between those two services on claims. No substantive changes have been made in the TFC and TFOC services or clinical guidelines. TFC and TFOC rules will be revised at a later date. The proposed changes are necessary and the department does not see an alternative. There is no fiscal impact with these rule changes.

#### New Rule VII

The department is proposing a definition of permanency TFOC treatment in this new rule. Placing the definition in a new rule will make it easier for the department and the public to find and interpret. No substantive changes are intended.

#### ARM 37.86.2206

The department is moving the TGH and TFC ARM 37.86.2206(2) to new TGH and TFC rule numbers in [New Rules I through VII]. TFC is listed as family and foster care in ARM 37.86.2206(2). The department is rewording the prior authorization language in ARM 37.86.2206(3) and referencing the department's CMHB Provider Manual and Clinical Guidelines for Utilization Management used for authorizing children's mental health services. The department is also amending the address in ARM 37.86.2206(3) by taking out Addictive and Mental Disorders Division and replacing it with the CMHB address. Most of the children's mental health rules are already in ARM Title 37, chapter 87. The proposed changes are necessary and the department intends no substantive changes due to the rule reorganization. No fiscal impact will occur as a result of these rule changes.

#### ARM 37.86.2207

The department is proposing to strike all references to TGH services and TFC in this rule because they are being moved to the Children's Mental Health section of ARM Title 37, chapter 87. The service matrix reference in ARM 37.86.2207(10) is being repealed because the TGH and TFC references are being repealed as well. It is already in the children's mental health section of ARM Title 37, chapter 87. No controversy is expected as a result of these rule changes, and there is no fiscal impact with these proposed rule changes.

#### ARM 37.86.2219

The department is proposing to repeal ARM 37.86.2219. The prior authorization requirements in that section will be moved to the new TGH section of the Children's Mental Health ARM Title 37, chapter 87. The requirement that TGH services need to be ordered by a physician or licensed mental health professional will not move, as it is redundant and already required for the certificate of need (CON) which in turn is referred to in the CMHB Provider Manual and Clinical Guidelines for Utilization Management. The intensive, campus-based, and moderate levels of TGH will not move to the new TGH rule because only one level of TGH is being proposed. This change is being proposed to simplify TGH licensure and Medicaid requirements. The licensing and Medicaid requirements in the proposed rules were developed collaboratively with the Licensure Bureau to be consistent. Costs associated with providing TGH services, such as room and board, that are not reimbursed by Medicaid will also be repealed in this ARM and moved to the TGH ARM Title 37, chapter 87.

The TGH clinical management guidelines in this rule are being repealed because they are already in the Children's Mental Health's (CMHB) Provider Manual and Clinical Guidelines for Utilization Management. To have them in all three places would be redundant. New TGH clinical guidelines are being proposed in an updated version of the CMHB Provider Manual and Clinical Guidelines for Utilization Management. The new TGH clinical guidelines will reflect one instead of three levels of TGH service and ENA authorization requirements.

The campus-based TGH daily rate was changed on October 1, 2007 to the higher Intensive TGH daily rate of \$171.69. There are no moderate TGHs at this time. All TGHs receive the highest TGH rate. For state fiscal year (SFY) 2010, the daily TGH rate is \$183.98. The proposed changes are necessary to maintain youth access and the department does not see an alternative to making this change. No overall impact is expected as a result of these rule changes.

#### ARM 37.86.2221

The department is proposing to repeal ARM 37.86.2221. The TFC prior authorization requirements will be moved to the new TFC section of the children's mental health ARM Title 37, chapter 87. The requirement that TFC services need to be ordered by a physician or licensed mental health professional will be removed, as

it is redundant and already required for the CON which is described in the CMHB Provider Manual and Clinical Guidelines for Utilization Management. The TFC clinical management guidelines in this rule are being repealed because they too are already in the CMHB Provider Manual and Clinical Guidelines for Utilization Management and to have them in both places would be redundant. TFC and TFOC will be separated and will have different procedure codes and modifiers. The department does not see any alternative to these changes, and there is no expected fiscal impact.

#### ARM 37.87.702

The department is proposing to change the CBPRS definition in ARM 37.87.702(1) because of significant utilization growth and budget constraints. CBPRS is a rehabilitative service. The department believes it should be provided for a short period of time to improve the youth's functioning in one or more sphere as defined in the SED definition at ARM 37.87.303. The change proposes youth receiving CBPRS must be at risk for out of home or residential care placement.

The department is proposing to add ARM Title 24, chapters 189 and 219 to ARM 37.87.702(3), referencing the licensure requirements for psychologists, social workers, and professional counselors for clarity. The proposed changes are necessary to avoid confusion and the department does not see a practical alternative. No controversy or fiscal impact is expected as a result of these rule changes.

#### ARM 37.87.703

The department is also proposing to change CBPRS covered services in ARM 37.87.703(1)(a) because of significant utilization growth and budget constraints. CBPRS covered services are being reorganized and renumbered in this rule for clarity. CBPRS is not a stand-alone service and may only be provided in conjunction with other mental health services in ARM 37.87.703(1)(a)(ii).

CBPRS may be provided during day treatment program hours for youth participating in the PRTF waiver if authorized by the department in ARM 37.87.703(1)(a)(iii), because youth participating in the waiver may require a higher level of service to be successful in the community.

Prior authorization for CBPRS on the same day as CSCT, day treatment and partial hospital programs will not be required in ARM 37.87.703(1)(a)(iv), if CBPRS is provided before or after program hours, and is verified in the case documentation.

The department is proposing CBPRS not be provided during program hours concurrent with CSCT, day treatment and partial hospital programs in ARM 37.87.703(1)(a)(v), because these programs are reimbursed at a bundled rate and are required to be intensive. The medical necessity requirements for CBPRS are being repealed because CBPRS during the other program hours will no longer be

allowed. The CBPRS chapter of the CMHB Provider Manual and Clinical Guidelines for Utilization Management will be revised to reflect these changes.

Vocational and pre-vocational training activities have been added to the list of services not allowed for CBPRS in ARM 37.87.703(1)(a)(v).

The department is limiting the number of hours group CBPRS can be provided, the number of youth allowed per group, and setting a staff to youth ratio in ARM 37.87.703(1)(a)(vi).

The supervision requirements for in-training mental health professionals in (1)(d) are being changed to be consistent with the definition of in-training mental health professional in ARM 37.87.702 that references their professional licensing requirements. The professional licensing requirements address who needs to provide the supervision for them.

Outpatient therapy services in ARM 37.87.703(1)(e) are being revised to require psychotherapy services be provided in accordance with the current version of the American Medical Association's Current Procedural Terminology (AMA CPT) Professional Edition. The AMA CPT will be adopted instead of having an incomplete list of requirements for outpatient therapy. The department uses the terms outpatient therapy and psychotherapy interchangeably, as provided in the definition of outpatient therapy in ARM 37.87.102.

Some of the documentation requirements for outpatient therapy services in ARM 37.87.703(1)(e) are being repealed because they are already covered in other rules applicable to all Medicaid providers.

The covered physician services in ARM 37.87.703(1)(g) under mental health professional services were rewritten for clarity. The professional component of physician and psychiatrist services are covered according to the rules and limitations referenced for all mental health professionals.

The department expects some fiscal impact with the CBPRS rule changes. There was a 68% increase in group CBPRS from SFY 2008 to SFY 2009, from \$76,171 to \$127,767, and a 45% increase in individual CBPRS for the same period from \$2,321,136 to \$3,373,820. Data is incomplete for SFY 2010, but the CMHB anticipates an increase in CBPRS utilization for SFY 2010. Group and individual CBPRS expenses as of June 30, 2010 are \$116,111 and \$3,738,988, respectively. The unique count of youth served for SFY 2008 was 1,270; for SFY 2009 it was 1,519; and so far for SFY 2010 it is 1,583.

#### ARM 37.87.901

The department is updating both the Medicaid Mental Health and Mental Health Services Plan, Individuals Under 18 Years of Age Fee Schedule (fee schedule) in ARM 37.87.901(1)(b) and the Medicaid Mental Health Plan and Mental Health

Services Plan for Youth Excluded from Simultaneous Reimbursement (service matrix) in ARM 37.87.901(3) to reflect the proposed rule changes.

The following changes have been made to the fee schedule incorporated in ARM 37.87.901(1)(b). The TGH intensive, moderate and campus based levels have been eliminated to leave one level of TGH. (There are currently no moderate level TGHs, the intensive and campus based levels are reimbursed the same amount.) ENA services are added to the fee schedule with a UD modifier and a proposed rate of \$14.56 per hour.

The new procedure code for moderate level TFC is H2020, to distinguish it from TFOC. Moderate and permanency level TFOC have been added with their own modifiers, HR and HE respectively. Moderate TFC therapeutic home leave (THV) was changed to moderate level TFOC THV, because moderate level TFC is provided in the youth's biological or adoptive home. Permanency level TFC is changed to permanency level TFOC. Permanency level may only be provided in TFOC. The TFC changes are necessary to enable CMHB to distinguish family care from foster care services. The department does not see any practical management alternative. There is no fiscal impact expected from the TFC proposed changes.

The following changes have been made to the service matrix incorporated in ARM 37.87.901(3). Moderate level TFOC, permanency level TFOC and ENA services have been added.

CBPRS will be taken off the service matrix, but a note on the matrix will let providers know they need to refer to the CBPRS rules to see when CBPRS services can be reimbursed. There are too many different CBPRS scenarios to address them all adequately on the service matrix.

ENA services will be reimbursed on the same day as TGH services, when prior-authorized. ENA is a 1:1 service specifically for youth in a TGH, provided by TGH staff. ENA services may also be reimbursed for youth in a TGH during day treatment program hours, when prior-authorized.

Outpatient therapy will not be reimbursed on the same day as TGH services when the TGH becomes compliant with the new licensure rule which requires higher standards for therapy provided in the TGH. The new licensure rules will allow TGHs time to comply with higher standards of care.

Outpatient therapy will not be reimbursed on the same day as permanency level TFOC. This change is being made on the service matrix to be consistent with the permanency level TFOC rule that already requires individual, group, and family therapy to be provided.

The department is making the following procedure code and modifier changes on the service matrix:

The department will remove the intensive, moderate, and campus levels and use procedure code S5145 for TGH.

For ENA the department will add procedure code and modifier S5145 UD.

For moderate level TFC it will remove procedure code and modifier S5145 HR and use procedure code H2020.

For moderate level TFOC the department will add procedure code and modifier S5145 HR.

The term permanency TFC will be changed to permanency TFOC.

There will be some financial impact as a result of these changes. The department paid \$212,566 for outpatient therapy for 3,502 youth in TGH and \$632,460 for outpatient therapy for 10,774 youth in TFC in SFY 2010 to date. The department sees this rule change as necessary.

#### ARM 37.87.903

The department is adding TGH, TGH with ENA, TFC and TFOC services to the list of services in ARM 37.87.903 (3)(d) that require prior authorization. The CMHB Provider Manual and Clinical Guidelines for Utilization Management effective date in ARM 37.87.903(6) is being changed to November 1, 2010, to identify the update authorization requirements for TGH, ENA, TFC, TFOC, and CBPRS services. No significant changes are being made to the TFC and TFOC clinical guidelines. These changes are necessary if the proposed rules amendments are adopted and the department does not expect a fiscal impact. The fiscal impact of ENA services are addressed under New Rule IV.

7. The department intends the rule amendments to be applied effective December 1, 2010.

8. 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: Rhonda Lesofski, 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 [dphhslegal@mt.gov](mailto:dphhslegal@mt.gov), and must be received no later than 5:00 p.m., November 5, 2010.

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

10. 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 8 above or may be made by completing a request form at any rules hearing held by the department.

11. An electronic copy of this proposal notice is available through the Secretary of State's web site at <http://sos.mt.gov/ARM/Register>. The Secretary of State strives to make the electronic copy of the notice conform to the official version of the notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the notice and the electronic version of the notice, only the official printed text will be considered. In addition, although the Secretary of State works to keep its web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems.

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

/s/ John Koch  
Rule Reviewer

/s/ Anna Whiting Sorrell  
Anna Whiting Sorrell, Director  
Public Health and Human Services

Certified to the Secretary of State September 13, 2010.

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

In the matter of the adoption of New )  
Rules I through XLII, the amendment )  
of ARM 37.97.101, 37.97.102, )  
37.97.105, 37.97.106, 37.97.110, )  
37.97.115, 37.97.128, 37.97.130, )  
37.97.132, 37.97.206, 37.97.207, )  
37.97.216, 37.97.230, and the repeal )  
of ARM 37.97.118, 37.97.201, )  
37.97.202, 37.97.213, 37.97.220, )  
37.97.225, 37.97.226, 37.97.233, )  
37.97.238, 37.97.239, 37.97.250, )  
37.97.253, 37.97.254, 37.97.257, )  
37.97.258, 37.97.259, 37.97.270, )  
37.97.501, 37.97.502, 37.97.506, )  
37.97.508, 37.97.519, 37.97.521, )  
37.97. 522, 37.97.524, 37.97.526, )  
37.97.528, 37.97.801, 37.97.805, )  
37.97.809, 37.97.810, 37.97.811, )  
37.97.815, 37.97.816, 37.97.817, )  
37.97.820, 37.97.821, 37.97.822, )  
37.97.825, 37.97.830, 37.97.831, )  
37.97.832, 37.97.833, 37.97.836, )  
37.97.837, 37.97.838, 37.97.842, and )  
37.97.843 pertaining to youth care )  
facility (YCF) licensure )

NOTICE OF PUBLIC HEARING ON  
PROPOSED ADOPTION,  
AMENDMENT, AND REPEAL

TO: All Concerned Persons

1. On November 3, 2010, at 10:30 a.m., the Department of Public Health and Human Services 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 adoption, amendment, and repeal of the above-stated rules.

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 Department of Public Health and Human Services no later than 5:00 p.m. on October 25, 2010, to advise us of the nature of the accommodation that you need. Please contact Rhonda Lesofski, 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 [dphhslegal@mt.gov](mailto:dphhslegal@mt.gov).

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

NEW RULE I YOUTH CARE FACILITY (YCF): QUALITY ASSESSMENT

(1) The youth care facility (YCF) shall implement and maintain an active quality assessment program for improving policies, procedures, and services. At a minimum, the quality assessment program must include procedures for:

(a) conducting youth satisfaction surveys at least annually which are maintained and filed at the facility;

(b) maintaining records on the occurrence, duration, and frequency of physical escorts and physical restraints used; and

(c) reviewing, on an ongoing basis, serious incident reports, grievances, complaints, medication errors, and the use of physical restraints with special attention given to identifying patterns and making necessary changes in how services are provided.

(2) The YCF shall prepare and maintain on file an annual report including improvements made as a result of the quality assessment activities specified in this rule.

AUTH: 52-2-111, 52-2-603, 52-2-622, MCA

IMP: 52-2-113, 52-2-603, 52-2-622, MCA

NEW RULE II YOUTH CARE FACILITY (YCF): CHILD ABUSE OR NEGLECT AND SERIOUS INCIDENTS

(1) Each YCF shall require each staff member, employee, intern, and volunteer to read and sign a statement that clearly defines child abuse and neglect and outlines the individual's responsibility to report all known or suspected incidents of child abuse or neglect of any youth to the department within 24 hours.

(2) Any YCF staff member or employee who knows or has reasonable cause to suspect that an incident of child abuse or neglect has occurred shall report within 24 hours of the incident to the YCF administrator, or a person designated by the YCF administrator, and to the state child abuse hotline (866) 820-5437 as required in 41-3-201, MCA. The YCF shall fully cooperate with any investigation conducted as a result of the report.

(3) A therapeutic group home must report abuse or neglect to the Mental Disabilities Board of Visitors as required in 53-21-107, MCA.

(4) Each YCF shall have written policies and procedures for handling any suspected incident of child abuse or neglect, including but not limited to:

(a) a procedure for ensuring that the staff member suspected does not continue to provide direct care until an investigation is completed;

(b) a procedure for developing a safety plan approved by the department which protects the youth and staff until the investigation is complete;

(c) a procedure for taking appropriate disciplinary measures against any staff member involved in an incident of child abuse or neglect, including but not limited to:

(i) termination of employment;

(ii) retraining of the staff member; or

(iii) any other appropriate action by the YCF geared towards the prevention of future incidents of child abuse or neglect.

(5) Any serious incident involving a youth must be reported in writing the next business day to the person or agency which placed the youth and to the department's licensure bureau.

(a) The report must be in writing and must include but is not limited to:

(i) the date and time of the incident;

(ii) all youth and staff member(s) involved; and

(iii) a description of the incident and the circumstances surrounding it.

(b) A copy of the report must be maintained at the YCF.

(6) The YCF shall cooperate with all licensing investigations, which may include private one-on-one interviews with staff and residents.

AUTH: 52-2-603, 52-2-622, MCA

IMP: 41-3-201, 52-2-603, 52-2-622, MCA

NEW RULE III YOUTH CARE FACILITY (YCF): STAFF BACKGROUND CHECKS (1) The administrator, staff, volunteers, and interns must have a state criminal background check, a state child protective services background check, and if applicable, a tribal criminal background check and tribal child protective services background check conducted prior to being employed by the provider or working at the YCF.

(2) If an applicant has lived outside the state within the past five years, the YCF must complete background checks in every state that the applicant has resided in within the past five years.

(3) The department will deny or revoke a license upon finding that:

(a) the administrator, staff member, volunteer, or intern has been convicted by a court of competent jurisdiction of a felony or misdemeanor involving but not limited to homicide, sexual intercourse without consent, sexual assault, aggravated assault, assault on a minor, assault on an officer, assault with a weapon, kidnapping, aggravated kidnapping, prostitution, robbery, or burglary;

(b) the administrator, staff member, volunteer, or intern has a conviction for a crime pertaining to children and families, including but not limited to child abuse or neglect, incest, child sexual abuse, ritual abuse of a minor, felony partner and family member assault, child pornography, child prostitution, internet crimes involving children, felony endangering the welfare of a minor, felony unlawful transactions with children, or aggravated interference with parent-child contact;

(c) the administrator, staff member, volunteer, or intern has within the previous five years a felony conviction of a drug related offense, including but not limited to use, distribution, or possession of controlled substances, criminal possession of precursors to dangerous drugs, criminal manufacture of dangerous drugs, criminal possession of imitation dangerous drugs with the purpose to distribute, criminal possession, manufacture of or delivery of drug paraphernalia, or driving under the influence of alcohol or other drugs; or

(d) the administrator, staff member, volunteer, or intern has been convicted of abuse, sexual abuse, neglect, or exploitation of an elderly person or a person with a developmental disability.

- (4) The department may deny or revoke a license upon finding that:
- (a) the administrator, staff member, volunteer, or intern has a conviction for a misdemeanor partner and family member assault, misdemeanor endangering the welfare of a child, misdemeanor unlawful transaction with a child, or a crime involving an abuse of the public trust.
  - (5) The administrator, staff member, volunteer, or intern who is charged with a crime involving children, physical or sexual violence against any person, or any felony drug related offense and awaiting trial may not provide care or be present in the facility pending the outcome of the criminal proceeding.
  - (6) No administrator, staff member, volunteer, or intern shall have been named as a perpetrator in a substantiated report of child abuse or neglect.
  - (7) The YCF is responsible for assuring that the persons covered by this chapter have met these requirements before providing care.
  - (8) No administrator, staff member, volunteer, or intern shall pose any potential threat to the health, safety, and well being of the youth in care.

AUTH: 52-2-111, 52-2-603, 52-2-622, MCA  
IMP: 52-2-113, 52-2-603, 52-2-622, MCA

NEW RULE IV YOUTH CARE FACILITY (YCF): YOUTH TO AWAKE STAFF RATIOS (1) The following ratio must be followed:

- (a) the youth to awake staff ratio of a youth group home shall be no more than 8:1 at all times; and
  - (b) the youth to awake staff ratio of a youth shelter care facility shall be no more than 8:1 at all times.
- (2) Child care agencies shall meet staffing requirements as set forth in ARM 37.97.207.
- (3) Therapeutic group homes shall meet staffing requirements as set forth in [NEW RULE XXXIX].
- (4) The YCF must have a policy that specifies a nighttime safety protocol for youth.

AUTH: 52-2-111, 52-2-603, 52-2-622, MCA  
IMP: 52-2-113, 52-2-603, 52-2-622 , MCA

NEW RULE V YOUTH CARE FACILITY (YCF): STAFF TRAINING (1) A YCF shall have written policies, procedures, and initial and ongoing training curriculum that meet the minimum requirements in this rule.

- (2) Providers shall assure adequate and timely training to ensure the safety of youth in care.
- (3) All direct care staff shall complete a minimum of 24 hours of orientation training consisting of the following minimum requirements:
  - (a) an overview of the YCF's policy, procedures, organization, and services;
  - (b) mandatory child abuse reporting laws;
  - (c) behavioral management techniques;
  - (d) fire safety, including emergency evacuation routes;
  - (e) confidentiality;

- (f) suicide prevention;
  - (g) emergency medical procedures;
  - (h) report writing including the development and maintenance of logs and journals;
  - (i) youth rights as outlined in [NEW RULE VI]; and
  - (j) hours required for on the job training.
- (4) Orientation training shall be completed and documented before the staff person may count in the youth to awake staff ratio as specified in [NEW RULES IV and XXXIX].
- (5) All direct care staff shall complete the following certification training within 90 days of hire:
- (a) the use of de-escalation training and methods of managing youth as described in the provider's policies;
  - (b) first aid and CPR; and
  - (c) maintain and update these certifications as required.
- (6) Direct care staff may not work alone without completing the training requirements of (5).
- (7) The YCF shall provide ongoing training for staff to improve proficiency in their knowledge and skills. Training must be a minimum of 20 hours annually thereafter and appropriate for the level of care provided.
- (8) All training must be documented and kept on file for each staff member, administrator, volunteer, and intern.

AUTH: 52-2-111, 52-2-603, 52-2-622, MCA  
IMP: 52-2-113, 52-2-603, 52-2-622, MCA

NEW RULE VI YOUTH CARE FACILITY (YCF): YOUTH RIGHTS (1) A YCF shall develop and maintain a youth's rights policy that supports and protects the fundamental human, civil, constitutional, and statutory rights of all youth. These rights shall include but are not limited to the following:

- (a) freedom from abuse, neglect, and unnecessary physical restraint;
  - (b) educational services in accordance with Montana state law, if the YCF operates during the school year;
  - (c) recognition and respect in the delivery of services;
  - (d) receive care according to individual need;
  - (e) personal privacy, when it is not contrary to the treatment and safety of the youth;
  - (f) family contact by mail and phone, as long as the contact is not contrary to the treatment and safety needs of the youth; and
  - (g) consideration of the youth's opinions and recommendations when developing the youth's case plan with documentation of the youth's input.
- (2) The YCF shall have a youth grievance policy and procedures.
- (3) The program shall review the youth's rights policy with the youth at the time of admission. The youth and staff reviewing the policy shall sign a statement acknowledging the review. The statement must be maintained in the youth's record.

AUTH: 52-2-111, 52-2-603, 52-2-622, MCA

IMP: 52-2-113, 52-2-603, 52-2-622, MCA

NEW RULE VII YOUTH CARE FACILITY (YCF): ADMISSIONS (1) Each YCF shall admit only those youth for whom it has an operational program and who meet its admissions policies.

(2) Each YCF shall have a policy for screening all referrals. This policy must include procedures for accepting emergency placements.

(3) Each YCF shall have and follow written admissions policies and procedures which include but are not limited to the following requirements:

(a) age, sex, and behavioral and/or emotional needs of youth served;

(b) a description of the intake process for youth at admission; and

(c) a description of the orientation provided to the youth.

(4) An initial assessment of the youth's emotional, medical, developmental, social, and behavioral status must be conducted within eight hours of the youth's admission.

(5) The admission person or committee shall review all preplacement referral information including a social history and resources to determine the appropriateness of placement, including age and developmental needs of youth accepted into the YCF.

(6) The YCF's policies and procedures must provide for and encourage a preplacement process with the child and family and may allow exceptions for emergency placements and geographical distances. The referring parties should be encouraged to assist with these arrangements.

(7) Placements may only be accepted from parents or agencies authorized by law to place children.

(8) The admissions policy may not limit contact with the youth's approved family members.

AUTH: 52-2-111, 52-2-603, 52-2-622, MCA

IMP: 52-2-113, 52-2-603, 52-2-622, MCA

NEW RULE VIII YOUTH CARE FACILITY (YCF): PLACEMENT AGREEMENTS (1) When a youth is admitted to a YCF, the YCF shall enter into a written placement agreement with the placing agency and/or parents or guardian, except when the facility has an existing written agreement with the placing agency that meets the requirements in (2).

(2) The placement agreement must contain the terms of the youth's placement, the responsibilities of the YCF, the placing agency's responsibilities, and when appropriate, the parent's or guardian's responsibilities.

(3) No youth from out of state shall be accepted into the YCF without the approval of the interstate compact administrator pursuant to Title 41, chapter 4, part 1, MCA.

(4) Placement agreements do not expressly or implicitly modify or supersede any other agreement between the provider and the department, and are not sufficient as written agreements to modify any other agreement between the provider and the department. All modifications of those other agreements must be in writing.

AUTH: 52-2-111, 52-2-603, 52-2-622, MCA  
IMP: 52-2-113, 52-2-603, 52-2-622, MCA

NEW RULE IX YOUTH CARE FACILITY (YCF): YOUTH ORIENTATION

- (1) A YCF shall have written orientation policies and procedures for admission to the YCF. A youth's orientation shall include but is not limited to:
- (a) a procedure for ensuring that each youth receives a personal orientation to the YCF as soon as appropriate, but not later than 12 hours after admission;
  - (b) inventory of each youth's belongings;
  - (c) behavioral expectations;
  - (d) information on privilege systems;
  - (e) discipline policy;
  - (f) health and safety procedures;
  - (g) YCF rules;
  - (h) information on the YCF's search policies; and
  - (i) emergency evacuation procedures, including escape routes.
- (2) Documentation that is signed by both the youth and the staff person(s) conducting the orientation must be placed in the youth's file.

AUTH: 52-2-111, 52-2-603, 52-2-622, MCA  
IMP: 52-2-113, 52-2-603, 52-2-622, MCA

NEW RULE X YOUTH CARE FACILITY (YCF): CASE PLAN (1) Each YCF

- shall develop a case plan for each youth in care. A case plan is a specific plan for providing care, treatment, and services of any kind to a specific youth.
- (2) The case plan must include but is not limited to the following:
- (a) the youth's physical and medical needs;
  - (b) behavior management issues;
  - (c) mental health services when appropriate;
  - (d) the service goals with corresponding time frames, placement goals, discharge plans, estimated discharge date, and follow-up services;
  - (e) education plans;
  - (f) measurable goals and objectives; and
  - (g) the responsibilities of the youth, staff, and custodial parent or guardian for meeting the goals and objectives.
- (3) The initial case plan must:
- (a) be developed within seven days after admission; and
  - (b) be updated at least every 90 days from the day of development.
- (4) The placing agency, parent or guardian, and the youth must be involved in developing the case plan.
- (5) A copy of the signed case plan must be provided to the placing agency and parent or guardian within seven days of developing and updating the plan.
- (6) In addition to the requirements of this rule, therapeutic group homes must also meet the treatment plan requirements in [NEW RULE XLII].

AUTH: 52-2-111, 52-2-603, 52-2-622, MCA

IMP: 52-2-113, 52-2-603, 52-2-622, MCA

NEW RULE XI YOUTH CARE FACILITY (YCF): PHYSICAL CARE

(1) Every youth shall have access to the services of at least one licensed health care professional as defined in 50-5-101, MCA.

(2) Medical, dental, psychiatric, psychological care, and counseling services must be obtained for youth as needed.

(3) If a youth has not received a complete physical examination within six months prior to placement, the YCF shall arrange for the youth to have a complete physical examination within 30 days after admission to the facility and annually thereafter.

(4) If a youth has not had a dental examination within a year prior to placement, the YCF shall arrange for the youth to have a dental examination within 90 days after admission. All necessary dental work must be done and checkups must be arranged for the youth at least annually.

(5) If a youth has not had an eye examination within a year prior to placement, the YCF shall arrange for the youth to have an eye examination within 90 days after admission. All necessary checkups must be arranged for the youth at least annually.

(6) Provisions for treatment of diseases, remedial defects or deformities, and malnutrition must be made by the provider immediately upon the licensed health care professional's recommendation with notification to the placing agency and parent or guardian.

AUTH: 52-2-111, 52-2-603, 52-2-622, MCA

IMP: 52-2-113, 52-2-603, 52-2-622, MCA

NEW RULE XII YOUTH CARE FACILITY (YCF): MEDICATION STORAGE AND ADMINISTRATION

(1) A YCF shall have and follow written policies and procedures regarding the storage, administration, and disposal of prescription, nonprescription, and over-the-counter medication.

(2) All medication must be kept in a locked nonportable container, stored in its original container with the original prescription label. For medications taken on outings, all medication must be in the possession of a staff member trained to assist with the self-administration of medications.

(3) Staff who assist with self-administration must be trained to assist in proper medication procedures. Training must be documented in each staff member's personnel file.

(4) All prescription medications must be ordered by licensed health care professionals working within the scope of their practice. All prescription orders must contain the dosage to be given.

(5) Psychotropic medication is prohibited unless a licensed health care professional working within the scope of that professional's practice determines that the medications are clinically indicated.

(6) Under no circumstances may psychotropic or any other prescription or over-the-counter medication be given for disciplinary purposes, for the convenience of the staff, or as a substitute for other appropriate treatment services.

(7) A written record of all medications self-administered by a youth must be maintained. The record must include but is not limited to:

- (a) youth's name;
- (b) name and dosage of the medication;
- (c) the date and time the medication was taken or was refused by the youth;
- (d) name of the staff member who assisted in the self-administration of the medication; and
- (e) documentation of any medication errors, results of errors, and any effects observed.

(8) Prescribed medication may not be stopped or changed in dosage or administration without first consulting with a licensed health care professional. Results of the consultation must be recorded in the youth's record. The licensed health care professional shall document in writing any changes to medication. This documentation must be kept as part of the youth's case record.

(9) Placing workers, parents, or custodial guardians must be notified of all medications prescribed to youth including medication changes.

(10) All unused and expired medication must be properly disposed of and documented in the youth's case record.

AUTH: 52-2-111, 52-2-603, 52-2-622, MCA

IMP: 52-2-113, 52-2-603, 52-2-622, MCA

NEW RULE XIII YOUTH CARE FACILITY (YCF): CARE AND GUIDANCE

(1) A YCF shall provide to each youth sufficient staff to ensure:

- (a) appropriate care, supervision, safety, treatment, and guidance;
- (b) opportunities for educational, social, and cultural growth through suitable reading materials, toys, activities, and equipment; and
- (c) opportunities to associate with peer groups in school and community settings.

(2) A YCF shall ensure cooperation with the placing agency in:

- (a) participation in case conferences; and
- (b) arranging for contact with each youth's family unless there are documented safety reasons for restricting contact.

(3) When the placement has been made by the parent, the provider shall be responsible for assisting with referral for support services.

(4) The provider shall assist the youth and, when appropriate, the youth's family in preparing for the youth's discharge from the YCF.

AUTH: 52-2-111, 52-2-603, 52-2-622, MCA

IMP: 52-2-113, 52-2-603, 52-2-622, MCA

NEW RULE XIV YOUTH CARE FACILITY (YCF): NUTRITION

(1) A YCF shall provide for or serve three regular, well-balanced meals per day, and snacks. The meals and snacks must be appropriate to the nutritional needs of the youth and must include the four basic food group requirements.

(2) Special diets must be provided for youth as ordered in writing by a licensed health care professional. Such orders must be kept on file by the YCF.

(3) Copies of menus of the food actually served must be kept on file for one month and be available for inspection.

(4) All food must be transported, stored, covered, prepared, and served in a sanitary manner.

(5) Use of home canned products is prohibited unless the product has been commercially approved.

(6) Hands must be washed with warm water and soap before the handling of food. Hand sanitizer gels may be used in lieu of washing hands with soap and water.

AUTH: 52-2-111, 52-2-603, 52-2-622, MCA

IMP: 52-2-113, 52-2-603, 52-2-622, MCA

NEW RULE XV YOUTH CARE FACILITY (YCF): RELIGION AND CULTURE (1) The YCF shall have written policies and procedures on how the youth's individual religious and cultural beliefs will be addressed.

(2) The YCF shall provide youth with a reasonable opportunity to practice their respective religions. Youth must be permitted to have reasonable access to religious materials of their choice. If reasonable access is denied, the YCF must have documentation of the specific reasons for the denial.

(3) The YCF shall document its efforts in providing opportunity and encouragement to each youth to identify with the youth's cultural heritage.

AUTH: 52-2-111, 52-2-603, 52-2-622, MCA

IMP: 52-2-113, 52-2-603, 52-2-622, MCA

NEW RULE XVI YOUTH CARE FACILITY (YCF): PERSONAL NEEDS

(1) The YCF shall assure that each youth has clothing suitable to the youth's age and size and comparable to the clothing of other youth in the community.

(2) Youth shall have some choice in the selection of their clothing.

(3) A YCF shall provide necessary supplies and train youth in personal care, hygiene, and grooming.

AUTH: 52-2-111, 52-2-603, 52-2-622, MCA

IMP: 52-2-113, 52-2-603, 52-2-622, MCA

NEW RULE XVII YOUTH CARE FACILITY (YCF): PRIVACY AND INDIVIDUALISM (1) A YCF shall allow youth to have privacy.

(2) A YCF shall provide a separate bed, separate storage space for clothing and personal articles, and a place for each youth to display socially appropriate creative works and symbols of the youth's identity.

(3) Each youth must be provided with access to a quiet area where the youth can be alone when appropriate.

AUTH: 52-2-111, 52-2-603, 52-2-622, MCA

IMP: 52-2-113, 52-2-603, 52-2-622, MCA

NEW RULE XVIII YOUTH CARE FACILITY (YCF): MONEY (1) Money earned by a youth or received as a gift or allowance must be part of the youth's personal property and accounted for separately from the YCF funds.

(2) If the YCF is partly supported by institutional production on a commercial basis, the YCF shall comply with state and federal child labor and minimum wage laws.

AUTH: 52-2-111, 52-2-603, 52-2-622, MCA

IMP: 52-2-113, 52-2-603, 52-2-622, MCA

NEW RULE XIX YOUTH CARE FACILITY (YCF): YOUTH TRAINING AND EMPLOYMENT (1) For youth age 16 and older a YCF may assist in:

(a) preparing youth for economic independence;  
(b) referring youth to the appropriate independent living program; and  
(c) opportunity to obtain the skills necessary for employment as determined to be appropriate to meet the individual's needs. Such skills include but are not limited to:

- (i) completing applications;
- (ii) personal appearances for employment situations;
- (iii) attitudes toward employment; and
- (iv) interviewing for jobs.

(2) A YCF shall distinguish between tasks which youth are expected to perform as part of living together, jobs to earn spending money, and jobs performed for vocational training. Youth in care may not be used as employees of the YCF without prior approval of the department.

(3) Youth may be given age appropriate, nonvocational work assignments within the youth's capabilities as a constructive experience. The work assignment shall comply with all state and federal labor laws.

AUTH: 52-2-111, 52-2-603, 52-2-622, MCA

IMP: 52-2-113, 52-2-603, 52-2-622, MCA

NEW RULE XX YOUTH CARE FACILITY (YCF): EDUCATION (1) A YCF shall provide access to an educational program appropriate to the needs of each youth and comply with state school attendance laws.

(2) A YCF licensed as a youth shelter care facility shall assure that each youth is offered an appropriate educational program and make a reasonable effort to comply with state school attendance laws.

(3) The youth shelter care facility shall provide a day program plan for youth who will not be enrolled in the school system.

AUTH: 52-2-111, 52-2-603, 52-2-622, MCA

IMP: 52-2-113, 52-2-603, 52-2-622, MCA

NEW RULE XXI YOUTH CARE FACILITY (YCF): RECREATION (1) The YCF may have an on-grounds recreation program that is operated by the YCF's staff. However, when available, the YCF shall provide the youth access to

community recreation and cultural events when appropriate to the youth's needs, interests, and abilities.

AUTH: 52-2-111, 52-2-603, 52-2-622, MCA

IMP: 52-2-113, 52-2-603, 52-2-622, MCA

NEW RULE XXII YOUTH CARE FACILITIES (YCF): TIME-OUT (1) A YCF must develop a written time-out policy and procedures which clearly provide:

(a) length of time the youth may remain in time-out which must be age appropriate;

(b) guidelines for staff observation of the youth when in time-out;

(c) documentation required for each time-out that is directed by staff;

(d) purpose of time-out; and

(e) staff training pertaining to the use of time-out.

(2) Staff may direct a youth to time-out when a youth's behavior is disruptive to the youth's ability to learn, to participate appropriately, or to function appropriately with other youth or the activity, and when other de-escalation techniques have failed. Restraint, seclusion, or confinement may not be used as part of time-out procedures.

(3) Time-out may not be used as punishment.

(4) Youth placed in time-out must be reintroduced to the group in a sensitive and nonpunitive manner as soon as control is regained.

AUTH: 52-2-111, 52-2-603, 52-2-622, MCA

IMP: 52-2-113, 52-2-603, 52-2-622, MCA

NEW RULE XXIII YOUTH CARE FACILITY (YCF): BEHAVIOR MANAGEMENT POLICIES (1) A YCF shall have and follow written behavior management policies and procedures which include a description of the model, program, or techniques to be used with youth. The YCF shall have policies addressing discipline, therapeutic de-escalation in crisis situations, nonviolent crisis intervention, and time-out. Behavior management must be based on an individual assessment of each youth's needs, stage of development, and behavior. It must be designed with the goal of teaching youth to manage their own behavior, and be based on the concept of providing effective treatment by the least restrictive means.

(2) The behavior management policies and procedures must prohibit:

(a) the use of physical force, mechanical, chemical, or physical restraint as discipline;

(b) pain compliance, aversive conditioning, and use of pressure point techniques;

(c) placing of anything in or on a youth's mouth;

(d) cruel or excessive physical exercise, prolonged positions, or work assignments that produce unreasonable discomfort;

(e) verbal abuse, ridicule, humiliation, profanity, and other forms of degradation directed at a youth or a youth's family;

(f) physical discipline of any means including but not limited to hitting, shaking, biting, or pinching;

(g) locked confinement or seclusion;

(h) withholding of necessary food, water, clothing, shelter, bedding, rest, medications as prescribed, medical care, or toilet use;

(i) denial of visits or communication with the youth's family as punishment or discipline. Denial of visits or communication with the youth's family must be in collaboration with the youth's placing agent or by court order;

(j) isolation as punishment; and

(k) any other form of punishment or discipline which subjects a youth to pain, humiliation, or unnecessary isolation or restraint.

(3) If YCF policies and procedures allow for disciplining a group of youth for actions of one youth, the policies and procedures must clearly prescribe the circumstances and safeguards under which disciplining the group is allowed.

(4) Any staff person involved in or witnessing an infraction of this rule shall complete an incident report clearly detailing the events of the infraction. The report must be completed prior to the end of the involved staff person's shift.

(5) A copy of the incident report shall be placed in the youth's file and the incident must be reported to the licensure bureau, placing agent, and parent or guardian within one working day of its occurrence.

(6) An authorized staff person must be notified of the incident immediately and:

(a) begin an investigation within 24 hours of incident; and

(b) complete a written report within two days upon completion of the investigation.

(7) An investigation of the incident may be conducted by the department.

(8) A complete report of any investigation conducted by the YCF must be placed in the provider's records and must be available for inspection by the department or the youth's placing agency.

AUTH: 52-2-111, 52-2-603, 52-2-622, MCA

IMP: 52-2-113, 52-2-603, 52-2-622, MCA

NEW RULE XXIV YOUTH CARE FACILITY (YCF): USE OF NONVIOLENT CRISIS INTERVENTION STRATEGIES (1) The YCF shall have written policies and procedures governing the appropriate use of nonviolent crisis intervention strategies, including but not limited to the use of de-escalation techniques and physical restraint methods if used by provider.

(2) The nonviolent crisis intervention strategies policies and procedures must comply with the following:

(a) Crisis prevention and verbal and nonverbal de-escalation techniques are the preferred methods and must be used first to manage behavior. All staff working directly with youth must be trained in de-escalation techniques. This training must be documented in each staff member's personnel file.

(b) Physical restraint may only be used to safely control a youth until the youth can regain control of the youth's own behavior. Physical restraint must only be used in the following circumstances:

(i) when the youth has failed to respond to de-escalation techniques and it is necessary to prevent harm to the youth or others; or

(ii) when a youth's behavior puts themselves or others at substantial risk of harm and the youth must be forcibly moved.

(c) Physical restraint must be used only until the youth has regained control and must not exceed 15 consecutive minutes. If the youth remains a danger to self or others after 15 minutes, the youth's record must include written documentation of attempts made to release the youth from the restraint and the reasons that continuation of restraint is necessary.

(d) Physical restraint may be used only by employees who are documented to be specifically trained in nonviolent crisis intervention techniques.

(e) YCF policies and procedures must prohibit the application of a nonviolent physical restraint if a youth has a documented physical condition that would contradict its use, unless a health care professional has previously and specifically authorized its use in writing. Documentation must be maintained in the youth's record.

(f) YCF policies and procedures must require the documentation of:

(i) the behavior which required the physical restraint;

(ii) the specific attempts to de-escalate the situation before using physical restraint;

(iii) the length of time the physical restraint was applied including documentation of the time started and completed;

(iv) the identity of the specific staff member(s) involved in administering the physical restraint;

(v) the type of physical restraint used;

(vi) any injuries to the youth resulting from the physical restraint; and

(vii) debriefing completed with the staff and youth involved in the physical restraint.

(g) YCF policies and procedures must require that whenever a physical restraint has been used on a youth more than four times within a seven-day period, lead clinical staff members or treatment team members will review the youth's situation to determine the suitability of the youth remaining in the YCF, whether modification to the youth's plan is warranted, or whether staff need additional training in alternative therapeutic behavior management techniques. The YCF shall take appropriate action as a result of the review.

AUTH: [52-2-111](tel:52-2-111), [52-2-603](tel:52-2-603), [52-2-622](tel:52-2-622), MCA

IMP: [52-2-113](tel:52-2-113), [52-2-603](tel:52-2-603), [52-2-622](tel:52-2-622), MCA

#### NEW RULE XXV YOUTH CARE FACILITY (YCF): DISCHARGE SUMMARY

(1) Within ten business days of the discharge of a youth from the YCF, a discharge report must be completed, and include:

(a) the youth's name, date of birth, admission and discharge dates, reason for placement and discharge, the placing agent, and/or parent or guardian;

(b) a written summary of services provided, including the youth's participation and progress in the program, contact information of persons who conducted evaluations of the youth, condition of the youth, compliance with YCF policies and procedures, and recommendations regarding the youth;

(c) the youth's educational status;

- (d) medical, dental, and psychiatric care received during placement;
  - (e) follow-up health care required for the youth;
  - (f) current medications, dosage taken, number of times per day, and name of prescribing licensed health care professional;
  - (g) youth's reaction to discharge and whether or not the discharge was planned or unplanned;
  - (h) recommendations for follow-up services for the youth;
  - (i) an up-to-date inventory of the youth's clothing and personal belongings;
- and
- (j) the signature of the staff member who prepared the report and the date of preparation.

(2) The original discharge report must be maintained by the YCF in the youth's file and a copy must be provided to the placing agency or legal guardian within ten days of completion.

AUTH: 52-2-111, 52-2-603, 52-2-622, MCA

IMP: 52-2-113, 52-2-603, 52-2-622, MCA

#### NEW RULE XXVI YOUTH CARE FACILITY (YCF): CASE RECORDS

(1) A YCF shall maintain a written case record for each youth which shall include administrative, treatment, and educational data from the time of admission until the time the youth is discharged from the YCF. A youth's case record must include but is not limited to the following:

- (a) the name, sex, and birth date of the youth;
- (b) the name, address, and telephone number of the parent(s) or guardian of the youth;
- (c) date of admission and placing agency;
- (d) if the youth was not living with the youth's parents prior to admission, the name, address, telephone number, and relationship to the youth of the person with whom the youth was living;
- (e) date of discharge, reason for discharge, and the name, telephone number, and address of the person or agency to which the youth was discharged;
- (f) all documents related to the referral of the youth to the facility as provided by the placing agency;
- (g) current custody and legal guardianship documents as provided by the placing agency;
- (h) the youth's court status, if applicable;
- (i) a copy of the youth's birth certificate or a written statement of the youth's birth date, including the source of this information;
- (j) consent forms signed by the parents or guardian prior to placement allowing the YCF to authorize all necessary medical care, routine tests, immunization, and emergency medical or surgical treatment;
- (k) cumulative health records including medical history and immunization records as provided by the placing agency;
- (l) education records and reports, including but not limited to, reports cards and individual education plan (IEP) reports;
- (m) treatment or clinical records and reports;

- (n) records of special or critical incidents;
  - (o) case plans, treatment plans, and related material;
  - (p) social assessment that is current to date of placement; and
  - (q) an immediate needs assessment and assigned responsibilities.
- (2) In addition to the requirements in (1), therapeutic group homes must maintain an updated copy of the youth's clinical assessment.

AUTH: 52-2-111, 52-2-603, 52-2-622, MCA

IMP: 52-2-113, 52-2-603, 52-2-622, MCA

NEW RULE XXVII YOUTH CARE FACILITY (YCF): SEARCHES (1) The provisions of this rule apply to all searches by YCF staff of the youth's person and the youth's personal property, including searches of personal correspondence. The facts and circumstances supporting a determination of reasonable cause for the search must be documented in the youth's file.

(2) Youth may not be subjected to any search except as follows:

- (a) there is reasonable cause to believe that the search will result in discovery of contraband;
- (b) there is reasonable cause to believe that the search is necessary to alleviate a threat of harm to the youth, other youths, or staff; or
- (c) there is a court order/parole order in the youth's case record allowing for searches.

(3) The YCF shall adopt policies and procedures relating to searches, including pat-down searches, personal property searches, correspondence searches, urinalysis testing, and breathalyzer testing. The policies must include but are not limited to the following:

- (a) a procedure for documenting all searches, reasons for the search, who conducted the search, and the results of the search;
- (b) notification of the search policy to placing worker or parent/guardian and youth at time of admission;
- (c) a protocol for conducting personal property searches when the youth is not available to be present for the search;
- (d) the consequences to a youth when contraband is located;
- (e) description of what happens to contraband which has been located; and
- (f) pat-down searches on youth, which must be conducted by staff persons of the same sex.

(4) Staff must be trained in the proper protocol for all searches.

(5) Youth may not be subjected to any of the following intrusive acts:

- (a) strip searches;
- (b) body cavity searches; or
- (c) video surveillance except in common areas such as the living room, kitchen, and hallways.

(6) The YCF shall have adopted policies and procedures prior to use of urinalysis testing which address, at minimum, procedures for obtaining samples for urinalysis testing, procedures for processing urinalysis testing, and consequence to the youth when a urinalysis is positive.

(a) Youth may not be subjected to testing unless the testing:

- (i) has been ordered by a court;
- (ii) is required pursuant to a case plan for monitoring drug or alcohol use, as approved by the parent, legal guardian, parole officer, or committing agency; or
- (iii) is requested by the youth's parent or legal guardian.

(b) The YCF shall notify the youth's placing worker and custodial parent or guardian of every urinalysis testing performed on the youth and the results.

(c) Staff shall document compliance with YCF policies and procedures in connection with each urinalysis testing.

(7) The YCF shall have adopted policies and procedures prior to use of breathalyzer testing which address, at minimum, procedures to be used to obtain a breathalyzer test and consequences to the youth when a breathalyzer is positive:

(a) Breath testing may only be conducted by appropriate law enforcement personnel and probation, parole, or correctional officer.

(b) Youth may be not subjected to breathalyzer testing unless the testimony:

- (i) has been ordered by a court;
- (ii) is required pursuant to a case plan for monitoring alcohol use, as approved by the parent or legal guardian; or
- (iii) is requested by the youth's parent or legal guardian, probation, parole, or correctional officer.

(c) The YCF must notify the youth's placing worker and parent or guardian of every breathalyzer test performed on the youth and the results.

(d) Staff shall document compliance with YCF policies and procedures in connection with each breathalyzer testing.

AUTH: 52-2-111, 52-2-603, 52-2-622, MCA

IMP: 52-2-113, 52-2-603, 52-2-622, MCA

NEW RULE XXVIII YOUTH CARE FACILITY (YCF): CONTRABAND (1) A YCF shall define prohibited contraband in a written policy.

(2) Law enforcement must be notified as appropriate when illegal contraband is discovered.

(3) All contraband that is not illegal must be returned to the youth's parent or guardian, or destroyed in accordance with the YCF's contraband policy. When contraband is disposed of, the disposal must be witnessed by at least two staff members and be documented in the youth's case record.

(4) If contraband that is not illegal is stored by the YCF, the YCF shall have written policies clearly outlining the storing procedure.

AUTH: 52-2-111, 52-2-603, 52-2-622, MCA

IMP: 52-2-113, 52-2-603, 52-2-622, MCA

NEW RULE XXIX YOUTH CARE FACILITY (YCF): SAFETY (1) A YCF shall have and follow appropriate written policies and procedures on safety and equipment.

(2) There must be a first aid kit with sufficient supplies available at all times. A first aid kit must:

- (a) be readily available on site as well as in all vehicles used by the YCF;

(b) meet the standards of an appropriate national organization for the activity being conducted and the location and environment being used;

(c) be reviewed with new staff for contents and use; and

(d) be inventoried on a quarterly basis.

(3) Policies and procedures must be in place for the safe use and storage of fuels and all heat sources, including inaccessibility to youth when not being used under the direct supervision of staff.

(4) Policies and procedures must be in place for the safe use and storage of poisons and toxins as follows:

(a) All detergents, chemical sanitizers, and related cleaning compounds and other chemicals must be stored in a safe location that is inaccessible to youth when not being used.

(b) Combustible and flammable materials and liquids must be properly stored so as not to create a fire hazard.

(c) Poisonous compounds such as insecticide, rodenticide, and other chemicals bearing the EPA toxicity labels "warning" or "danger" must be kept under lock and key.

(d) Poisonous or toxic chemicals may not be stored above or adjacent to food, dishes or utensils, or food contact surfaces. The chemicals may not be used in such a manner that they could contaminate these articles.

(5) Emergency information for youth must be easily accessible at the facility. Emergency information for each youth must include but is not limited to:

(a) the name, address, telephone number, and relationship of a designated person to be contacted in case of an emergency;

(b) the name, address, and telephone number of the youth's licensed health care professional or source of health care;

(c) the name, address, telephone number, and relationship of the person able to give consent for emergency medical treatment;

(d) documentation of any medical conditions that may affect care including but not limited to known allergies;

(e) a signed release for emergency medical treatment from the parent or legal guardian; and

(f) a copy of the youth's current medical insurance card or insurance information when a card is not available to providers.

AUTH: 52-2-111, 52-2-603, 52-2-622, MCA

IMP: 52-2-113, 52-2-603, 52-2-622, MCA

NEW RULE XXX YOUTH CARE FACILITY (YCF): POTENTIAL WEAPONS

(1) A YCF shall have and follow written policy and procedures on management of weapons and potential weapons.

(2) Firearms must not be allowed on the YCF's property.

(3) Firearms must not be in the presence of youth with the exception of law enforcement at any time on or off the YCF's property.

(4) Staff shall supervise youth possession and use of knives, hatchets, other edged tools, or any item which may pose a danger to self or others.

AUTH: 52-2-111, 52-2-603, 52-2-622, MCA  
IMP: 52-2-113, 52-2-603, 52-2-622, MCA

NEW RULE XXXI YOUTH CARE FACILITY (YCF): INFECTION CONTROL

(1) A YCF shall develop and implement an infection prevention and control program. At a minimum the facility shall develop, implement, and review, at least annually, written policy and procedures regarding infection prevention and control which must include procedures to identify high risk individuals and what methods are used to protect, contain, or minimize the risk to youth and staff.

AUTH: 52-2-111, 52-2-603, 52-2-622, MCA  
IMP: 52-2-113, 52-2-603, 52-2-622, MCA

NEW RULE XXXII YOUTH CARE FACILITY (YCF): ANIMALS AND PETS

(1) The YCF may keep household pets and a youth or staff may have a service animal as defined in ARM 37.40.1487, and permitted by local ordinance, subject to the following provisions:

- (a) pets must be clean and disease-free;
- (b) the immediate environment of pets must be kept clean;
- (c) birds must be kept in appropriate enclosures, unless the bird is a companion breed maintained and supervised by the owner; and
- (d) pets that are kept at the facility shall have documentation of current vaccinations, including rabies, as appropriate.

(2) The administrator or designee shall determine which pets may be brought into the facility. Upon approval, family members may bring pets to visit, if the pets are clean, disease-free, and vaccinated as appropriate.

(3) Facilities that allow birds shall have procedures that protect residents, staff, and visitors from psittacosis, ensure minimum handling of droppings, and require droppings to be placed in a plastic bag for disposal.

(4) Prior to admission of companion birds, documentation of the import, out-of-state veterinarian health certificate, and import permit number provided by the pet store or breeder must be provided and maintained in the owner's records. If the health certificate and import permit number are not available, or if the bird was bred in-state, a certificate from a veterinarian stating that the bird is disease-free is required prior to residency. If the veterinarian certificate cannot be obtained by the move-in date, the resident may keep the bird enclosed in a private single occupancy room, using good hand washing after handling the bird and bird droppings until the veterinarian examination is obtained.

(5) Pets may not be permitted in food preparation, storage, or dining areas during meal preparation time or during meal service or in any area where their presence would create a significant health or safety risk to others.

AUTH: 52-2-111, 52-2-603, 52-2-622, MCA  
IMP: 52-2-113, 52-2-603, 52-2-622, MCA

NEW RULE XXXIII YOUTH CARE FACILITY (YCF): PHYSICAL ENVIRONMENT

(1) A YCF shall provide a minimum of ten foot-candles of light in all rooms and hallways, with the following exceptions:

(a) All reading lamps must have a capacity to provide a minimum of 30 foot-candles of light.

(b) All toilet and bathing areas must be provided with a minimum of 30 foot-candles of light.

(c) General lighting in food preparation areas must be a minimum of 30 foot-candles of light.

(d) Hallways must be illuminated at all times by at least a minimum of five foot-candles of light at the floor.

(2) Adequate space must be provided for all phases of daily living, including recreation, privacy, group activities, and visits from family, friends, and community acquaintances.

(3) Youth must have indoor areas of at least 40 square feet of floor space per youth for quiet, reading, study, relaxing, and recreation. The minimum space requirement may not include halls, kitchens, and any rooms not used by youth may not be included in the minimum space requirement.

(4) A bedroom must contain at least 50 square feet of floor space per person. Bedrooms for single occupancy must have at least 80 square feet.

(5) The maximum number of youth per bedroom must not exceed four. The bedrooms must have floor to ceiling walls.

(6) The YCF shall provide:

(a) at least one toilet for every four residents; and

(b) one bathing facility for every six residents.

(7) All resident rooms with toilets or shower/bathing facilities must have an operable window to the outside or must be exhausted to the outside by a mechanical ventilation system.

(8) Each resident must have access to a bathroom without entering another resident's room, the kitchen, or dining areas.

AUTH: 52-2-111, 52-2-603, 52-2-622, MCA

IMP: 52-2-113, 52-2-603, 52-2-622, MCA

NEW RULE XXXIV YOUTH CARE FACILITY (YCF): WATER SUPPLY

(1) An adequate and potable supply of water must be provided.

(2) Before a license may be issued, a YCF using an individual, shared, or multiple user water supply must submit the following to the department or its designee:

(a) satisfactory coliform bacteria and nitrate test results as specified in ARM Title 17, chapter 38, subchapter 2; and

(b) the results of an onsite sanitary survey of the water supply system to detect sanitary deficiencies.

(3) A supplier of an individual, shared, or multiple user water supply shall conduct a coliform bacteria test of the system at least twice a year with one sample collected between April 1 through June 30 and the second sample collected between August 1 through October 31, and conduct a nitrate test of the system at

least once every three years. Water tests must be analyzed at a certified laboratory. A supplier shall keep sampling result records for at least three years.

(4) A public water supply system must be constructed and operated in accordance to current applicable laws as regulated by the Montana Department of Environmental Quality.

(5) Nonpotable water sources must be marked "not for human consumption".

(6) Plumbing must be installed and maintained in a manner to prevent cross connections between the potable water supply and any nonpotable or questionable water supply or any source of pollution through which the potable water supply might become contaminated. The potable water system must be installed to preclude the possibility of backflow. A hose may not be attached to a faucet unless a backflow prevention device is installed.

(7) A water supply system is determined to have failed and requires treatment, replacement, repair, or disinfection, when the water supply becomes unsafe, or when it exceeds the maximum contaminant levels specified in ARM Title 17, chapter 38, subchapter 2. A water supply system is inadequate when it is found to be less than 20 psi measured at the extremity of the distribution line during the instantaneous peak usage.

(8) Extension, alteration, repair, or replacement of a water supply system or development of a new water supply system must be in accordance with all applicable state and local laws.

(9) Bottled and packaged potable water must be obtained from a licensed and approved source and be handled and stored in a way that protects it from contamination.

AUTH: 52-2-111, 52-2-603, 52-2-622, MCA

IMP: 52-2-113, 52-2-603, 52-2-622, MCA

NEW RULE XXXV YOUTH CARE FACILITY (YCF): SEWAGE SYSTEM AND SOLID WASTE (1) An adequate and safe wastewater system must be provided for conveying, treating, and disposing of all sewage. Immediate measures must be taken to alleviate health and sanitation hazards caused by wastewater at the YCF when they occur.

(2) All sewage, including liquid waste, must be disposed of by a public sewage system approved by the Montana Department of Environmental Quality or by a sewage treatment and disposal system constructed and operated in accordance to applicable state and local laws.

(3) A wastewater system has failed and requires replacement or repair if any of the following conditions occur:

(a) the system fails to accept, treat, or dispose of wastewater as designed;

(b) effluent from the wastewater system contaminates a potable water supply or state waters; or

(c) the wastewater system is subjected to mechanical failure, including electrical outage, or collapse or breakage of a septic tank, lead line, or drainfield line.

(4) Extension, alteration, replacement, or repair of any wastewater system must be done in accordance with all applicable state and local laws.

(5) Mop water or soiled cleaning water may not be disposed of in any sink other than a mop or utility sink or a toilet.

(6) Solid waste must be collected, stored, and disposed of in a manner that does not create a sanitary nuisance. Solid waste must be removed from the premises at least weekly to a licensed solid waste disposal facility.

AUTH: 52-2-111, 52-2-603, 52-2-622, MCA

IMP: 52-2-113, 52-2-603, 52-2-622, MCA

NEW RULE XXXVI YOUTH CARE FACILITY (YCF): FOOD PREPARATION AND HANDLING (1) Safe food handling and preparation practices must be followed in all YCFs.

(2) The minimum hand washing requirements include the following:

(a) The facility must have conveniently located hand washing facilities, supplied with hand soap, disposable towels kept clean in a dispenser, and cleanable trash can.

(b) An individual in a YCF handling or preparing food shall thoroughly wash hands, wrists, and exposed arms with soap and warm running water for at least 20 seconds:

(i) before touching anything used to prepare food;

(ii) before touching food that will not be cooked;

(iii) after touching raw meat, fish, or poultry;

(iv) after cleaning, handling dirty dishes, removing garbage, or storing supplies;

(v) after using the toilet facilities;

(vi) after eating or drinking;

(vii) after touching the face, hair, or skin;

(viii) after blowing the nose, coughing, or sneezing; and

(ix) after touching any soiled object.

(c) After handwashing, hands must be dried and faucets turned off with a clean paper towel.

(d) If used, chemical hand sanitizers must be followed by thorough hand rinsing before contact with food.

(3) General food safety requirements include the following:

(a) All food must be from an approved source and shall be transported, stored covered, prepared, and served in a sanitary manner to prevent contamination.

(b) Food must be free from adulteration or other contamination and must be safe for human consumption.

(c) Milk and other dairy products must be pasteurized.

(d) Use of home canned foods other than jams, jellies, and fruits is prohibited.

(e) Use of thermometers is required to check food temperatures.

(f) Cold storage of potentially hazardous food must be at 41°F or below.

(g) Frozen food must be kept frozen.

(h) Hot storage of potentially hazardous food must be 135°F or above.

(i) Each type of food must be stored and arranged so that cross-contamination of one type with another is prevented.

(j) Raw fruits and vegetable must be thoroughly washed in potable water to remove soil and other contaminants before being cut, combined with other ingredients, cooked, served, or offered for human consumption in ready-to-eat form. Fruits and vegetables may be washed by using chemicals approved by the EPA.

(4) General health and safety requirements include the following:

(a) Use clean cutting boards, knives, can openers, and other equipment and utensils for each type of food preparation to prevent cross-contamination.

(b) A person with symptoms of a communicable disease that can be transmitted to foods or who is a carrier of such a disease may not work with food, clean equipment, or clean utensils.

(c) When the regulatory authority has reasonable cause to suspect possible disease transmission within a YCF, the YCF shall take appropriate action in accordance with ARM Title 37, chapter 114 regarding communicable disease control.

(d) The person in charge at the YCF shall contact the regulatory authority immediately in the event of a fire, flood, power outage, or similar event that might result in the contamination of food, or that might prevent potentially hazardous food from being held at required temperatures.

(5) Minimum food storage requirements include the following:

(a) Food must be stored to prevent potential contamination.

(b) Food packages must be in good condition and protected of their contents so that the food is not exposed to adulteration or potential contaminants.

(c) Working containers holding food or food ingredients that are removed from their original packages must be identified with the common name of the food.

(d) Packaged food may not be stored in direct contact with water or undrained ice if the food package could allow water entry.

(6) Equipment and utensil sanitation requirements include the following:

(a) Kitchenware, tableware, and food contact surfaces must be washed, rinsed, and completely dried after each use.

(b) Moist cloths used for wiping kitchen and dining area surfaces, equipment, and utensils must be placed in chemical sanitizer solution frequently enough and be of sufficient strength to maintain 200 to 400 parts per million (ppm) available chlorine or equivalent.

(c) Sinks used for food preparation must be cleaned before beginning the preparation of the food.

(7) A domestic style dishwasher may be used only if it is equipped with a heating element and the following conditions are met:

(a) The dishwasher must be capable of washing and sanitizing all dishware, utensils, and food service equipment normally used for the preparation and service of a meal in one cycle.

(b) The dishwasher must have water at a temperature of at least 165°F when it enters the machine, if it uses hot water for sanitization.

(c) If it uses a heat cycle with a heating element for sanitization, the dishwasher must be allowed to run through the entire cycle before it is opened.

(d) At least a two-compartment sink must be available as a backup in the event the dishwasher becomes inoperable.

(8) If a two-compartment sink is used, all dishware, utensils, and food service equipment must be thoroughly cleaned in the first sink compartment with a hot detergent solution that is kept clean and at a concentration indicated on the manufacturer's label, sanitized in the second compartment by immersion in any chemical sanitizing agent that will provide the equivalent bactericidal effect of a solution containing at least 100 ppm but not more than 200 ppm of available chlorine at a temperature of at least 75°F for one minute, and air-dried before being stored.

AUTH: 52-2-111, 52-2-603, 52-2-622, MCA

IMP: 52-2-113, 52-2-603, 52-2-622, MCA

NEW RULE XXXVII YOUTH CARE FACILITY (YCF): EMERGENCY AND EVACUATION PLANS (1) A YCF shall have and follow a written emergency plan developed in conjunction with emergency services in the community, and it must include specific procedures for evacuations, disasters, medical emergencies, hostage situations, casualties, missing youth, and other serious incidents identified by the YCF.

(2) The emergency plan must, at a minimum, include:

(a) designation of authority and staff assignment;

(b) a specific evacuation plan;

(c) provisions for transportation and relocation of YCF participants when necessary;

(d) provisions for supervision of youth after an evacuation or relocation;

(e) provisions for the instruction of all participants on how to respond in the case of an emergency; and

(f) provisions for arranging medical care and notifying a youth's licensed health care professional, placing agent, and parent or guardian.

AUTH: 52-2-111, 52-2-603, 52-2-622, MCA

IMP: 52-2-113, 52-2-603, 52-2-622, MCA

NEW RULE XXXVIII YOUTH CARE FACILITY (YCF): FINANCES (1) Each YCF shall:

(a) provide a sound financial plan to carry out its defined purposes and provide proper care for children;

(b) provide documentation of sufficient funds or resources for its first year of operation and be able to furnish evidence to that effect;

(c) maintain financial records of all receipts, disbursements, assets, and liabilities; and

(d) upon request by the department, have all accounts audited by an independent auditor who is not regularly employed by the YCF or a member of the YCF's board of directors.

(2) Financial responsibility for medical and dental treatment must be established prior to placement and must usually lie with the parent, guardian, custodian, and/or referring party of the child.

(3) The YCF must show proof that professional or general liability insurance is in effect for the protection of the YCF, staff, and youth.

AUTH: 52-2-111, 52-2-603, 52-2-622, MCA

IMP: 52-2-113, 52-2-603, 52-2-622, MCA

NEW RULE XXXIX THERAPEUTIC GROUP HOMES (TGH): STAFFING

(1) In addition to the requirements specified in [NEW RULE XXXIX], TGH providers must meet staffing requirements specified in this rule to provide a therapeutic environment and treatment interventions identified in the youth's individual treatment plan.

(2) A TGH with four or fewer youth shall have a ratio of youth to direct care staff of no more than 2:1 each day for a 15-hour period beginning at, or between 7:00 a.m. and 7:30 a.m., or beginning at some other reasonable morning half hour which is approximately 15 hours prior to the bedtime of the youth.

(3) A TGH with five or more shall have a minimum of two direct care staff present for 15 hours each day between 7:00 a.m. and 7:30 a.m., or beginning at some other reasonable half hour which is approximately 15 hours prior to the bedtime of the youth.

(4) Exceptions to youth to direct care staff ratio:

(a) During regular school hours when youth are not normally present, at least one on-call staff must be available. Staff must report to work at the TGH within 30 minutes of notification that they are needed.

(b) If no more than two youths do not attend school and remain in the TGH, the program manager may be counted in the direct care staff ratio.

(5) A minimum of one direct care staff must be present and awake nine hours each night at or between 10:00 p.m. and 7:00 a.m., or no earlier than 15 hours from the time daytime staffing start working. In addition, one on-call staff must be available each night and report to work within 30 minutes of notification that they are needed.

(6) Each program manager shall be responsible for no more than two TGH. The program manager may not be counted in the direct care staffing to youth ratio except as provided in (4)(b).

(7) An individual providing mental health professional services shall meet the requirements of ARM 37.87.702.

(8) Program managers and lead clinical staff may be the same employee as long as they meet the minimum qualifications of both positions and have sufficient time to carry out the functions of both positions.

(9) Lead clinical staff shall be responsible for the supervision and overall provision of treatment services to youth in the TGH. The lead clinical staff must not be counted in the direct care staff to youth ratio.

(10) Adequate staff must be employed to implement each youth's individualized treatment plan.

AUTH: 52-2-111, 52-2-603, 52-2-622, MCA

IMP: 52-2-113, 52-2-603, 52-2-622, MCA

NEW RULE XL THERAPEUTIC GROUP HOMES (TGH): CLINICAL ASSESSMENT (1) A clinical assessment must be completed on a youth admitted to a TGH within ten business days (Monday through Friday), of admission unless a current clinical assessment that has been completed within the last 72 months is submitted with the youth's referral packet.

AUTH: 52-2-111, 52-2-603, 52-2-622, MCA  
IMP: 52-2-113, 52-2-603, 52-2-622, MCA

NEW RULE XLI THERAPEUTIC GROUP HOMES (TGH): THERAPY REQUIREMENTS (1) Each youth must receive from the lead clinical staff 150 minutes per week (Sunday through Saturday) of individual, group, and family therapy as clinically indicated based on the specific treatment needs of the youth. Therapy requirements include the following:

(a) Individual therapy must be provided at least 50 minutes out of the required 150 minutes per week. Individual therapy may be provided in two 25-minute sessions per week as clinically appropriate. The lead clinical staff shall document specific reasons why a 50-minute therapy session cannot be provided.

(b) Family therapy must be provided to the youth and biological, adoptive, or foster family members with whom the youth previously resided or plans to reside with upon discharge. If family therapy is not appropriate based on the particular situation of the youth, the lead clinical staff shall document specific reasons why family therapy cannot be provided.

(2) Therapy sessions must address the youth's treatment goals and objectives in the treatment plan, and each session must be documented in the case record by the lead clinical staff. Documentation must include the signature of the person who provided the therapy and the date, start and end times of each session.

(3) Internal staff meetings to address the needs of each youth must be conducted weekly and must include the program manager, lead clinical staff, and direct care staff.

AUTH: 52-2-111, 52-2-603, 52-2-622, MCA  
IMP: 52-2-113, 52-2-603, 52-2-622, MCA

NEW RULE XLII THERAPEUTIC GROUP HOMES (TGH): TREATMENT PLAN (1) In addition to the requirements specified in [NEW RULE X], the treatment plan must document specific and measurable objectives and interventions based on a clinical assessment related to the youth's mental health needs.

(2) Treatment plans must be reviewed and updated at least every 30 days.

(3) All direct care staff and treatment team members, including the lead clinical staff involved in the care of the youth, shall read and sign off on the treatment plan within seven days of its development or update.

(4) A copy of the treatment plan must be provided to the youth's placing agency and custodial parent or guardian within seven days of the plan's development or update.

AUTH: 52-2-111, 52-2-603, 52-2-622, MCA  
IMP: 52-2-113, 52-2-603, 52-2-622, MCA

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

37.97.101 YOUTH CARE FACILITY (YCF): PURPOSE (1) These rules establish licensing procedures and licensing requirements for youth care facilities.

AUTH: ~~41-3-503~~, ~~41-3-1103~~, ~~41-3-1142~~, 52-2-111, 52-2-603, 52-2-622, ~~53-4-111~~, MCA  
IMP: ~~41-3-501~~, ~~41-3-503~~, ~~41-3-1102~~, ~~41-3-1142~~, 52-2-113, 52-2-602, 52-2-622, ~~53-2-201~~, ~~53-4-113~~, MCA

37.97.102 YOUTH CARE FACILITY (YCF): DEFINITIONS (4) The following definitions apply to all YCF licensing rules:

(1) "Chemical restraint" means the use of a drug or medication that is used to control behavior or restrict the youth's freedom of movement, and which is not a standard treatment for the youth's medical or psychiatric condition. The use of chemical restraint is prohibited in all YCFs.

(2) "Child" or "youth" means any person under the age of 18 years, without regard to emancipation, except for youth covered by Montana Medicaid programs which allow for participation of youth up to the age of 21 years as defined in ARM 37.87.102.

(3) "Child care agency" means any YCF in which substitute care is provided to 13 or more youth.

(4) "Clinical assessment" means a psychological assessment with DSM - IV diagnosis and a social history completed by the lead clinical staff or an in-training mental health professional supervised by the lead clinical staff. Clinical assessments include the following information:

(a) diagnosis supported by a rationale and specific behaviors;

(b) trauma history;

(c) chemical dependence issues;

(d) presenting problem;

(e) history of problem;

(f) psychiatric history (interventions, responses to treatment, medications);

(g) social and educational history; and

(h) risk factors.

(5) "Correspondence search" means opening, inspecting, and/or reading a youth's mail or inspecting the contents of a package.

(6) "Department" means Department of Public Health and Human Services.

(7) "Direct care staff" means YCF personnel who directly participate in the care, supervision, and guidance of youth in a YCF.

(8) "Discharge plan" means a realistic plan developed to transition the youth to a less restrictive and appropriate placement with specific services identified and available.

(9) "In-training mental health professional" is defined in ARM 37.87.702.

(10) "Lead clinical staff (LCS)" means an employee of the therapeutic group home (TGH) provider. The LCS is responsible for the supervision and overall provision of treatment services to youth in the TGH. The LCS must be a licensed clinical psychologist, licensed master level social worker (MSW), or licensed clinical professional counselor (LCPC). The LCS can be an in-training mental health professional.

(11) "Licensure bureau" means the area of the department responsible for licensing a YCF.

(12) "Maternity home" means a YCF which provides for the care and maintenance of youth during pregnancy, childbirth, and postnatal periods. A maternity home must meet the licensing requirements of a child care agency regardless of the number of residents served.

(13) "Mechanical restraint" means the use of devices as a means of restricting a youth's freedom of movement. The use of mechanical restraint is prohibited in any YCF.

(14) "Pat-down search" means a body search done outside of a youth's clothing with the intention of locating suspected contraband.

(15) "Personal property search" means a search which includes but is not limited to going through a youth's personal property and/or room including closet, bed, desk, dresser drawers, etc., with the intention of looking for contraband.

(16) "Physical escort" means the temporary touching or holding of the hand, wrist, arm, shoulder, or back for the purpose of inducing a youth who is acting out to walk to a safe location.

(17) "Physical restraint" means a personal restriction that immobilizes or reduces the ability of the free movement of an individual's arms, legs, or head. Such term does not include physical escort. Physical restraint may be imposed only in emergency circumstances and only to ensure the immediate physical safety of the resident, a staff member, or others, when less restrictive interventions have been determined to be ineffective.

(18) "Program manager" means an employee of a therapeutic group home provider who trains and supervises direct care staff. A program manager shall have a bachelor's degree in human services, or the experience and education, equivalent to a bachelor's degree. Human services experience equivalent to a bachelor's degree for a nondegree program manager is six years. Each year of post-secondary education in human services for a nondegree program manager equals one year of experience.

(19) "Seclusion" means a behavior control technique involving locked isolation in which the resident is physically prevented from leaving. Such term does not include time-out. Seclusion is prohibited in licensed YCFs.

(20) "Serious incident" means suicide attempt, use of excessive physical force by staff, physical or sexual assault of a youth by resident or staff, injury to a youth which requires emergency medical care, known or suspected abuse or neglect of a youth by staff or resident, or the death of a youth.

(21) "Substitute care" means the full-time care of youth in a residential setting for the purpose of providing food, shelter, security and safety, guidance, direction, and, if necessary, treatment to youth who are removed from or who are without the care and supervision of their parents or guardian.

(22) "Therapeutic milieu" means the entire treatment environment in which comprehensive treatment is delivered.

(23) "Therapeutic services" means the provision of psychotherapy and related services as defined in [New Rule I published at MAR Notice No. 37-518] by the lead clinical staff acting within the scope of the professional's license or provided by an in-training practitioner in a therapeutic group home.

(24) "Therapeutic group home (TGH)" means a treatment facility providing therapeutic services licensed and under contract with the department as a YCF with the supervision and intensity of treatment required to manage and treat up to eight youth who present severe emotional disturbance (SED) and/or behavioral disorders as determined by the department.

(25) "Time-out" means the restriction of a youth for a period of time to a designated area from which the resident is not physically prevented from leaving for the purpose of providing the youth the opportunity to regain self control.

(26) "Youth care facility (YCF)" means a licensed facility in which substitute care is provided to youth and includes youth foster homes, youth group homes, youth shelter care facilities, therapeutic group homes, and child care agencies.

(27) "Youth group home" means a YCF in which substitute care is provided to seven to 12 youth.

(28) "Youth group home manager" means an employee of a regular youth group home. The group home manager trains and supervises direct care staff and provides supervision to youth in care no more than 50 percent of the time. A group home manager must have a bachelor's degree in human services, or the experience alone or experience with and education equivalent to a bachelor's degree. Human services experience equivalent to a bachelor's degree for a nondegree manager is six years. Each year of post-secondary education in human services for a nondegree manager equals one year of experience.

(29) "Youth shelter care facility" means a YCF that regularly serves youth under temporary conditions until the court, probation office, the department, or other appropriate social agency has made other provisions for their care.

(30) "Youth shelter care manager" means an employee of a youth shelter care home. The shelter care manager trains and supervises direct care staff and provides supervision to youth in care no more than 50 percent of the time. A shelter care manager must have a bachelor's degree in human services, or the experience and education equivalent to a bachelor's degree. Human services experience equivalent to a bachelor's degree for a nondegree manager is six years. Each year of post-secondary education in human services for a nondegree manager equals one year of experience.

(31) "Youth/staff ratio" means number of youth in care per each on-duty direct care staff member.

~~(a) Except in regard to age requirements under Montana medicaid programs which allow for participation of youth up to the age of 21 years, "child" or "youth" means any person under the age of 18 years, without regard to sex or emancipation.~~

~~(b) "Substitute care" means full-time care of youth in a residential setting for the purpose of providing food, shelter, security and safety, guidance, direction, and, if necessary, treatment to youth who are removed from or who are without the care and supervision of their parents or guardian.~~

~~(c) "Youth care facility" (YCF) means a licensed facility in which substitute care is provided to youth and includes youth foster homes, youth group homes, youth shelter care facilities, therapeutic youth group homes, and child care agencies.~~

~~(d) "Youth foster home" or "foster care home" or "boarding home" means a YCF in which substitute care is provided to one to six children or youth to whom the foster parents are not related by blood, marriage, adoption or wardship.~~

~~(e) "Youth group home" means a YCF in which substitute care is provided to seven to 12 children or youth.~~

~~(f) "Child care agency" means any YCF in which substitute care is provided to 13 or more children.~~

~~(g) "Youth shelter care facility" means a YCF which regularly receives children under temporary conditions until the court, probation office, the department, or other appropriate social agency has made other provisions for their care.~~

~~(h) "Maternity home" means a YCF which provides for the care and maintenance of minor girls and adult women during pregnancy, childbirth, and postnatal periods. A maternity home must meet the licensing requirements of a child care agency regardless of the number of residents served.~~

~~(i) "Child care staff" means YCF personnel who directly participate in the care, supervision and guidance of children in a YCF.~~

~~(j) "Houseparent" means a staff member whose primary responsibility is the day-to-day care of children in a youth group home.~~

~~(k) "Foster parent" means a person responsible for the day-to-day care, supervision and guidance of children in a youth foster home.~~

~~(l) "Department" means department of public health and human services.~~

~~(m) "Time-out" means the placement of a child for a period of less than 30 minutes in an unlocked room.~~

~~(n) "Restraint" means the extraordinary restriction of a child's freedom or freedom of movement.~~

~~(o) "Passive physical restraint" means the least amount of direct physical contact required by a staff member using approved methods of making such physical contact to restrain a child from harming self or others.~~

~~(p) "Child/staff ratio" means number of children in care per each on-duty child care staff member.~~

~~(2) The following definitions apply only to child care agencies which operate an approved residential treatment center:~~

~~(a) "Residential treatment center" means a unit or facility of a child care agency that treats children who are seriously disturbed either mentally, emotionally or behaviorally. In addition to the child care agency rules, such unit or facility must meet the licensing requirements contained in ARM 37.97.250, 37.97.253, 37.97.254, 37.97.257, 37.97.258 and 37.97.259.~~

~~(b) "Seclusion" means isolation of a child in a locked room. Seclusion may be used to protect the child, other children, and staff and to give the child the opportunity to regain control of his or her behavior and emotions by providing definite external boundaries and decreased stimulation.~~

~~(c) "Chemical restraint" means the use of psychotropic medication to subdue, inhibit, confine or control a child's behavior.~~

(d) "~~Mechanical restraint~~" means the restriction by mechanical means of a child's mobility and/or ability to use his/her hands, arms or legs.

(3) ~~Additional definitions for youth care facilities licensed as therapeutic youth group homes are found in ARM 11.13.101.~~

(4) ~~The following definitions apply only to youth shelter care facilities:~~

(a) ~~"Pat down search" means a body search done outside of a youth's clothing with the intention of locating suspected contraband.~~

(b) ~~"Personal property search" means a search which involves going through a youth's personal property and/or room including closet, bed, desk, dresser drawers, etc., with the intention of looking for contraband.~~

(c) ~~"Correspondence search" means opening, inspecting and/or reading a youth's mail or inspecting the contents of a package.~~

AUTH: ~~41-3-1103, 41-3-1142, 52-2-111, 52-2-603, 52-2-622, 53-4-111, MCA~~  
IMP: ~~41-3-1102, 41-3-1142, 52-2-113, 52-2-602, 52-2-622, 53-2-201, 53-4-113, MCA~~

#### 37.97.105 YOUTH CARE FACILITY (YCF): LICENSE REQUIRED

(1) ~~Every youth care facility YCF shall be licensed by the department, or responsible tribal authority.~~

(2) ~~Failure of a provider to obtain or renew a license while continuing to operate a youth care facility YCF is a misdemeanor and shall be subject to the penalties provided in 41-3-504, MCA.~~

AUTH: ~~41-3-503, 53-4-111 52-2-111, 52-2-622, MCA~~  
IMP: ~~41-3-502, 41-3-504, 41-3-1103, 41-3-1141, 41-3-1143, 52-2-113, 52-2-603, 52-2-621, 52-2-623, 53-2-201, 53-4-113, MCA~~

37.97.106 YOUTH CARE FACILITY (YCF): LICENSES (1) ~~One-year licenses.~~ The department shall issue a one year youth care facility YCF license to any license applicant that meets all licensing requirements established by these rules, as determined by the department after a licensing study survey, or, that is licensed or otherwise approved by another state agency.

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

(ii) the YCF continues to meet all licensing requirements established by these rules, as determined by the department after a relicensing study survey.

(b) If a YCF makes timely application for renewal of a license, but the department fails to complete the relicensing study survey before the expiration date of the previous year's license, the previous year's license will continue in effect for the time necessary for the department to complete the relicensing study survey and to make a determination of compliance with licensing requirements.

(2) ~~Provisional license.~~ The department may in its discretion issue a provisional license for any period up to ~~6~~ six months to any license applicant which:

(a) and (b) remain the same.

(i) The department may in its discretion renew a provisional license if the license applicant shows good cause for failure to comply fully with all licensing requirements within the time period covered by the prior provisional license, but the

total time period covered by the initial provisional license and renewals may not exceed 1 one year.

~~(3) Restricted license.~~ A restricted license may be issued for the care of a specific child with the approval of the department.

~~(4)~~ remains the same.

~~(5) The current YCF license shall be publicly displayed at the YCF. No applicant(s) shall be newly licensed for a youth foster home if any one of the following has occurred within 12 months of the application, unless an exception is granted by the department:~~

~~(a) a death of a spouse or child in the applicant's family;~~

~~(b) a marital separation or divorce of the applicant(s);~~

~~(c) an adoption of a child who has not been living with the adoptive parent(s);~~

~~(d) the birth of a child to the applicant(s); or~~

~~(e) loss of employment by the applicant;~~

~~(f) If (5)(a), (b), (c), (d) or (e) occur in a licensed foster home, the foster parent(s) shall notify the licensing social worker within 48 hours. The licensing social worker will reevaluate the home within 30 days to determine whether there should be any change in the licensing status.~~

~~(6) If a couple, the applicant(s) shall have been together for at least 24 months.~~

~~(7) Any applicant who has received services for substantiated abuse or neglect of a child as defined in ARM 37.47.602(1)(m) shall be denied a foster care license unless special approval is given by the regional administrator after careful review of extenuating circumstances which justify the issuance of a restricted license.~~

~~(8) Any applicant whose own children have been in foster care should be denied a foster care license, unless an exception is granted by the department because the circumstances leading to the provision of services or the placement no longer exists.~~

AUTH: 41-3-1103, 41-3-1142, 53-4-114 52-2-111, 52-2-603, 52-2-622, MCA  
IMP: 41-3-1103, 41-3-1142, 52-2-113, 52-2-603, 52-2-622 53-4-113, MCA

### 37.97.110 YOUTH CARE FACILITY (YCF): LICENSING PROCEDURES

~~(1)~~ remains the same.

(2) The YCF shall submit all written program management policies and procedures to the department for approval with the initial application. Policies and procedures must comply with requirements outlined in this chapter. The YCF shall submit to the department any significant changes to policies and procedures for approval.

~~(2)~~ (3) Upon receipt of an a complete application for license or renewal of license, the department shall conduct a licensing study survey to determine if the applicant meets all applicable licensing requirements for licensure ~~as established in these rules.~~

~~(3)~~ (4) If the department determines during the survey that an application or accompanying information is incomplete or erroneous, it the applicant is out of compliance with the applicable licensing requirements, the department will notify the

applicant of the specific deficiencies or errors, and the applicant shall submit ~~the required or corrected information~~ a written plan of correction within ~~60 ten~~ ten working days of the department's notification of noncompliance specifying how compliance will be made. ~~The department shall not issue a license or renew a license until it receives all required or corrected information.~~

(5) The department must approve the plan of correction prior to issuing a license.

(6) The department shall not issue a license or renew a license until it receives all required or corrected information.

AUTH: ~~41-3-503, 41-3-1103, 41-3-1142, 53-4-114~~ 52-2-111, 52-2-603, 52-2-622, MCA

IMP: ~~41-3-503, 41-3-1103, 41-3-1142, 52-2-113, 52-2-603, 52-2-622, 53-2-201, 53-4-113~~, MCA

37.97.115 YOUTH CARE FACILITY (YCF): LICENSE REVOCATION AND DENIAL, SUSPENSION, RESTRICTION, AND REVOCATION (1) The department, after written notice to the applicant or licensee, may deny, suspend, restrict, revoke, or reduce to a provisional status a license upon a finding of any of the following that:

- (a) the YCF is not in compliance with fire safety standards; ~~or~~
- (b) the YCF is not in substantial compliance with any other licensing requirements established by this ~~rule; or~~ chapter;
- (c) the YCF has made any misrepresentations to the department, either negligent or intentional, regarding any aspect of its operations or facility; ~~or~~
- (d) the YCF has failed to use the foster care payments for the support of the foster child; ~~or~~
- (e) the YCF or its staff have been named as the perpetrator in a substantiated report of abuse or neglect; ~~or~~
- (f) the YCF or any member of its staff has violated provisions of this subchapter that resulted in child abuse or neglect;
- (g) the YCF or any member of its staff do not meet the requirements in [New Rule III];

~~(f)~~ (h) the YCF failed to report an incident of abuse or neglect to the department or its local affiliate as required by 41-3-201, MCA;

~~(g)~~ (i) it is determined on the basis of a department or law enforcement investigation that the YCF, its staff, or anyone living in a YCF household may pose any risk or threat to the safety or welfare of any youth placed in the YCF; ~~or~~

(j) the YCF has failed to provide an acceptable written plan of correction as specified in ARM 37.97.110.

(2) At the discretion of the department and for protection of the ~~child(ren)~~ child(ren) youth, youth in placement ~~the child(ren)~~ youth, youth may be moved immediately upon receipt of a report of sexual or physical abuse or neglect by the YCF.

(3) Any person denied a license under the provisions of this subchapter, or whose license has been suspended, restricted, revoked, or reduced to a provisional status, may request a hearing as provided in ARM 37.5.304, 37.5.305, 37.5.307, 37.5.310, 37.5.313, 37.5.316, 37.5.322, 37.5.325, 37.5.328, 37.5.331, 37.5.334, and 37.5.337.

AUTH: ~~41-3-503, 41-3-1103, 41-3-1142, 53-4-111,~~ 52-2-111, 52-2-603, 52-2-622,  
MCA

IMP: ~~41-3-503, 41-3-1103, 41-3-1142,~~ 52-2-113, 52-2-603, 52-2-622, 53-2-201, ~~53-4-113,~~ MCA

37.97.128 YOUTH CARE FACILITY (YCF): CONFIDENTIALITY OF RECORDS AND INFORMATION (1) All records maintained by a YCF and all personal information made available to a YCF pertaining to an individual ~~child~~ youth must be kept confidential and are not available to any person, agency, or organization except as specified in (2) through (4) of this rule.

(2) All records pertaining to an individual ~~child~~ youth are available upon request to:

(a) the ~~child's~~ youth's parent, guardian, legal custodian, or attorney absent specific and compelling reasons for refusing such records;

(b) a court with continuing jurisdiction over the placement of the ~~child~~ youth or any court of competent jurisdiction issuing an order for such records;

(c) a mature ~~child~~ youth to whom the records pertain, absent specific and compelling reasons for refusing specific records; or

(d) an adult who was formerly the ~~child~~ youth in care to whom the records pertain absent specific and compelling reasons for refusing such records.

(3) All records pertaining to individual ~~children~~ youth placed by the department are available at any time to the department or its representatives.

(4) Records pertaining to individual ~~children~~ youth not placed by or in the custody of the department shall be available to the department for the purposes of licensing or relicensing the YCF.

AUTH: ~~41-3-503, 41-3-1103, 41-3-1142, 53-4-111~~ 52-2-111, 52-2-603, 52-2-622,  
MCA

IMP: ~~41-3-503, 41-3-1142,~~ 52-2-113, 52-2-622, 53-2-105, 53-2-106, 53-2-201, ~~53-4-113,~~ MCA

37.97.130 YOUTH CARE FACILITY (YCF): REPORTS (1) remains the same.

(2) The YCF (~~except youth foster homes~~) shall report any of the following changes in writing to the department's licensure bureau, prior to the effective date of the change:

(a) remains the same.

(b) a change in location of which the department shall approve prior to the move;

(c) a change in the name of the agency, program, or facility; or

(d) a any significant change in the organization, administration, purposes, programs, or services.

~~(3) Youth foster homes shall report a change of residence to the department prior to moving and the department shall evaluate the new residence within 30 days of receiving the report.~~

~~(4) As required by 41-3-201, MCA, the provider or staff member shall report within 24 hours any incidents of known or suspected child abuse or neglect to the local county welfare office or the state child abuse hot line 1-800-332-6100.~~

~~(a) If no action is taken on the referral, or if the above resources are not available at the time, reports shall be made to the department of public health and human services district or state office.~~

~~(b) Each child care agency shall require each staff member of the agency to read and sign a statement which clearly defines child abuse and neglect and outlines the staff member's responsibility to report all incidents of child abuse or neglect according to state law to the department or its local affiliate and to the chief administrator of the agency or a person designated by the administrator.~~

~~(c) Each child care agency shall report any suspected or alleged incident of child abuse or neglect to the department and cooperate fully in the investigation of any incident.~~

~~(d) Each child care agency shall have written procedures for handling any suspected incident of child abuse including:~~

~~(i) a procedure for ensuring that the staff member involved does not work directly with the child involved until the investigation is completed;~~

~~(ii) a procedure for conducting in-house investigation of the incident;~~

~~(iii) a procedure for disciplining any staff member involved in an incident of child abuse; and~~

~~(iv) a procedure for notification of the county welfare department.~~

~~(5) Any serious incident involving a child shall be reported within the next working day to the person or agency which placed the child and to the licensing worker.~~

~~(a) A "serious incident" means suicide attempts, excessive physical force by staff, sexual assault by residents or staff, injury to a child which requires hospitalization, or the death of a child.~~

~~(b) The YCF shall complete a written incident report concerning any serious incident involving a child. The report shall include the date and time of the incident, the child involved, the nature of the incident, description of the incident and the circumstances surrounding it. A copy of the report shall be filed at the YCF and a copy shall be sent to the licensing worker.~~

~~(6) (3) Runaways shall be reported immediately to the police and within the next working day to the agency or person who placed the child youth.~~

~~(7) remains the same but is renumbered (4).~~

~~(8) The current YCF license shall be publicly displayed at the YCF.~~

AUTH: ~~41-3-503, 41-3-1103, 41-3-1142, 53-4-111~~ 52-2-111, 52-2-603, 52-2-622, MCA

IMP: ~~41-3-503, 41-3-1142,~~ 52-2-113, 52-2-622, 53-2-201, 53-4-113, MCA

37.97.132 YOUTH CARE FACILITY (YCF): GENERAL REQUIREMENTS FOR ALL ADMINISTRATORS, STAFF, INTERNS, AND VOLUNTEERS FOSTER PARENTS AND CHILD CARE STAFF WORKING IN YOUTH GROUP HOMES AND CHILD CARE AGENCIES (1) A YCF shall have written personnel and program policies and procedures covering but not limited to the following items:

- (a) screening procedure for all applicants;
- (b) job qualifications;
- (c) job descriptions;
- (d) supervisory structure; and
- (e) performance evaluations.

(2) A YCF shall maintain records for each staff member, volunteer, and intern regarding the following:

- (a) application for employment;
- (b) written results of at least two references;
- (c) record of orientation and ongoing training;
- (d) periodic performance evaluations;
- (e) copy of current licenses and certifications;
- (f) documentation of criminal background check as specified in [NEW RULE

III];

(g) documentation of child protective services background checks as specified in [NEW RULE III];

(h) "personal statement of health for licensure" form as provided by the department; and

(i) any other employee records required by this subchapter.

~~(1) (3)~~ (3) In addition to the specific requirements set out in subchapters 1 and 2, 4, and 6, of this chapter, child care all staff working in a YCF group homes and child care agencies, and foster parents, must:

- (a) be at least ~~18~~ 21 years of age;
- (b) ~~be of good moral character~~ have a high school diploma or GED;
- (c) be physically, mentally, and emotionally competent to care for children youth; and
- (d) like and understand children; and
- ~~(e)~~ (d) be in good general health.

~~(2) (4)~~ (4) The department may require an ~~an~~ psychological evaluation or medical examination of, and/or a signed authorization for release of medical or psychological records from: any YCF staff, intern, or volunteer if there are grounds to believe these individuals have engaged in behaviors which may place the YCF youth at risk of harm.

~~(a) any person applying for licensure as a foster parent, or any member of the household of a person applying for licensure as a foster parent;~~

~~(b) any foster parent, or any member of a foster parent household; and~~

~~(c) any person defined as child care staff.~~

~~(3) (5)~~ (5) A "personal statement of health for licensure" form provided by the department must be completed for each person subject to the requirements of this rule. The form must be submitted to the department with the initial application for licensure upon hire and annually thereafter. The "personal statement of health for licensure" form is available from the Department of Public Health and Human Services, Quality Assurance Division, Licensure Bureau, 2401 Colonial Drive, P.O. Box 202953, Helena, MT 59620-2953.

~~(4) The department may require completion of a criminal background and child and adult protective services check on each person subject to the requirements of this rule.~~

(6) Any YCF staff member, intern, volunteer, or other person whose behavior or health status endangers the residents may not be allowed at the YCF.

(7) YCF volunteers and interns shall:

(a) not be included in the youth to staff ratios;

(b) be under the direct and constant supervision of YCF staff;

(c) be provided orientation and initial training procedures. The training must include orientation on all YCF policies and procedures;

(d) follow written policies and procedures developed by the YCF defining the responsibilities, limitations, and supervision of volunteers and interns; and

(e) complete all required background checks.

AUTH: 41-3-1103, 41-3-1142, 53-4-111, 52-2-111, 52-2-603, 52-2-622, MCA

IMP: 41-3-1103, 41-3-1142, 53-4-111, 52-2-111, 52-2-603, 52-2-622, MCA

37.97.206 CHILD CARE AGENCY: PERSONNEL (1) ~~Each child care agency must have a written personnel policy covering the following items: job qualifications, job descriptions, supervisory structure, salary schedules, fringe benefits, insurance, hours of work, and performance evaluations.~~

~~(2) Personnel records. Each child care agency must maintain a personnel file for each employee. The personnel file must contain: application for employment, reports from references, record of in-service training or other training acquired after the date of hiring, reports of health examinations, and periodic performance evaluation.~~

~~(3) General personnel qualifications.~~

~~(a) All child care staff of a child care agency must meet the following general qualifications:~~

~~(i) understand the purpose of the child care agency and be willing to carry out its policies and programs; and~~

~~(ii) meet the general requirements for child care staff set out in ARM 37.97.132 and any additional qualifications for the position established by these rules.~~

~~(4) In-Service training. Each child care staff member must complete 15 hours of in-service training each year, in an area directly related to the staff member's duties. This training must be documented in each staff member's personnel file. The training may include formal course work, workshop attendance, or the reading of appropriate literature.~~

~~(5) The facility shall have a policy governing emergency medical procedures. That policy shall be fully explained to child care staff persons prior to their beginning to care for children.~~

~~(6) The child care agency shall employ, train and supervise an adequate number of staff necessary to ensure proper care, treatment and safety of the residents.~~

~~(7) No staff member, aide, volunteer or other person having direct contact with the children in the facility shall conduct themselves in a manner which poses any potential threat to the health, safety and well being of the children in care.~~

~~(8) The personal references of all staff shall be verified by the child care agency.~~

~~(9) Any staff member whose behavior or health status endangers the residents shall not be allowed at the child care agency.~~

~~(10) Administration.~~

~~(a) A child care agency must designate an administrator to direct and manage the child care agency's work in all areas. The administrator's duties specifically include but are not limited to directing the care and services provided to children in care, personnel matters, and any other specific matters determined by the board of directors of the child care agency.~~

~~(b) An administrator must meet the following qualifications in addition to the general qualifications for child care staff:~~

~~(i) have a bachelor's degree supplemented with experience in an area relating to professional child care or appropriate graduate education;~~

~~(ii) have a thorough understanding of the purposes and programs of child care agencies in general; and~~

~~(iii) have general leadership, administrative, and management ability, including the ability to supervise child care personnel.~~

~~(11) Social services.~~

~~(a) Each child care agency must employ an adequate number of trained professionals to provide the following services for each child in care:~~

~~(i) to plan for a child's admission, coordinate the case plan and overall treatment plan, negotiate for the necessary resources for the child, and prepare the child for discharge and return to the family or other placement;~~

~~(ii) to serve as advocate for the child and liaison with the family, the referring party, and the community;~~

~~(iii) to prepare and maintain all required records and reports regarding the child;~~

~~(iv) to provide post-placement plans and services and to make the necessary referrals;~~

~~(v) to assist the child and staff to adjust to the child's placement; and~~

~~(vi) to record the child's reactions to the child care agency, school, other children, staff, and family, and to participate in staff discussion regarding progress and plans for the child.~~

~~(b) Those persons providing social services must meet the following qualifications in addition to the general qualifications for child care staff:~~

~~(i) have a bachelor's degree in a behavioral science and experience in areas related to child care or services; or~~

~~(ii) have a reasonable equivalent to the above.~~

~~(c) Maternity home staff, in addition to the above requirements, must employ an adequate number of trained professionals to provide the following services to residents:~~

~~(i) decision-making counseling to explore adoption and parenting options;~~

~~(ii) family systems counseling to explore parenting roles and potential abuse issues; and~~

~~(iii) prenatal and parent training education.~~

(1) A child care agency shall employ an administrator to direct and manage the child care agency. The administrator's duties specifically include but are not limited to directing the care and services provided to youth, personnel matters, and

any other specific matters determined by the board of directors of the child care agency.

(2) The administrator is the person who is ultimately responsible for ensuring that the child care agency is in compliance with applicable licensing rules and ensuring that staff are familiar with and complying with all of the child care agency's policies and procedures.

(3) An administrator shall meet the following qualifications in addition to the general qualifications for direct care staff:

(a) a bachelor's degree;

(b) two years experience working with youth and two years experience in staff supervision and administration;

(c) completion of initial staff training; and

(d) at least 16 contact hours of annual continuing education relevant to the individual's duties and responsibilities as administrator of the child care agency.

(4) Each child care agency shall employ an adequate number of trained professionals to provide the following services for each youth in care:

(a) plan for a youth's admission, coordinate the case plan and overall treatment plan, negotiate for the necessary resources for the youth, and prepare the youth for discharge and return to the family or other placement;

(b) serve as advocate for the youth and liaison with the family, the referring party, and the community;

(c) prepare and maintain all required records and reports regarding the youth;

(d) provide post-placement plans and services and make the necessary referrals;

(e) assist the youth and staff to adjust to the youth's placement; and

(f) record the youth's reactions to the child care agency, school, other youth, staff, and family, and participate in staff discussion regarding progress and plans for the youth.

(5) Those persons providing social services shall have a bachelor's degree in a behavioral science and experience in areas related to child care or social services in addition to the general qualifications for direct care staff defined in ARM 37.97.132.

(6) Maternity homes shall employ an adequate number of trained professionals to provide the following services to residents:

(a) decision-making counseling to explore adoption and parenting options;

(b) family systems counseling to explore parenting roles and potential abuse and neglect issues; and

(c) prenatal and parent education.

~~(42) (7) Education.~~ If a child care agency conducts a formal education program for children in care, teachers must have the same minimum qualifications as comparable teachers in the public and private schools of Montana.

AUTH: ~~41-3-503, 41-3-1103, 41-3-1142, 53-4-111, 53-4-113, 52-2-111, 52-2-113,~~  
52-2-603, 52-2-622, MCA

IMP: ~~41-3-503, 41-3-1103, 41-3-1142,~~ 52-2-113, 52-2-603, 52-2-622, ~~53-2-201, 53-4-113,~~ MCA

37.97.207 CHILD CARE AGENCY: CHILD/STAFF RATIO ~~(1) Each child care agency must maintain the minimum child/staff ratios set forth in this rule.~~

~~(a) Children of child care staff members, including foster children, who are present in the child care unit must be counted in computing child/staff ratios.~~

~~(b) Child care agencies other than receiving homes must use the actual number of children in care each day to compute the child/staff ratio.~~

~~(c) Child care agencies, other than maternity homes, must maintain the following minimum staff ratios:~~

~~(i) from 3:00 p.m. to 11:00 p.m., 1 to 8; and~~

~~(ii) from 11:00 p.m. to 3:00 p.m., 1 to 10.~~

~~(d) A child care agency's residential treatment center must meet the child/staff ratios set forth in ARM 37.97.250.~~

~~(e) Maternity homes must maintain the following minimum child/staff ratios (excluding babies being cared for by their mothers):~~

~~(i) from 3:00 p.m. to 10:00 p.m., 1 to 12; and~~

~~(ii) from 10:00 p.m. to 3:00 p.m., 1 to 16.~~

~~(iii) additional staff must be available for duty within 30 minutes.~~

(1) Each child care agency, except maternity homes, must maintain the minimum youth to awake staff ratios:

(a) from 7:00 a.m. to 11:00 p.m., 8 youth to 1 staff; and

(b) from 11:00 p.m. to 7:00 a.m., or any other reasonable eight-hour period of time when residents are generally sleeping, 10 youth to 1 staff.

(2) Maternity homes must maintain a minimum youth to awake staff ratio of 8 youth to 1 staff.

(a) The youth to staff ratio in a maternity home includes any child who is not being properly cared for by the youth parent who is a resident of the maternity home.

(b) Additional staff must be available for duty within 30 minutes of contact.

(3) Child care agencies must use the actual number of children in care each day to compute the youth to awake staff ratio.

AUTH: 41-3-503, 41-3-1142, 53-4-111, 52-2-111, 52-2-622, MCA

IMP: 41-3-503, 41-3-1142, 52-2-111, 52-2-622, 53-2-201, 53-4-113, MCA

37.97.216 CHILD CARE AGENCY: RECORDS (1) Each child care agency ~~must~~ shall maintain accurate and current records on each child youth in care, ~~as follows~~ including:

(a) identifying information on the youth and ~~his~~ the youth's family, including the ~~child's~~ youth's name, date and place of birth, sex, religion, race, names of relatives, and other necessary information;

(b) date of the ~~child's~~ youth's admission and name of the referring party;

(c) date of the ~~child's~~ youth's discharge and authorization for the discharge;

(d) documentation concerning a ~~child's~~ youth's specific medical problems;

and

(e) a dated record of significant occurrences for each ~~child~~ youth while in care.

(2) Additional records to be kept by all child care agencies, except receiving homes, ~~are as follows~~ include:

(a) a copy of the court order, parental agreement, consent decree, or consent adjustment authorizing the ~~child's~~ youth's placement and any other pertinent court action concerning the ~~child~~ youth;

(b) remains the same.

(c) a social ~~study~~ history on the ~~child~~ youth and his ~~youth's~~ youth's family;

(d) psychological or psychiatric information on the ~~child~~ youth if psychological or psychiatric services have been provided to the ~~child~~ youth at any time;

(e) quarterly progress reports on the ~~child's~~ youth's reaction to the placement and services provided;

(f) quarterly reports from any parties providing any services to the ~~child~~ youth outside the child care agency; and

(g) remains the same.

(3) In addition, a copy of the youth's most recent physical examination of the ~~child~~ must be kept by ~~all the~~ the child care agency agencies, ~~except receiving homes and maternity homes.~~

~~(4) Each child care agency must keep an accurate monthly record showing the number of children in care, the number admitted and discharged, the children's ages and sex, and the current average length of stay. This information must be submitted to the department upon the department's request.~~

~~(5) Every child care agency, except receiving homes, must provide for regular periodic review of the health records of all children in care by a registered nurse or other appropriately qualified health professional to assure the continued health care of the children.~~

AUTH: ~~41-2-1142, 41-3-503, 41-3-1103, 52-2-111, 52-2-603, 52-2-622, 53-4-111,~~  
MCA

IMP: ~~41-3-503, 41-3-1103, 41-3-1142, 52-2-113, 52-2-603, 52-2-622, 53-2-201, 53-~~  
4-113, MCA

37.97.230 CHILD CARE AGENCY: TREATMENT PROGRAM (1) The child care agency shall have a written description of its treatment program which ~~shall~~ must be made available to the youth's placing agency, ~~and parents~~ parent, or guardian. The written description shall include but not be limited to:

(a) the name, position, and qualification of the person who has overall responsibility for the treatment program;

(b) through (g) remain the same.

(h) provisions for transfer to another treatment resource when goals for treatment of a particular ~~child~~ youth have not been met or further treatment is required;

(i) description of procedures used for assessing the appropriateness of the treatment strategy for each particular ~~child~~ youth;

(j) provisions for ongoing monitoring and recording; and

(k) remains the same.

(2) The treatment program ~~shall~~ must be designed to provide:

(a) adequate safeguards for the ~~child's~~ youth's health and welfare;

(b) remains the same.

(c) ~~utilization~~ usage of available community resources.

AUTH: ~~41-3-1103, 53-4-113, 52-2-113, 52-2-603~~, MCA

IMP: ~~41-3-1103~~ 52-2-603, MCA

5. The department proposes to repeal the following rules:

37.97.118 YOUTH CARE FACILITY, HEARING PROCEDURES, is found on page 37-23789 of the Administrative Rules of Montana.

AUTH: 41-3-503, 41-3-1103, 41-3-1142, 52-2-111, 52-2-602, 52-2-622, 52-2-704, 53-4-111, MCA

IMP: 41-3-503, 41-3-1103, 41-3-1142, 52-2-111, 52-2-113, 53-2-201, 52-2-602, 52-2-622, 53-4-113, MCA

37.97.201 CHILD CARE AGENCY: ADMISSIONS AND DISCHARGES, is found on page 37-23823 of the Administrative Rules of Montana.

AUTH: 41-3-503, 41-3-1103, 41-3-1142, 53-4-111, 53-4-113, MCA

IMP: 41-3-503, 41-3-1103, 41-3-1142, 53-2-201, 53-4-113, MCA

37.97.202 CHILD CARE AGENCY: CASE PLANS, is found on page 37-23824 of the Administrative Rules of Montana.

AUTH: 41-3-503, 41-3-1142, 53-4-111, MCA

IMP: 41-3-503, 41-3-1142, 53-2-201, 53-4-113, MCA

37.97.213 CHILD CARE AGENCY: FINANCES, is found on page 37-23839 of the Administrative Rules of Montana.

AUTH: 41-3-503, 41-3-1142, 53-4-111, MCA

IMP: 41-3-503, 41-3-1142, 53-2-201, 53-4-113, MCA

37.97.220 CHILD CARE AGENCY: SUPERVISION OF MEDICATION, is found on page 37-23845 of the Administrative Rules of Montana.

AUTH: 41-3-1103, 41-3-1142, 53-4-111, MCA

IMP: 41-3-1103, 53-4-111, 53-4-113, MCA

37.97.225 CHILD CARE AGENCY: TIME-OUT, is found on page 37-23851 of the Administrative Rules of Montana.

AUTH: 41-3-1103, 53-4-111, MCA

IMP: 53-2-201, 53-4-111, 53-4-113, MCA

37.97.226 CHILD CARE AGENCY: PASSIVE PHYSICAL RESTRAINT, is found on page 37-23851 of the Administrative Rules of Montana.

AUTH: 41-3-1103, 41-3-1142, 53-4-111, MCA  
IMP: 41-3-1103, 53-2-201, 53-4-111, 53-4-113, MCA

37.97.233 CHILD CARE AGENCY: MANAGEMENT, is found on page 37-23856 of the Administrative Rules of Montana.

AUTH: 41-3-1103, 53-4-113, MCA  
IMP: 41-3-1103, MCA

37.97.238 CHILD CARE AGENCY: EDUCATION, is found on page 37-23857 of the Administrative Rules of Montana.

AUTH: 41-3-1103, 53-4-113, MCA  
IMP: 41-3-1103, MCA

37.97.239 CHILD CARE AGENCY: RECREATION, is found on page 37-23857 of the Administrative Rules of Montana.

AUTH: 41-3-1103, 53-4-113, MCA  
IMP: 41-3-1103, MCA

37.97.250 CHILD CARE AGENCY: RESIDENTIAL TREATMENT CENTER, STAFFING, is found on page 37-23867 of the Administrative Rules of Montana.

AUTH: 41-3-1103, 41-3-1142, 53-4-111, MCA  
IMP: 41-3-1103, 41-3-1142, 53-2-201, 53-4-113, MCA

37.97.253 CHILD CARE AGENCY: RESIDENTIAL TREATMENT CENTER, EDUCATION, is found on page 37-23871 of the Administrative Rules of Montana.

AUTH: 41-3-1142, 53-4-111, MCA  
IMP: 53-2-201, 53-4-111, MCA

37.97.254 CHILD CARE AGENCY: RESIDENTIAL TREATMENT CENTER, RECREATION, is found on page 37-23871 of the Administrative Rules of Montana.

AUTH: 41-3-1142, 53-4-111, MCA  
IMP: 53-4-111, 53-4-113, MCA

37.97.257 CHILD CARE AGENCY: RESIDENTIAL TREATMENT CENTER, SECLUSION, is found on page 37-23873 of the Administrative Rules of Montana.

AUTH: 41-3-1103, 41-3-1142, 53-4-111, MCA  
IMP: 41-3-1103, 41-3-1142, 53-2-201, 53-4-113, MCA

37.97.258 CHILD CARE AGENCY: RESIDENTIAL TREATMENT CENTER, MECHANICAL RESTRAINT, is found on page 37-23856 of the Administrative Rules of Montana.

AUTH: 41-3-1103, 41-3-1142, 53-4-111, MCA  
IMP: 41-4-1103, 41-3-1141, 41-3-1142, 53-4-11, 53-4-113, MCA

37.97.259 CHILD CARE AGENCY: RESIDENTIAL TREATMENT CENTER, CHEMICAL RESTRAINT, is found on page 37-23877 of the Administrative Rules of Montana.

AUTH: 41-3-1103, 41-3-1142, 53-4-111, MCA  
IMP: 41-3-1103, 41-3-1141, 41-3-1142, 53-4-111, 53-4-113, MCA

37.97.270 CHILD CARE AGENCY: ADDITIONAL REQUIREMENTS, is found on page 37-23878 of the Administrative Rules of Montana.

AUTH: 41-3-503, 41-3-1103, 53-4-111, 53-4-113, MCA  
IMP: 41-3-503, 41-3-1103, 53-2-201, 53-4-113, MCA

37.97.501 YOUTH GROUP HOME: ADMINISTRATION, is found on page 37-23901 of the Administrative Rules of Montana.

AUTH: 41-3-503, 41-3-1103, 53-4-111, MCA  
IMP: 41-3-503, 41-3-1103, 53-2-201, 53-4-113, MCA

37.97.502 YOUTH GROUP HOME: PROGRAM REQUIREMENTS, is found on page 37-23901 of the Administrative Rules of Montana.

AUTH: 41-3-503, 41-3-1103, 53-4-111, MCA  
IMP: 41-3-503, 41-3-1103, 53-2-201, 53-4-113, MCA

37.97.506 YOUTH GROUP HOME: PHYSICAL CARE, is found on page 37-23907 of the Administrative Rules of Montana.

AUTH: 41-3-503, 41-3-1103, 53-4-111, MCA  
IMP: 41-3-503, 41-3-1103, 53-2-201, 53-4-113, MCA

37.97.508 YOUTH GROUP HOME: ENVIRONMENTAL REQUIREMENTS, is found on page 37-23908 of the Administrative Rules of Montana.

AUTH: 41-3-503, 41-3-1103, 53-4-111, MCA  
IMP: 41-3-503, 41-3-1103, 53-2-201, 53-4-113, MCA

37.97.519 YOUTH GROUP HOME: FIRE SAFETY, is found on page 37-23927 of the Administrative Rules of Montana.

AUTH: 41-3-503, 41-3-1103, 53-4-111, MCA  
IMP: 41-3-503, 41-3-1103, 53-2-201, 53-4-113, MCA

37.97.521 YOUTH GROUP HOME: TRANSPORTATION, is found on page 37-23928 of the Administrative Rules of Montana.

AUTH: 41-3-503, 41-3-1103, 53-4-111, MCA  
IMP: 41-3-503, 41-3-1103, 53-2-201, 53-4-113, MCA

37.97.522 YOUTH GROUP HOME: GUNS AND AMMUNITION, is found on page 37-23928 of the Administrative Rules of Montana.

AUTH: 41-3-503, 41-3-1103, 53-4-111, MCA  
IMP: 41-3-503, 41-3-1103, 53-2-201, 53-4-113, MCA

37.97.524 YOUTH GROUP HOME: STAFF, is found on page 37-23933 of the Administrative Rules of Montana.

AUTH: 41-3-503, 41-3-1103, 41-3-1142, 52-2-111, 52-2-603, 52-2-622, 53-4-111, 53-4-212, MCA  
IMP: 41-3-503, 41-3-1103, 41-3-1142, 52-2-113, 52-2-603, 52-2-622, 53-2-201, 53-4-113, MCA

37.97.526 YOUTH GROUP HOME: PLACEMENT AGREEMENTS, is found on page 37-23934 of the Administrative Rules of Montana.

AUTH: 41-3-503, 41-3-1103, 53-4-111, MCA  
IMP: 41-3-503, 41-3-1103, 53-2-201, 53-4-113, MCA

37.97.528 YOUTH GROUP HOME: CHILDREN'S CASE RECORDS, is found on page 37-23935 of the Administrative Rules of Montana.

AUTH: 41-3-503, 41-3-1103, 53-4-111, MCA  
IMP: 41-3-503, 41-3-1103, 53-2-201, 53-4-113, MCA

37.97.801 YOUTH SHELTER CARE: RELATIONSHIP TO YOUTH CARE FACILITY LICENSURE, is found on page 37-23961 of the Administrative Rules of Montana.

AUTH: 41-3-1103, 41-3-1142, 52-2-111, MCA  
IMP: 41-3-1142, 52-2-113, MCA

37.97.805 YOUTH SHELTER CARE: ADMINISTRATION, is found on page 37-23961 of the Administrative Rules of Montana.

AUTH: 41-3-1103, 41-3-1142, 52-2-111, MCA

IMP: 41-3-1142, 52-2-113, MCA

37.97.809 YOUTH SHELTER CARE: PROGRAM REQUIREMENTS, CARE AND GUIDANCE, is found on page 37-23967 of the Administrative Rules of Montana.

AUTH: 41-3-1103, 41-3-1142, 52-2-111, MCA

IMP: 41-3-1142, 52-2-113, MCA

37.97.810 YOUTH SHELTER CARE: PROGRAM REQUIREMENTS, NUTRITION, is found on page 37-23968 of the Administrative Rules of Montana.

AUTH: 41-3-1103, 41-3-1142, 52-2-111, MCA

IMP: 41-3-1142, 52-2-113, MCA

37.97.811 YOUTH SHELTER CARE: PROGRAM REQUIREMENTS, EDUCATION, is found on page 37-23968 of the Administrative Rules of Montana.

AUTH: 41-3-1103, 41-3-1142, 52-2-111, MCA

IMP: 41-3-1142, 52-2-113, MCA

37.97.815 YOUTH SHELTER CARE: PROGRAM REQUIREMENTS, RELIGION AND CULTURE, is found on page 37-23973 of the Administrative Rules of Montana.

AUTH: 41-3-1103, 41-3-1142, 52-2-111, MCA

IMP: 41-3-1142, 52-2-113, MCA

37.97.816 YOUTH SHELTER CARE: PROGRAM REQUIREMENTS, PERSONAL NEEDS, is found on page 37-23973 of the Administrative Rules of Montana.

AUTH: 41-3-1103, 41-3-1142, 52-2-111, MCA

IMP: 41-3-1142, 52-2-113, MCA

37.97.817 YOUTH SHELTER CARE: PROGRAM REQUIREMENTS, PRIVACY AND INDIVIDUALISM, is found on page 37-23973 of the Administrative Rules of Montana.

AUTH: 41-3-1103, 41-3-1142, 52-2-111, MCA

IMP: 41-3-1142, 52-2-113, MCA

37.97.820 YOUTH SHELTER CARE: PROGRAM REQUIREMENTS, SEARCHES, is found on page 37-23977 of the Administrative Rules of Montana.

AUTH: 41-3-1103, 41-3-1142, 52-2-111, MCA

IMP: 41-3-1142, 52-2-113, MCA

37.97.821 YOUTH SHELTER CARE: PROGRAM REQUIREMENTS, MONEY, is found on page 37-23978 of the Administrative Rules of Montana.

AUTH: 41-3-1103, 41-3-1142, 52-2-111, MCA  
IMP: 41-3-1142, 52-2-113, MCA

37.97.822 YOUTH SHELTER CARE: PROGRAM REQUIREMENTS, TRAINING AND EMPLOYMENT, is found on page 37-23978 of the Administrative Rules of Montana.

AUTH: 41-3-1103, 41-3-1142, 52-2-111, MCA  
IMP: 41-3-1142, 52-2-113, MCA

37.97.825 YOUTH SHELTER CARE: PROGRAM REQUIREMENTS, DISCIPLINE, is found on page 37-23979 of the Administrative Rules of Montana.

AUTH: 41-3-1103, 41-3-1142, 52-2-111, MCA  
IMP: 41-3-1142, 52-2-113, MCA

37.97.830 YOUTH SHELTER CARE: PROGRAM REQUIREMENTS, YOUTH ORIENTATION, is found on page 37-23981 of the Administrative Rules of Montana.

AUTH: 41-3-1103, 41-3-1142, 52-2-111, MCA  
IMP: 41-3-1142, 52-2-113, MCA

37.97.831 YOUTH SHELTER CARE: PHYSICAL CARE, is found on page 37-23981 of the Administrative Rules of Montana.

AUTH: 41-3-1103, 41-3-1142, 52-2-111, MCA  
IMP: 41-3-1142, 52-2-113, MCA

37.97.832 YOUTH SHELTER CARE: ENVIRONMENT, is found on page 37-23982 of the Administrative Rules of Montana.

AUTH: 41-3-1103, 41-3-1142, 52-2-111, MCA  
IMP: 41-3-1142, 52-2-113, MCA

37.97.833 YOUTH SHELTER CARE: FIRE SAFETY, is found on page 37-23982 of the Administrative Rules of Montana.

AUTH: 41-3-1103, 41-3-1142, 52-2-111, MCA  
IMP: 41-3-1142, 52-2-113, MCA

37.97.836 YOUTH SHELTER CARE: TRANSPORTATION, is found on page 37-23985 of the Administrative Rules of Montana.

AUTH: 41-3-1103, 41-3-1142, 52-2-111, MCA  
IMP: 41-3-1142, 52-2-113, MCA

37.97.837 YOUTH SHELTER CARE: GUNS AND AMMUNITION, is found on page 37-23985 of the Administrative Rules of Montana.

AUTH: 41-3-1103, 41-3-1142, 52-2-111, MCA  
IMP: 41-3-1142, 52-2-113, MCA

37.97.838 YOUTH SHELTER CARE: STAFF, is found on page 37-23985 of the Administrative Rules of Montana.

AUTH: 41-3-1103, 41-3-1142, 52-2-111, MCA  
IMP: 41-3-1142, 52-2-113, MCA

37.97.842 YOUTH SHELTER CARE: PLACEMENT AGREEMENTS, is found on page 37-23991 of the Administrative Rules of Montana.

AUTH: 41-3-1103, 41-3-1142, 52-2-111, MCA  
IMP: 41-3-1142, 52-2-113, MCA

37.97.843 YOUTH SHELTER CARE: CASE RECORDS, is found on page 37-23991 of the Administrative Rules of Montana.

AUTH: 41-3-1103, 41-3-1142, 52-2-111, MCA  
IMP: 41-3-1142, 52-2-113, MCA

6. The Department of Public Health and Human Services (the department) is proposing to adopt New Rules I through XLII, the amendment of ARM 37.97.101, 37.97.102, 37.97.105, 37.97.106, 37.97.110, 37.97.115, 37.97.128, 37.97.130, 37.97.132, 37.97.206, 37.97.207, 37.97.216, 37.97.230, and the repeal of 37.97.118, 37.97.201, 37.97.202, 37.97.213, 37.97.220, 37.97.225, 37.97.226, 37.97.233, 37.97.238, 37.97.239, 37.97.250, 37.97.253, 37.97.254, 37.97.257, 37.97.258, 37.97.259, 37.97.270, 37.97.501, 37.97.502, 37.97.506, 37.97.508, 37.97.519, 37.97.521, 37.97.522, 37.97.524, 37.97.526, 37.97.528, 37.97.801, 37.97.805, 37.97.809, 37.97.810, 37.97.811, 37.97.815, 37.97.816, 37.97.817, 37.97.820, 37.97.821, 37.97.822, 37.97.825, 37.97.830, 37.97.831, 37.97.832, 37.97.833, 37.97.836, 37.97.837, 37.97.838, 37.97.842, and 37.97.843 pertaining to youth care facility licensure.

The department proposes to update youth care facility licensure rules for several reasons. First, providers have requested that the rules be consolidated. Rules for youth group homes, youth shelter care facilities, and child care agencies are located in separate subchapters, and therapeutic home rules are located in an entirely separate chapter, ARM Title 37, chapter 37, subchapter 1. The department agrees with the provider's proposal because the requirements were difficult to use, often

duplicative, and required various parts of the department to enforce the rules and review facilities for compliance.

Secondly, providers have been seeking dual licensure to include both youth group homes and youth shelter care facilities to alleviate the need for youth to move from shelter care to a group home placement when their circumstances change. The department concurs with the providers, and it has determined that dual licensing is in the best interest of the youth by meeting longer placement goals without disrupting the placement of the youth.

The department's Quality Assurance Division has worked collaboratively with several entities in developing the proposed new rules, including the Children's Mental Health Bureau and the Child and Family Services Division. The proposed new rules combine the requirements for licensing, medical necessities, and contracts. The department met with all interested providers on October 12, 2008, November 12, 2008, and July 23, 2009.

In order to consolidate the rules, the department found it necessary to repeal some rules because it finds that various requirements should be applied to all types of youth care facilities, and some rules are redundant or no longer necessary.

General requirements for all facilities are proposed to be in one subchapter. The department proposes to put the licensing rules for therapeutic group homes (TGH) and the Medicaid TGH rules in one place for easy reference. Repealing the TGH rules in ARM Title 37, chapter 37, subchapter 1 will allow the proposed new rules to be incorporated into the general youth care facility chapter, ARM Title 37, chapter 97.

The department is also proposing to repeal rules regarding child care agency, residential treatment centers (RTC). Montana has had three licensed RTCs in the past. This facility type has not been successful in Montana and currently none exist. Providers have found that these facilities are too expensive to operate with the licensing requirements. In addition, RTCs often get confused with the licensed residential treatment facilities (Acadia, Shodair, and Yellowstone Boys and Girls Ranch), which are health care facilities. This has caused a great deal of confusion within the state and with out-of-state placements. The RTCs are not health care facilities, therefore providers are unable to receive federal Title IV-E funding. Also, these RTC facilities did not have the number of placements needed to provide the level of care specified by the rules.

Rules proposed to be repealed are ARM 37.97.118, 37.97.201, 37.97.202, 37.97.213, 37.97.220, 37.97.225, 37.97.226, 37.97.233, 37.97.238, 37.97.239, 37.97.250, 37.97.253, 37.97.254, 37.97.257, 37.97.258, 37.97.259, 37.97.270, 37.97.501, 37.97.502, 37.97.506, 37.97.508, 37.97.519, 37.97.521, 37.97.522, 37.97.524, 37.97.526, 37.97.528, 37.97.801, 37.97.805, 37.97.809, 37.97.810, 37.97.811, 37.97.815, 37.97.816, 37.97.817, 37.97.820, 37.97.821, 37.97.822,

37.97.825, 37.97.830, 37.97.831, 37.97.832, 37.97.833, 37.97.836, 37.97.837, 37.97.838, 37.97.842, and 37.97.843.

Proposed changes include the addition of several safety requirements that are missing from the current rules. The changes provide consistency throughout the youth care licensing rules. The department also has proposed to change all references of "child" or "children" to "youth" to avoid confusion. Both terms are defined to mean the same age group of youth served.

#### New Rule I

This proposed new rule is necessary to ensure that providers are continually assessing and improving the quality of their program and care. Quality assessment is an industry standard of care.

#### New Rule II

Proposed New Rule II is necessary to help ensure the safety of youth served in youth care facilities. It outlines what facility staff are to know regarding the definitions of child abuse or neglect, the mandatory reporting requirements, and procedures to deal with child abuse or neglect incidents.

#### New Rule III

Proposed New Rule III is necessary to incorporate federal guidelines pertaining to criminal background information of staff. Federal law prohibits the employment of individuals working in youth care facilities who have convictions for certain offenses. The facilities must comply with these laws in order to receive federal funds. Providers have also requested the department to clarify what is acceptable and what is prohibited regarding criminal background information.

#### Rule IV

The department is proposing New Rule IV to replace ARM 37.97.524 and 37.97.838. The ratios in this new rule remain the same. Ratio requirements found in ARM Title 37, chapter 97, subchapters 5 and 8 are proposed to be repealed. The requirement to add a nighttime safety protocol will increase safety for all youth and staff by allowing the facility to determine what measures are needed depending on the population the YCF serves and the level of night supervision.

#### Rule V

The department is proposing New Rule V in order to provide training requirements for staff to ensure that they are prepared to address the ever changing needs of the facility and the youth being served. Staff must be prepared to deal with a wide variety of possible scenarios in youth care facilities such as how to deal with crisis and emergency situations. Due to the difficult nature of youth being served,

providers need to implement effective de-escalation methods and assure staff is trained in these procedures. The proposed new rule provides training timelines and expectations. Without these timelines, it is possible that staff may not be trained in a timely manner when situations arise. Requirements for continued training give staff the opportunity to keep current with changes in youth care management and improve their knowledge and skills to deal with difficult youth. When staff are not adequately trained to provide appropriate care, a youth may be placed at risk of harming themselves or others.

#### Rule VI

Proposed New Rule VI provides a process for youth who feel their rights are violated. Such a system currently does not exist. This proposed new rule is necessary to protect both the youth being served and the provider.

#### Rule VII

This proposed new rule is necessary to require providers to develop an admission policy that clearly defines the type of youth who would be appropriately served in their facilities. Youth being placed in care have a wide variety of needs and behaviors, and one facility may not be able to do what is required for the youth. Inappropriate placement can be harmful or disruptive to the youth, other youth in the facility, and facility staff.

#### Rule VIII

Proposed New Rule VIII consolidates provisions contained in the rules from each type of facility. Changes have been made for placement agreements to ensure they do not modify any other existing agreements or contracts between the provider and the department. It is necessary to adopt this rule to combine the requirements into one rule applicable to all facility types. Doing so allows for easier reading for providers.

#### Rule IX

The department is proposing New Rule IX to apply to all facilities. Concurrently, the requirements only apply to shelter care facilities. This new rule is necessary to ensure that youth are adequately informed upon admission of the provider's specific program policies and expectations. It is particularly important to inform the youth of the fire and safety issues, evacuation plans, discipline policy, and behavioral modification programs under which the provider operates. Youth must be made aware of the daily operations and treatment requirements necessary in order to maximize the benefit of their placement.

#### Rule X

This proposed new rule is necessary to ensure that the youth's needs are being addressed by implementing measurable goals and objectives. Because each youth placed has his or her own needs that the facility must address, individual case plans should be created to meet this goal. Timelines are included to ensure that the youth's needs are being continually monitored and updated as necessary.

#### Rule XI

This proposed new rule combines all physical care rules that exist for each type of facility. Doing so will decrease the number of rules and will make the requirements easier to follow. No substantive changes were made.

#### New Rule XII

Proposed New Rule XII consolidates the medication requirements that are contained in several other rules. Combining the requirements will allow youth care facilities to easily locate and comply with the requirements. New Rule XII clearly outlines procedures for the administration, storage, and documentation of medication. The proposed new rule helps provide for the safety of youth by ensuring that the youth is given the proper medication, in the appropriate dosage, at the appropriate time. It further prohibits the use of medication as a means of discipline. Proposed New Rule XII incorporates the state's Board of Nursing guidelines for documenting assistance with the self-administration of medication.

#### New Rule XIII through New Rule XXI

These proposed new rules consolidate the same requirements contained in the rules for each type of facility. The substance remains unchanged.

#### New Rule XXII

Time-out is an allowed behavior management technique that exists in current rules, however the rules provide no guidelines. Proposed New Rule XXII describes the appropriate use of time-out. The department's approval of the provider's time-out policy will allow the department to maintain oversight in its use. The department feels that it is necessary to specifically identify time-out as an individual behavior management policy because of the widespread use and various ways it is implemented. It is important to distinguish time-out from seclusion which is prohibited as explained in the proposed new provision in ARM 37.97.102.

#### New Rule XXIII

New Rule XXIII is necessary to provide YCFs guidance in developing and implementing behavior management policies. All YCFs must have clearly defined policies so the youth understand what is expected of them and know the consequences of their behaviors in order to provide the most benefits from their

treatment. Prohibited practices are clearly defined in this rule in order to protect the health and safety of the youth being served.

#### New Rule XXIV

Proposed New Rule XXIV provides clear guidelines in the application of crisis intervention and physical restraints. The rule incorporates federal guidelines pertaining to physical restraints, including when the use of physical restraint is acceptable and when it is prohibited. Since the use of physical restraints is a serious behavioral management technique and is to be used only in emergency situations, it is necessary to have strict guidelines in order to protect the youth, other facility youth, and the staff.

#### New Rule XXV

Proposed New Rule XXV is necessary to provide consistency in documentation for all youth who are discharged from a YCF. It is important to have a written summary of services provided to the youth in order to evaluate the outcomes and to determine the need for continued services.

#### New Rule XXVI

This proposed new rule consolidates case record requirements that exist under each facility type's rules. Additional documentation in resident case records is necessary to ensure the youth in care is receiving the appropriate level of intervention.

#### New Rule XXVII

It is necessary to adopt the search and seizure requirement in proposed New Rule XXVII so that all YCFs adhere to strictly comply with youth rights. Search requirements currently pertain to only youth shelter care facilities. The department has determined that this new rule should be applicable to all YCFs to protect the youth served and the providers who have been entrusted in their care.

#### New Rule XXVIII

It is necessary to adopt proposed New Rule XXVIII to address issues of prohibited contraband within a YCF. The new rule attempts to assure that general guidelines will be implemented consistently and equitably within that facility. The new rule ensures that each individual facility determine what is to be considered contraband and what procedures will be followed when prohibited contraband is found.

#### New Rule XXIX

Proposed New Rule XXIX regarding general safety requirements for all YCFs is necessary to protect youth and staff in the YCF. Having documented policies and

procedures ensure that precautionary steps have been taken to avoid accidents or injuries.

#### New Rule XXX

Proposed New Rule XXX is necessary because allowing guns and other potential weapons in a YCF increases the risk of harm to youth and facility staff.

#### New Rule XXXI

Proposed New Rule XXXI is needed to prevent the spread of diseases. The minimum standards specified in this rule provide YCFs with guidelines to implement an effective infection prevention and control program.

#### New Rule XXXII

It is necessary to address the safety concerns and health issues wherever animals and pets are allowed in a YCF. Proposed New Rule XXXII addresses general safety requirements and allows for consistency regarding animals and pets throughout all YCFs. This rule assists in protecting youth and facility staff from unsanitary conditions.

#### New Rules XXXIII through XXXV

Proposed New Rules XXXIII through XXXV consolidate the requirements found in each facility type's rules. No substantive changes were made.

#### New Rule XXXVI

Proposed New Rule XXXVI should be adopted to assure that YCFs meet the minimum requirements needed for safe food preparation, handling, and sanitation. Currently, local health departments may conduct inspections if requested by YCFs. The department strongly encourages this practice if such inspections are available. The department's Quality Assurance Division (or QAD) worked in conjunction with the department's Food and Consumer Safety Section in proposing this rule's requirements. This rule is necessary to prevent communicable diseases, which may cause serious health problems, from developing and spreading.

#### New Rule XXXVII

This proposed new rule combines the requirements found in each facility type's rules. No substantive changes were made.

#### New Rule XXXVIII

The financial requirements of this proposed rule are currently required only for child care agencies. The department has determined that the requirements should be

applicable to all YCFs. It is not unreasonable to expect that a YCF will have the resources to be financially viable for the first year of operation. If a facility were to become licensed without the resources to continue its operation for at least one year, youth placed in the facility may be forced to move, thereby causing disruptions in their treatment. The facility's maintenance of financial records assists the department in measuring compliance with this rule. In the event the YCF is having financial difficulties that may result in inadequate care of the youth being served, an unbiased audit by an outside source is needed to determine if the financial difficulty places the youth at risk. It is necessary to require the YCF to have financial responsibility for medical and dental treatment in order to ensure that the youth receive required treatment. All YCFs are required to provide ongoing medical and dental treatment to the youth, and the facility's lack of resources should not hinder in obtaining such services. This new rule clarifies who is responsible for the payment of those services since a variety of payment sources may be applicable. The requirement for liability insurance allows the facility to reimburse for any costs without being placed in financial difficulty.

#### Therapeutic group homes (TGH)

The proposed new rules eliminate the existing three levels of care. The majority of youth being served in TGHs meet the criteria for intensive level of care. Eliminating the level system will have no impact on the youth being served. Combining the license requirements for one level of care will benefit both the providers and the department. All providers would operate under the same rules, resulting in less confusion.

The federal rules for TGHs do not define specific levels of care and place that responsibility on individual states to determine the appropriate standards. As a result, the department finds it necessary to describe the services so they may be paid for by the Montana Medicaid program. Title 42 CFR 440.130(d) states: "Rehabilitative services, except as otherwise provided under this subpart, includes any medical or remedial services recommended by a physician or other licensed practitioner of the healing arts, within the scope of this practice under state law, for maximum reduction of physical or mental disability and restoration of a recipient to his best possible functional level." Title 42 CFR 440.40 states: "(b) EPSDT. Early and periodic screening and diagnosis and treatment means (1) screening and diagnostic services to determine physical or mental defects in recipients under age 21; and (2) health care, treatment, and other measures to correct or ameliorate any defects and chronic conditions discovered."

#### New Rule XXXIX

Under this proposed rule, direct care staffing requirements for TGHs licensed for four or fewer youth will not change, which will result in no financial impact for the providers. Direct care staffing requirements for TGHs licensed for five or more youth will decrease, which will result in cost savings for the providers. If required, the providers will be able to request additional staffing and services from the

department's Children's Mental Health Bureau. The proposed new rule provides that it is not necessary to have direct care staff in the TGH if no youth is present, such as "during school hours". This will minimize the facility's cost but still maintain adequate supervision. Nighttime staffing only requires one direct care staff to be on duty, however, the department has determined that it is necessary for an on-call person to be available, especially since the TGH serves seriously emotionally disturbed youth and their behavior can be unpredictable.

Also in New Rule XXXIX the department proposes that program managers oversee no more than two TGHs. This has been a common practice. The quality of a program manager's duties and responsibilities may suffer if overseeing more than two TGHs. It is unreasonable to expect program managers to perform their duties, adequately supervise the youth, and be counted in the direct care staffing ratio in several facilities. The program manager can also serve as the lead clinical staff if he or she meets the qualifications and has sufficient time to carry out the duties of both positions. Currently, each level of TGH care needs at least one full-time program manager for each group home. Some need more than one because the program manager provided therapeutic care. Following the requirements in New Rule XXXIX will result in potential cost savings for the provider. The changes proposed for program manager have decreased requirements significantly, resulting in a potential cost savings for the provider.

A requirement to employ an in-training or licensed mental health professional for the lead clinical staff has been added. Currently, treatment in the TGH can be provided by a bachelor degree level program manager, or a person with education or experience equivalent to a bachelor's degree. The department believes that unlicensed individuals are not qualified to adequately provide therapeutic services and interventions. The youth being served are seriously emotionally disturbed and require intensive therapeutic interventions. A lead clinical staff educated and trained in the vast therapeutic methodologies will be able to determine the appropriate therapeutic interventions for the youth. Due to the nature of the services provided, lead clinical staff may not be counted in the direct care staff ratio. Because they are not available to provide direct care services to other youth when conducting therapy.

Permitting in-training mental health professionals to act as lead clinical staff under the supervision of a licensed professional allows the in-training individual to gain experience while helping the provider to meet its needs in providing therapeutic services. This can serve as a recruitment tool for providers when attempting to hire lead clinical staff. Lead clinical staff will be responsible for the direct implementation and oversight of all the youth's therapeutic needs.

New Rule XXXIX is proposed to require staffing patterns to accommodate the treatment plan objectives. Individual treatment plans can be very complex and require staff to perform additional duties depending on the youth being served. Direct care staff is responsible for implementing certain portions of the treatment plan that occur in the therapeutic milieu. The provider may have to adjust staffing in order to provide all requirements to the treatment plan. If, for example, the treatment

plan for a youth in the TGH includes one-on-one supervision, the facility must be adequately staffed to carry out this directive.

The department anticipates that this proposed rule may result in an increased fiscal impact for providers who do not currently employ lead clinical staff to provide treatment. Based on the results of the TGH Cost Report completed in state fiscal year 2008, the department believes TGH providers will be reimbursed adequately to absorb these additional costs. Based on the report, the average cost for TGH providers' "licensed therapies" is \$23.25 per client per day. The average cost per day for "nonlicensed observation and supports" is \$148.47 per client per day. The total of these two amounts is \$171.72, which comprise the therapeutic or Medicaid reimbursed categories. The state fiscal year 2010 Medicaid daily reimbursement rate for TGH services is \$183.98. Medicaid pays 107% of the average TGH provider cost, or 7% higher than the average TGH costs. The Medicaid rate will adequately cover the average TGH costs. The above costs were based on 88% occupancy rates. If the TGH's average occupancy level is higher than 88%, their revenue to cost ratio is even higher. The department does not foresee any impact to the department, as the rate for bundled services will remain the same.

The professional staffing requirements for the currently licensed campus-based TGH will be reduced under the proposed New Rule XXXIX. Currently, staffing requires .25 social worker, .25 clinical director, .25 director of operations, and .20 registered nurse. The duties of the clinical director have been proposed to be incorporated into the lead clinical staff position, and the duties of the director of operations and social worker have been incorporated into the program manager position. Therefore, some reduction in staffing can be realized for providers currently licensed as campus-based TGHs, resulting in a potential cost savings. The department proposes to remove the nurse requirements because a TGH is not a medical model, and a nurse is not required for the intensive or moderate level of care at a TGH. Youth being served can obtain medical care from licensed health care professionals practicing in the community. The elimination for the need of a registered nurse may provide potential cost savings to the facility.

#### New Rule XL

This proposed new rule is necessary to clearly define when clinical assessments are due and what the department defines as "current" in relationship to a current clinical assessment. Without this rule, there are no clinical assessment requirements for a youth in therapeutic care, therefore the appropriate timeframes for a clinical assessment would be open to interpretation, and lead clinical staff may not have a current understanding of the youth's specific treatment needs. The clinical assessment is necessary to identify a youth's mental health, diagnosis, and circumstances that perpetuated the placement in a therapeutic environment. The clinical assessments need to be updated on an annual basis to document changes in the youth's mental health needs and to update the treatment plans accordingly.

#### New Rule XLI

This proposed new rule is necessary to identify the minimum amount of therapy that would be appropriate for a youth placed in a TGH. The department finds that current therapy requirements are too vague and inconsistent between the levels of care in a TGH. The new rule would implement more definitive requirements for the duration and frequency of providing psychotherapy and treatment to each youth. The proposed new rule outlines specific requirements for individual, group, and family therapy in order to ensure the youth receive the appropriate services that are reimbursable under the Montana Medicaid guidelines. The department believes that the youth in TGH will benefit from the rule's strengthened therapeutic requirements.

Commonly, a therapy session lasts for 50 minutes, however in some situations a particular youth may not be able to participate in such a lengthy therapy session. Proposed New Rule XLI accommodates these circumstances by allowing individual therapy to be conducted within shorter timelines as indicated by the lead clinical staff.

Proposed New Rule XLI describes who is considered a member of the youth's family in order to participate in family therapy. The department believes family therapy is an essential component of the youth's treatment because the goal is to return the youth to the family or similar home situation. The department acknowledges that in extreme circumstances family therapy may not be appropriate as indicated by the lead clinical staff, social worker, or a court order. The new rule allows the lead clinical staff to not require family therapy if it is contraindicated.

The documentation requirements in proposed New Rule XLI are not new, however they are more clearly defined for consistency among all providers. Documentation of therapeutic interventions is necessary to ensure the youth's treatment plan is being implemented when the plan has therapeutic requirements. The proposed new rule also specifies what medical records are to contain.

The current requirement for internal staff meetings remains the same in proposed New Rule XLI. A treatment meeting is a method to effectively communicate the progress of the youth's treatment plan and identify current needs and potential difficulties. The department is reducing the requirement from two meetings per week to one because having two meetings has not shown an increased benefit for youth.

#### New Rule XLII

Proposed New Rule XLII is needed to indicate what treatment objectives and interventions are necessary to help the youth overcome the severe emotional disturbance or behavior disorder that resulted in placement. Designating a review period allows for the comprehensive assessment of appropriateness of the treatment. If the youth's treatment is not producing the desired outcomes, the treatment plan should be modified. Staff must be aware of the treatment plan in order to provide the care needed. Communicating the treatment plan to the placing

agency and parent or guardian provides information on the objectives, interventions, and outcomes regarding the youth's treatment.

#### ARM 37.97.102

The department proposes additional definitions that are used throughout the chapter, and update definitions to incorporate federal requirements. Minor proposed changes are also provided for clarity to conform any formatting requirements to administrative rules.

The terms "chemical restraint", "mechanical restraint", "physical escort", "passive physical restraint", and "seclusion" have been either added or modified in accordance with federal law, which provides that these interventions are prohibited.

The terms "time-out" has been modified to distinguish it from seclusion. It reflects federal language.

The term "serious incident" has been modified to identify what occurrences meet the level needed for reporting requirements. The substance of this definition is the same as the current one in ARM 37.97.130, however it has been modified to include "injury to a child which requires medical attention". Current language provides that serious incidents require hospitalization. The definition change is necessary because youth in YCFs can be seriously injured but not require hospitalization. These nonhospitalized injuries may be a result of a licensing violation and may require intervention.

The original sections in ARM 37.97.130 are proposed for deletion because they only applied to youth shelter care facilities. The department's proposed changes will make the new definitions applicable to all youth care facilities.

#### ARM 37.97.106

The proposed amendment to this rule is being made to change the reference from licensing "study" to "survey", which is terminology that is common in department facility licensing. This proposed change provides consistency among license types and eliminates confusion by using terminology that is more indicative of the requirements. References to youth foster homes are proposed to be deleted. Youth foster homes are considered youth care facilities, however they are licensed under ARM Title 37, chapter 51 and are regulated by the department's Child and Family Services Division.

#### ARM 37.97.110

It is necessary to amend this rule to provide clarification in the licensing procedure and explain the requirements needed to complete a licensing application. The department added the requirement to submit all program policies and procedures to ensure compliance with all applicable rules in this chapter. The rule changes give

the provider a specific timeline to complete and submit the plan of correction to the department in order to ensure all licensing requirements have been met prior to issuing a license. Designating a specific deadline to submit the plan of correction keeps the process moving forward and avoids delays in the issuance of a license. The proposed amendments have the potential to save time and money for both the applicant and the department.

#### ARM 37.97.115

The proposed amendment to ARM 37.97.115 clarifies when action may be taken against a YCF when abuse or neglect occurs. The addition of ARM 37.97.115(1)(f) is to provide more safeguards so youth are not abused or neglected. Investigations completed by other entities have been added because the department is not the only investigator of abuse and neglect. The rule specifically states reasons for negative licensure actions should the facility fail to provide an acceptable plan of correction, and provide recourse for an applicant or licensee impacted by the adverse licensing decision. The department proposes to move the hearing rights provision found currently in ARM 37.97.118 into ARM 37.97.115(3) so all matters pertaining to license denial and revocation are in one rule.

#### ARM 37.97.128

The term "child" is being replaced by the term "youth" which appears in all proposed new rules and amendments. No substantive changes have been made.

#### ARM 37.97.130

The department proposes to take out the provisions in ARM 37.97.130(3), (4), and (5), and place them in proposed new Rule II. The serious nature of abuse, neglect, and serious incidents warrants the requirements to be more easily located in a separate rule. A change was made to reflect the state's current child abuse and neglect reporting procedure.

#### ARM 37.97.132

The department's proposed change consolidates all requirements for staffing into one rule. The requirements are standard conditions of employment that are used in any workplace. These conditions are commonly used to define job duties and what qualifications are necessary to successfully perform those duties. It is necessary for the provider to maintain personnel records. The records provide documentation showing compliance with these rules, thereby ensuring the safety and well-being of the youth.

The department proposes to change the minimum age requirement for staff from 18 to 21 years of age. YCFs can serve youth up to the age of 21. The department believes it is not appropriate for staff to be younger than the youth they are in charge of caring for because the age difference may lead to potential behavior problems.

For instance, the youth may not be inclined to take direction from a younger staff member. Requiring a high school diploma or GED for staff is necessary because the job responsibilities require the basic knowledge obtained through a high school education.

Changes to ARM 37.97.132 include combining all staff requirements specified in other rules. The various requirements that currently exist for different types of facilities should be applicable to all YCFs. One rule is also easier for operators to comprehend.

#### ARM 37.97.206

The amendments to ARM 37.97.206 clarify the duties of a YCF administrator to ensure that all licensing requirements are met. The amended provisions also require additional training and educational for administrators and social service staff to ensure that they are prepared to address the changing needs of the facility and youth being served. Due to the complexity of child care agencies, it has been determined that the administrators should be experienced in child care and also possess the administrative skills necessary to meet the duties of the position. The administrator is responsible for overseeing the entire organization, including such areas as education, social services, finances, human resources, and program development and implementation.

The amendments to ARM 37.97.206 specify the education and skills necessary for social service workers to provide appropriate services to the youth and their families. The complexity of social services has changed since these rules were originally adopted over 20 years ago. The social service worker now must know the appropriate methodologies for treatment, the array of available services and resources, and family dynamics. This knowledge is traditionally received through higher education.

#### ARM 37.97.207

The proposed amendments to this rule prohibit child care staff to have their own children at the YCF due to confidentiality and other risk factors. The child/staff ratio for maternity homes has been modified to include children not being cared for by their mothers because staff may later be responsible to care for them. The child/staff ratio has also been increased to provide a safe and secure environment for all residents in a maternity home, including babies and young children.

#### ARM 37.97.216

The department proposes to repeal the requirements in ARM 37.97.216(4) and (5) because they do not benefit the youth being served by the YCF. Health care record reviews do not necessarily assure that the youth are receiving continued health care. Leaving the requirements as they are may be an unnecessary expenditure for the YCF.

ARM 37.97.230

ARM 37.97.230 is proposed to be amended to clarify who may receive the written description of the child care agency's treatment program.

The department rejected the option of leaving the rules as they currently exist because providers requested changes to make the rules easier to use and to accommodate dual licensure. The department has also found that the current rules were difficult to enforce. The proposed new rules, amendments, and repealed rules continue to provide for the safety and well-being of youth in placement while meeting both the providers and department's needs. The current rules no longer meet the current safety standards for YCFs, criminal background criteria, and child abuse and neglect criteria. They do not comply with the latest federal requirements. They also fail to provide for treatment goals and objectives for higher levels of care, and address adequate levels of training for YCF staff in order for them to promote the safety and well-being of the youth. YCFs are required to provide care and supervision to an increasingly demanding population. These rule changes attempt to provide for those needs.

7. 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: Rhonda Lesofski, 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 [dphhslegal@mt.gov](mailto:dphhslegal@mt.gov), and must be received no later than 5:00 p.m., November 5, 2010.

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

9. 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 7 above or may be made by completing a request form at any rules hearing held by the department.

10. An electronic copy of this proposal notice is available through the Secretary of State's web site at <http://sos.mt.gov/ARM/Register>. The Secretary of State strives to make the electronic copy of the notice conform to the official version of the notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the notice and the electronic version of the notice, only the official printed text will be considered. In addition, although the Secretary of State works to keep its web site accessible at all times, concerned persons should be aware that the web

site may be unavailable during some periods, due to system maintenance or technical problems.

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

/s/ Michelle Maltese  
Rule Reviewer

/s/ Anna Whiting Sorrell  
Anna Whiting Sorrell, Director  
Public Health and Human Services

Certified to the Secretary of State September 13, 2010.

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 37.80.101 and 37.80.201 ) PROPOSED AMENDMENT  
pertaining to child care assistance )

TO: All Concerned Persons

1. On October 15, 2010, at 1:30 p.m., the Department of Public Health and Human Services 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.

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 Department of Public Health and Human Services no later than 5:00 p.m. on October 6, 2010, to advise us of the nature of the accommodation that you need. Please contact Rhonda Lesofski, 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 dphhslegal@mt.gov.

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

37.80.101 PURPOSE AND GENERAL LIMITATIONS (1) through (11) remain the same.

(12) An application for child care assistance will be denied if the applicant fails to submit all required documentation within 30 days of the date on which the application is received by the resource and referral agency. Applicants ~~may receive~~ must be offered one 15-day extension to submit required documentation in the possession of a third party ~~provided the applicant submits a request for extension prior to the expiration of the 30-day period.~~

(13) The ~~e~~Child ~~e~~Care ~~a~~Assistance ~~p~~Program will be administered in accordance with:

(a) remains the same.

(b) the Montana Child Care Manual in effect on ~~August 1, 2010~~ November 1, 2010. The Montana Child Care Manual, dated ~~August 1, 2010~~ November 1, 2010, is adopted and incorporated by this reference. The manual contains the policies and procedures utilized in the implementation of the department's Child Care Assistance ~~p~~Program. A copy of the Montana Child Care Manual is available at each child care resource and referral agency; at the Department of Public Health and Human Services, Human and Community Services Division, 111 N. Jackson St., P.O. Box

202925, Helena, MT 59620-2925; and on the department's web site at [www.childcare.mt.gov](http://www.childcare.mt.gov).

AUTH: 52-2-704, 53-4-212, MCA

IMP: 52-2-702, 52-2-704, 52-2-713, 52-2-731, 53-2-201, 53-4-211, 53-4-601, 53-4-611, 53-4-612, MCA

37.80.201 NONFINANCIAL REQUIREMENTS FOR ELIGIBILITY AND PRIORITY FOR ASSISTANCE (1) In addition to the income requirements of ARM 37.80.202, the following nonfinancial requirements must be met in order for payments under this chapter to be made:

(a) through (a)(ii)(B) remain the same.

(b) The monthly minimum hourly work requirement does not apply to:

(i) through (v) remain the same.

(vi) a parent, in a two-parent household, who is severely disabled and unable to care for their child; and

(vii) in extreme circumstances of verifiable medical, financial, and physical hardship, a decision to approve eligibility or continued eligibility in cases not otherwise meeting the required eligibility standards can be made by either the Child Care Program manager or the chief of the Early Childhood Services Bureau. Approval decisions will be based on how the hardship impacts the family and whether the family would likely meet the eligibility criteria for child care assistance when the hardship is no longer present.

(2) through (11) remain the same.

AUTH: 40-4-234, 52-2-704, 53-4-212, MCA

IMP: 52-2-704, 52-2-713, 52-2-721, 52-2-722, 52-2-723, 52-2-731, 53-2-201, 53-4-211, 53-4-601, 53-4-611, MCA

4. The Department of Public Health and Human Services (department) is proposing amendments to ARM 37.80.101 and 37.80.201 pertaining to child care assistance.

#### ARM 37.80.101

The proposed amendment to ARM 37.80.101(12) is being updated to require Child Care Resource & Referral (CCR&R) agencies to offer an automatic 15-day extension for families to submit documentation required to qualify for child care assistance when families have to obtain that documentation from third parties. The department has found during administrative reviews that families who would have qualified for a 15-day extension to submit required documentation from third parties were not aware of the option or were not offered the option of receiving a 15-day extension. This change will require the CCR&R agencies with the state to offer the extension automatically when required documentation for eligibility must come from a third party.

The department does not anticipate any adverse affect or any fiscal impact associated with this change.

ARM 37.80.101(13)(b) currently adopts and incorporates by reference the Montana Child Care Manual effective August 1, 2010. The department proposes to make some revisions to this manual that will take effect on November 1, 2010. The proposed amendment to ARM 37.80.101(13) is necessary to incorporate into the Administrative Rules of Montana the revisions to the manual and to permit all interested parties to comment on the department's policies and to offer suggested changes. It is estimated that changes to the Child Care Manual could affect approximately 3500 recipient households, 2000 child care providers, and 11 CCR&R agencies. Manuals and draft manual material are available for review in each local office of public assistance and on the department's web site at [www.childcare.mt.gov](http://www.childcare.mt.gov). The department does not anticipate any adverse affect or any fiscal impact associated with the changes to the manual and to ARM 37.80.101(13)(b).

#### ARM 37.80.201

ARM 37.80.201(1)(b)(vii) is being updated to allow the Child Care Program manager or the chief of the Early Childhood Services Bureau to approve extreme cases not otherwise meeting the required eligibility standards if denial would likely cause a verifiable medical, financial, or physical hardship putting a child at risk for physical or emotional harm. On occasion, families face such hardship and the risk of such harm in circumstances which may cause the family to be ineligible for child care assistance. The hardship provision allows for child care to continue uninterrupted until these circumstances improve. Decisions of approval will be based on how the hardship and risk of harm impact the family and whether the family would likely meet the eligibility criteria for child care assistance once the hardship is no longer present.

The department does not anticipate any adverse affect or any fiscal impact associated with this change.

Following is a brief overview of the Child Care Manual sections with substantive changes related to the above ARM changes.

#### Section 1-7 - Parent Eligibility – Overview – Hardship Eligibility

As is reflected in the change to ARM 37.80.201(1)(b)(vii), this manual provision is being updated to allow the Child Care Program manager or the chief of the Early Childhood Services Bureau to approve extreme cases not otherwise meeting the required eligibility standards if denial would likely cause a verifiable medical, financial, or physical hardship putting a child at risk for physical or emotional harm. On occasion, families face such hardship and the risk of such harm in circumstances which may cause the family to be ineligible for child care assistance. The hardship provision allows for child care to continue uninterrupted until these circumstances improve. Decisions of approval will be based on how the hardship and risk of harm

impact the family and whether the family would likely meet the eligibility criteria for child care assistance once the hardship is no longer present.

The department does not anticipate any adverse affect or any fiscal impact associated with this change.

#### Section 2-1 - Non-TANF Child Care Eligibility – Application Process

As is reflected in the change to ARM 37.80.101(12) this manual provision is being updated to require CCR&R agencies to offer an automatic 15-day extension for families to submit documentation required to qualify for child care assistance when families have to obtain that documentation from third parties. The department has found during administrative reviews that families who would have qualified for a 15-day extension to submit required documentation from third parties were not aware of the option or were not offered the option of receiving a 15-day extension. This change will require the CCR&R agencies with the state to offer the extension automatically when required documentation for eligibility must come from a third party.

The department does not anticipate any adverse affect or any fiscal impact associated with this change.

#### Section 2-1 - Application Process – Presumptive Eligibility

This manual provision is being revised to change the permissive language of the previous provision to mandatory language requiring a family be presumed eligible for child care assistance during the 30 day verification period. The change is made to emphasize that the presumption applies to families only, and not to LUP/LUI providers, who are subject to background checks and other administrative requirements that commonly take more than 30 days. This revision will give assurance to providers who are already licensed or registered that child care will be paid for families while information is being verified. Presumption occurs beginning the day the application for the family is received and date stamped in the CCR&R office if a waiting list is not in effect at that time.

The change will apply to and should not adversely affect approximately 3,500 households currently receiving reimbursement through the scholarship program. It is estimated that 100% of the above mentioned participants will meet eligibility criteria for this program.

The department does not anticipate any adverse affect or any fiscal impact associated with this change.

#### Section 2-2 - Non-TANF Child Care Eligibility – Household Requirements – Homelessness

This manual provision is being revised to ensure that families who meet all general eligibility requirements for child care assistance with the exception of a permanent address, and who lack a permanent address due to temporary homelessness, will still be eligible for child care assistance. Families are increasingly suffering temporary homelessness who otherwise meet the child care assistance general eligibility requirements, including the household having a need for child care, having gross income not exceeding 150% of the poverty rate, being in compliance with the Child Support Enforcement Division, families working/receiving training, and teen parents attending school. The department has determined that denial of eligibility solely for the lack of a permanent address because of temporary homelessness is contrary to the overreaching intent of the law.

The department does not anticipate any adverse affect or any fiscal impact associated with this change.

#### Section 2-2 and 2-2A - Child Support

This manual provision is being created to explain clearly in a single section all issues, processes, and procedures concerning child support. Information in this subsection was taken from Section 2-2.

The department does not anticipate any adverse affect or any fiscal impact associated with this change.

#### Section 2-3 - Non-TANF Activity Requirements – Distance/Online Learning

This manual provision is being revised to increase the number of educational/training options available to families eligible for scholarship assistance by accepting Distance Learning/On-line coursework as fulfilling non-work-related activities requirements. The revisions are necessary because the state recognizes that an increased number of individuals are using Distance Learning/On-line coursework as a way to obtain formalized education without having to leave their families and homes to attend a traditional education program. This is especially important to families who live in the rural areas of the state where no local educational facility is available.

The calculated fiscal impact associated with this rule change will be approximately \$200,000 over an eight-month period based on anticipated additional qualifying students as well as those students currently receiving scholarship assistance who may select distance learning options over traditional educational institutions.

The department does not anticipate any adverse affect.

#### Section 2-3 - Non-TANF Child Care Eligibility – Minimum Hourly Work Requirement

This manual provision is being revised to reduce the minimum work requirement from 120 to 60 hours when a family member is incarcerated. The department has

determined that a parent in an intact family whose spouse is incarcerated would face undue hardship by having to meet the 120-hour work requirement for a two-parent household, and that the work requirement for such a parent should be reduced to the 60-hour standard applicable for a single parent family until the incarcerated spouse is released and able to work. Likewise, should the nonincarcerated parent be a full-time student, the department believes it would cause undue hardship to require that parent meet the 60-hour/month work requirement for a full time student. Instead, the department will apply to the unincarcerated spouse the 40-hour/month standard applicable to a single parent attending school full time until the incarcerated spouse is released and able to work.

The department does not anticipate any adverse affect or any fiscal impact associated with this change.

#### Section 6-2 - Legally Unregistered Provider – Out-of-State Background Check Procedure

This manual provision is being revised to clarify the procedure used to track out of state background checks in light of the upcoming centralization of LUP services within one CCR&R agency in the state. While the tracking is done within the CCR&R agency, ultimate responsibility for all background check costs remains the responsibility of the parent.

The department does not anticipate any adverse affect or any fiscal impact associated with this change.

#### Section 6-3 - Issuing the Child Care Certification Plan – Sleep Time

This manual provision is being revised to limit the possibility of fraud occurring when an employee of a child care facility is also eligible for the Best Beginnings Child Care Program. Specifically, sleep time may be approved for parents working or attending education or training activities during the night on a very limited basis, only if no other resource exists. Sleep time may be allowed for parents employed at child care facilities during the night equal to or less than the number of hours of work time. However, participants requesting sleep time care must have their children in a facility other than the one where the participant is employed

The change will apply to and should not adversely affect approximately 2,000 caregivers currently working in child care facilities across the state. It is estimated that less than 1/2% of the above mentioned caregivers are third shift workers.

The department does not anticipate any adverse affect or any fiscal impact associated with this change.

#### Section 7-4 - Best Beginnings Quality Initiatives – Mini Grants

This manual provision is being revised to allow CCR&R agencies rather than the Early Childhood Services Bureau the ability to assist providers with funding to improve the quality of their child care programs. In the interest of fairness of funding allocation across the state by CCR&R region, each agency administers the Mini Grant program for their service delivery area. For this reason, it has been deemed appropriate for local CCR&R agencies to manage the grants. Mini Grants are intended to allow for localized application and to ensure flexibility in awarding amounts consistent with the needs of providers. Use of the grant funds are outlined in this policy revision.

The change will apply to and should not adversely affect approximately 2000 providers currently eligible to apply for the Mini Grants and the 11 CCR&R agencies contracted to implement this policy. It is estimated that 100% of the above mentioned participants will meet eligibility criteria for this program.

The department does not anticipate any adverse affect or any fiscal impact associated with this change.

5. The department intends the proposed rule changes to be applied effective November 1, 2010.

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: Rhonda Lesofski, 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 [dphhslegal@mt.gov](mailto:dphhslegal@mt.gov), and must be received no later than 5:00 p.m., October 21, 2010.

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 or may be made by completing a request form at any rules hearing held by the department.

9. An electronic copy of this proposal notice is available through the Secretary of State's web site at <http://sos.mt.gov/ARM/Register>. The Secretary of State strives to make the electronic copy of the notice conform to the official version of the notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the notice and the electronic version of the notice, only the official printed text will be considered. In addition, although the Secretary of State works to keep its

web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems.

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

/s/ Francis X. Clinch  
Rule Reviewer

/s/ Anna Whiting Sorrell  
Anna Whiting Sorrell, Director  
Public Health and Human Services

Certified to the Secretary of State September 13, 2010.

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

In the matter of the adoption of NEW ) NOTICE OF PUBLIC HEARING ON  
RULE I pertaining to motor carrier ) PROPOSED ADOPTION  
authority recognition )

TO: All Concerned Persons

1. On November 10, 2010, at 10:00 a.m., the Department of Public Service Regulation will hold a public hearing in the Bollinger Room at 1701 Prospect Avenue, Helena, Montana, to consider the proposed adoption of the above-stated rule.

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 of Public Service Regulation no later than 4:00 p.m. on November 4, 2010, to advise us of the nature of the accommodation that you need. Please contact Verna Stewart, Department of Public Service Regulation, 1701 Prospect Avenue, P.O. Box 202601, Helena, Montana, 59620-2601; telephone (406) 444-6170; fax (406) 444-7618; or e-mail [vstewart@mt.gov](mailto:vstewart@mt.gov).

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

NEW RULE I MOTOR CARRIER AUTHORITY RECOGNITION (1) Motor carriers granted authority to carry persons or passengers without limitation to the type of service are permitted to operate both as a rate regulated and charter passenger carrier.

AUTH: 69-12-201, MCA

IMP: 69-12-201, MCA

REASONABLE NECESSITY: The department is proposing the adoption of new Rule I pertaining to motor carrier authority recognition to clarify the passenger authority previously granted by the department and currently held by motor carriers. The department determines that it is necessary to clarify its current interpretation of motor carrier operating authorities in a manner consistent with its past policy.

4. Concerned persons may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments (original and ten copies) may also be submitted to: Verna Stewart, Department of Public Service Regulation, 1701 Prospect Avenue, P.O. Box 202601, Helena, Montana 59620-2601; telephone (406) 444-6170; fax (406) 444-7618; or e-mail [vstewart@mt.gov](mailto:vstewart@mt.gov), and must be received no later than 4:00 p.m., November 10, 2010. Please reference Docket L-10.09.1-RUL in all submissions or e-mails.

5. Commissioner Greg Jergeson, Department of Public Service Regulation, or another Commissioner will preside over and conduct this hearing.

6. The Montana Consumer Counsel, 616 Helena Avenue, P.O. Box 201703, Helena, Montana 59620-1703, telephone (406) 444-2771, is available and may be contacted to represent consumer interests in this matter.

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 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://sos.mt.gov/ARM/Register>. The Secretary of State strives to make the electronic copy of the notice conform to the official version of the notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the notice and the electronic version of the notice, only the official printed text will be considered. In addition, although the Secretary of State works to keep its web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems.

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

/s/ Al Brogan  
Al Brogan  
Rule Reviewer

/s/ Greg Jergeson  
Greg Jergeson, Chairman  
Department of Public Service Regulation

Certified to the Secretary of State September 13, 2010.

BEFORE THE DEPARTMENT OF REVENUE  
OF THE STATE OF MONTANA

In the matter of the amendment of ARM ) NOTICE OF PUBLIC  
42.15.802 relating to family education ) HEARING ON PROPOSED  
savings program ) AMENDMENT

TO: All Concerned Persons

1. On October 14, 2010, at 9:30 a.m., a public hearing will be held in the Third Floor Reception Area Conference Room of the Sam W. Mitchell Building, at Helena, Montana, to consider the amendment of the above-stated rules.

Individuals planning to attend the hearing shall enter the building through the east doors of the Sam W. Mitchell Building, 125 North Roberts, Helena, Montana.

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, contact the Department of Revenue no later than 5:00 p.m., October 4, 2010, to advise us of the nature of the accommodation that you need. Please contact Cleo Anderson, Department of Revenue, Director's Office, P.O. Box 7701, Helena, Montana 59604-7701; telephone (406) 444-5828; fax (406) 444-4375; or e-mail canderson@mt.gov.

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

42.15.802 CONTRIBUTIONS TO FAMILY EDUCATION SAVINGS PROGRAM ACCOUNTS (1) The program administrator determines who can be an account owner and from whom it will accept contributions to an account. More information regarding the administration of the program can be found at [montana.collegesavings.com/montana](http://montana.collegesavings.com/montana).

(1)(2) An taxpayer individual is allowed to deduct the reduce their Montana adjusted gross income by the lesser of the total contributions they actually made make to one or more Montana family education savings accounts during the tax year, or \$3,000.

(a) Except as provided in (i) and (ii), a A deduction is allowed only for contributions an individual makes to an to accounts owned by the taxpayer, the individual (or jointly with their taxpayer's spouse), or, if the taxpayer's,

(i) Section 15-62-207, MCA, provides that a qualifying contribution can also be made to an account owned by the individual's child or stepchild if that child or stepchild is a Montana resident, the taxpayer's child or stepchild. The department interprets that provision to allow only a parent or stepparent to claim a deduction for an amount they contribute to an account owned by their minor child or stepchild as provided in (ii). This interpretation is based on the program administrator's refusal to accept other contributions to accounts not owned by the contributor, and the

department may amend this rule and interpret the provision more broadly in the future if the program administrator permits other contributions to accounts not owned by the contributor.

(ii) If a parent or stepparent supplies the funds they use to establish an account under the Montana Uniform Transfers to Minors Act for which their minor child or stepchild is both the owner and designated beneficiary, and if the child or stepchild is a Montana resident, the parent or stepparent may elect to reduce their own Montana adjusted gross income by the amount they provided even if for other purposes the transaction would be treated as if they made a gift of cash to the child or stepchild who in turn contributed the money to a family education savings account they own entitling the child or stepchild to reduce the child or stepchild's Montana adjusted gross income.

(b) The reduction in Montana adjusted gross income for a contribution can be claimed only for the tax year the contribution is made.

(c) An account owner is not required to be a resident and a nonresident may reduce their Montana adjusted gross income, if any, for their contributions to an account they own. Except as provided in (1)(a), however, contributions to an account, whether by a resident or nonresident, if made to an account they do not own, cannot reduce their own Montana adjusted gross income.

(2) remains the same but is renumbered (3).

(4) A rollover from another state's 529 plan or other private family education savings account into a Montana family education savings account is considered a contribution for which a deduction may be claimed, provided all other provisions of the Family Education Savings Act are met. The rollover may, however, be treated by the other state or the other state's plan as an unqualified withdrawal.

(3) remains the same but is renumbered (5).

AUTH: 15-30-2620, 15-62-201, MCA

IMP: 15-30-2110, 15-62-201, 15-62-207, MCA

**REASONABLE NECESSITY:** The department is proposing to amend 42.15.802 to address questions regarding rollovers from another state's section 529, Internal Revenue Code, 26 U.S.C. 529 into the Montana plan and whether a nonresident may claim a reduction in their Montana adjusted gross income if they have Montana adjusted gross income.

The amendments explain that rollovers into the Montana plan are considered contributions for which a deduction may be claimed as long as all other conditions of the laws are met. The amendments also explain that it is the administrator of the Family Education Savings Program that determines who can own an account established with the program and from whom contributions to accounts will be accepted. The amendments also clarify that nonresidents, as well as residents, may claim a reduction in their Montana adjusted gross income for accounts that they own. They explain how parents and stepparents, whether residents or nonresidents, who establish and fund an account for their minor child or stepchild under the Montana Uniform Transfers to Minors Act may elect, if the child or stepchild is a Montana resident, to reduce their own Montana adjusted gross income in lieu of the child's reducing their adjusted gross income for contribution to an account the minor

child owns. The department also explains that contributions by others to accounts of minor children or stepchildren may be interpreted more broadly in the future if the program administrator begins accepting other contributions from accounts not owned by the contributor.

The department is deleting the authority reference of 15-62-201, MCA, because that statute does not give the department rulemaking authority. That statute gives the Board of Regents rulemaking authority.

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: Cleo Anderson, Department of Revenue, Director's Office, P.O. Box 7701, Helena, Montana 59604-7701; telephone (406) 444-5828; fax (406) 444-4375; or e-mail [canderson@mt.gov](mailto:canderson@mt.gov) and must be received no later than October 22, 2010.

5. Cleo Anderson, Department of Revenue, Director's Office, has been designated to preside over and conduct the hearing.

6. An electronic copy of this Notice of Public Hearing is available through the department's site on the World Wide Web at [www.mt.gov/revenue](http://www.mt.gov/revenue), under "for your reference"; "DOR administrative rules"; and "upcoming events and proposed rule changes." The department strives to make the electronic copy of this Notice of Public Hearing conform to the official version of the notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the notice and the electronic version of the notice, only the official printed text will be considered. In addition, although the department strives to keep its web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems.

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 notices regarding particular subject matter or matters. 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 person in 4 above or faxed to the office at (406) 444-4375, or may be made by completing a request form at any rules hearing held by the Department of Revenue.

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

/s/ Cleo Anderson  
CLEO ANDERSON  
Rule Reviewer

/s/ Dan R. Bucks  
DAN R. BUCKS  
Director of Revenue

Certified to Secretary of State September 13, 2010

BEFORE THE DEPARTMENT OF REVENUE  
OF THE STATE OF MONTANA

In the matter of the adoption of New Rules I	)	NOTICE OF PUBLIC
and II; amendment of ARM 42.14.101,	)	HEARING ON PROPOSED
42.14.106; amendment and transfer of	)	ADOPTION, AMENDMENT,
42.14.102, 42.14.103, 42.14.104, 42.14.105,	)	AMENDMENT AND
42.14.107, 42.14.108, 42.14.109, and	)	TRANSFER, AND REPEAL
42.14.110; and repeal of 42.4.111 relating to	)	
lodging facility use taxes and sales taxes	)	

TO: All Concerned Persons

1. On October 26, 2010, at 1:00 p.m., a public hearing will be held in the Third Floor Reception Area Conference Room of the Sam W. Mitchell Building, at Helena, Montana, to consider the adoption, amendment, amendment and transfer, and repeal of the above-stated rules.

Individuals planning to attend the hearing shall enter the building through the east doors of the Sam W. Mitchell Building, 125 North Roberts, Helena, Montana.

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, contact the Department of Revenue no later than 5:00 p.m., October 12, 2010, to advise us of the nature of the accommodation that you need. Please contact Cleo Anderson, Department of Revenue, Director's Office, P.O. Box 7701, Helena, Montana 59604-7701; telephone (406) 444-5828; fax (406) 444-4375; or e-mail canderson@mt.gov.

3. The proposed new rules do not replace or modify any section currently found in the Administrative Rules of Montana. The proposed new rules provide as follows:

NEW RULE I SEASONAL REGISTRATION AND PERMIT (1) A person who is engaged in the business of selling lodging accommodations to the general public and is not open for business all 12 months of a calendar year may apply for a seasonal seller's permit.

(2) A person may apply for a seasonal seller's permit by completing Form GenReg indicating that the business is seasonal and listing the calendar months the business operates.

(3) If a seller operates at any time within the four, three-month quarters of January through March; April through June; July through September; and October through December, they cannot apply for a seasonal seller's permit.

(a) Example: A seller is operating and is open for business April 15 through October 11 of each year. This seller can apply for a seasonal seller's permit as they operate and are open for business within only three, three-`1 month quarters (April through June; July through September, and the partial month of October.)

(b) Example: A seller is operating and is open for business March 15 through October 11 of each year. This seller cannot apply for a seasonal seller's permit as they operate and are open for business within each of the four, three month quarters (March 15 through March 31; April through June; July through September; and October through October 11).

AUTH: 15-65-102, 15-68-401, 15-68-801, MCA

IMP: 15-65-112, 15-68-401, MCA

REASONABLE NECESSITY: The department is proposing to adopt New Rule I to assist the sellers in further understanding the requirements and procedures when applying for a seller's seasonal permit. The rule illustrates the eligibility requirements in (2) and (3) and also provides two examples to provide further direction to possible eligible sellers.

The department is proposing to place New Rule I in subchapter 1. This subchapter will be renamed "Registration and Permits".

NEW RULE II APPLICATION OF TAX PAYMENT (1) All payments of the four percent lodging facility use tax and the three percent lodging facility sales tax are applied in the following manner:

(a) When the seller remits full payment of the taxes, 4/7 of the amount is applied to the four percent lodging facility use tax in Title 15, chapter 65, MCA, and 3/7 of the amount is applied to the three percent lodging facility sales tax in Title 15, chapter 68, MCA.

(b) When the seller remits less than full payment of the tax, the tax payment is first applied to the four percent lodging facility use tax in Title 15, chapter 65, MCA, with any remaining balance being applied to the three percent lodging facility sales tax.

(2) When a partial payment is made, the five percent vendor allowance only applies to the paid tax balance of the lodging facility sales tax, after the payment is applied to the full amount of the four percent tax due. If there are no funds available to apply to the three percent lodging facility sales tax, the seller is not entitled to a vendor allowance.

(3) If the seller amends a prior period, or the department adjusts a prior period and the seller now owes additional tax, the original payment will be adjusted to first apply all tax to the four percent lodging facility use tax, with any remaining balance to the three percent lodging facility sales tax.

(4) When reapplying a payment the vendor allowance will be adjusted to five percent of the timely paid amount that is applied to the three percent lodging facility sales tax.

AUTH: 15-65-102, 15-68-801, MCA

IMP: 15-65-112, 15-68-502, 15-68-510, MCA

REASONABLE NECESSITY: The department is proposing to adopt New Rule II to clarify for the seller how the payment will be applied between the lodging facility use tax and the lodging facility sales tax.

The rule states that the lodging facility tax will receive payment first and if there is any payment left, those funds will go to satisfy the three percent lodging facility sales tax. The rule also clarifies how much vendor allowance will be rewarded when partial payments are made.

The department is proposing to place New Rule II in a new subchapter 2 that references the Collection, Reporting, and Payment Requirements for the seller.

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

42.14.101 DEFINITIONS The following definitions apply to this subchapter:

(1) "Allowable state reimbursement" means the dollar amount stated in 2-18-501, MCA.

(2) "Average daily accommodation charge" (ADAC) is the average daily room rate for single occupancy for all units rented for ~~single occupancy~~ in a facility.

For example: ~~40 unit facility~~  
~~10 units are never rented for single occupancy~~  
~~30 units rented for single and other occupancy~~

~~of the 30 rented for single and other occupancy:~~

~~10 units rent for \$15.00/night = \$150.00~~  
~~20 units rent for \$12.00/night = 240.00~~  
~~Total rate charged for all rooms = \$390.00 = \$13.00 ADAC~~  
~~divided by number of units = 30~~

(2)(3) "Facility" ~~means a~~ as defined in 15-65-101, MCA and "Accommodations" as defined in 15-68-101, MCA are synonymous and includes a building, or a group of buildings, or an area recognized as a single entity.

(3)(4) "Gross receipts" means total gross ~~accommodation charges~~ sales received for use of a lodging facilities unit, whether the charges were received in money or otherwise, including all receipts, cash, credits, and property or services of any kind or nature.

(4) ~~"Intended for ... resident dwelling purposes" means a home, some permanent abode or residence, in which one has the intention of remaining, as further defined in 15-65-101, MCA.~~

(5) "Lodging" means accommodation intended for the purpose of sleeping or resting.

(6) "Lodging facility sales and use tax" means the four percent lodging facility use tax, as it applies to Title 15, chapter 65, MCA, and the three percent sales tax, as it applies to Title 15, chapter 68, MCA.

(6)(7) "Lodging facilities unit" means a unit or units an individual sleeping room or suite used within a facility. This is also includes, but is not limited to a single area within a campground, dormitory, hostel, guest ranch, or vacation rental.

(7)(8) "Nontaxable receipts" means exempt ~~accommodation charges~~ sales as defined in ARM 42.14.103. Also included are ~~accommodation charges~~ sales deemed uncollectible and written off ~~the records of the facility~~ during a specific

quarterly period, and any discounts which may have been included in gross receipts but not part of the ~~net accommodation~~ taxable sales charge to the user.

~~(8)~~(9) "Outfitting facility" means a facility that may:

- (a) use one or more permanent structures to furnish sleeping accommodations or bathhouse facilities to guests; and
- (b) offer hunting, fishing, or recreational services in conjunction with the services of an outfitter.

~~(9)~~(10) "Owner or operator of a facility" means any person or organization ~~who~~ that rents a lodging facility to the public and is ultimately responsible for the financial affairs of the facility. Such person may be an individual, corporation, partnership, estate, trust, association, joint venture, vacation rental property manager, or other unincorporated group or entity. Owner or operator also includes all religious, education, charitable, and social organizations or societies which are not excluded by the provisions of Title 15, chapter 65, MCA or Title 15, chapter 68, MCA, and all governmental entities at the federal, state, and local levels.

(11) "Permanent structure" means any structure that has an impermeable floor and is completely roofed and walled. This includes but is not limited to:

- (a) cabins;
- (b) bunkhouses;
- (c) shacks;
- (d) mobile homes;
- (e) yurts; and
- (f) luxury tents.

~~(40)~~(12) "Public" or "general public" are synonymous. ~~If~~ and means a facility ~~is charging that charges~~ for a lodging facilities unit and other services, it and is presumed to serve the general public unless proven otherwise.

(13) "Purchaser" as defined in 15-68-101, MCA is synonymous with the word "user".

~~(41)~~(14) "Rental agreement" is an agreement between ~~an owner or operator~~ a seller and a user. Such an agreement provides lodging to the user for a specified period of time in exchange for a specified payment amount or other form of compensation.

(15) "Sales price" as defined in 15-68-101, MCA is synonymous with the term "accommodation charge" as defined in 15-65-101, MCA.

(16) "Seller" means a seller as defined in 15-68-101, MCA and includes an owner or operator of a facility.

~~(42)~~ (17) "User" means the person(s) renting and paying for the lodging facilities.

AUTH: 15-65-102, 15-68-801, MCA

IMP: 15-65-101, 15-68-101, MCA

REASONABLE NECESSITY: The department is proposing to amend ARM 42.14.101 to include new definitions used within these rules and statute and to incorporate into existing definitions references to Title 15, chapter 68, MCA, which is the three percent lodging facility sales tax.

Specifically, the rule does the following:

- (a) Provides the appropriate rule reference to identify the allowable state reimbursement, which is important in calculating whether a facility is exempt from collecting the lodging facility sales and use tax.
- (b) Links the definition of a facility in both Title 15, chapter 65 and 68, MCA.
- (c) Establishes that gross receipts are total sales receipts.
- (d) Eliminates an unneeded definition of a resident dwelling.
- (e) Defines lodging facility sale and use tax.
- (f) Provides a definition of a permanent structure which is key in the decision of whether a facility is subject to the lodging facility sales and use tax.
- (g) Links the definitions of purchaser, sales price, and seller to Title 15, chapters 65 and 68, MCA.

The department is proposing to retain ARM 42.14.101 in subchapter 1 and rename that subchapter "Registration and Permits".

42.14.106 FACILITY REGISTRATION AND PERMIT (1) Every ~~owner or operator~~ seller required to ~~impose~~ collect the lodging facility sales and use tax must register and file an ~~application~~ Form GenReg, provided by the department or available on the department's web site at <http://www.mt.gov/revenue> and apply for a state account identification number ~~on the form provided by the department~~ for each facility owned or operated in Montana.

(2) A seller who is registering multiple locations and who has elected to file a combined return may file one application listing separately each location. The combined return can only include facilities that are located:

- (a) within the same county; or
- (b) within a recognized Convention and Visitors Bureau (CVB).

(3) An application registering multiple locations must include the following information on each location:

- (a) business name and address of each location; and
- (b) the federal employer identification number or social security number assigned to the owner of each location.

(4) A seller who is registering multiple locations in more than one county or CVB is required to complete a separate application for each county or CVB and include only those locations within the county or recognized CVB.

(5) Any ~~A seller~~ ~~owner or operator~~ who has acquired the business of another ~~an existing facility from a previous seller~~ shall not use the predecessor's state account identification number. The ~~owner or operator~~ seller must register and file Form GenReg to obtain a new state account identification number ~~before the due date of the first report upon acquiring the existing business~~. This applies to both ~~new businesses and businesses which have been purchased~~.

(6) A seller who establishes a new facility separate from an existing facility shall not use the existing account identification number, except for those owners or operators listed in (2). The owner or operator must register each facility separately and file Form GenReg to obtain a new state account identification number before operating the new facility.

~~(3)~~(7) Each registration application When completing Form GenReg, each seller must contain provide the federal ~~entity~~ employer identification number assigned to them by the Internal Revenue Service. For a sole proprietorships, this

number ~~is~~ may be a social security number if the sole proprietor is not required to apply for a federal employer identification number. Any entity change requiring a new federal employer identification or social security number requires a new facility registration.

~~(4)~~(8) No registration is considered complete unless the federal employer identification or social security number appears on the application.

~~(5)~~(9) Not being registered does not relieve an A seller owner or operator who fails to register with the department for reporting and remitting the lodging facility sales and use tax is not relieved from the collection and reporting requirements.

AUTH: 15-65-102, 15-68-801, MCA  
IMP: 15-65-114, 15-68-401, 15-68-402, MCA

REASONABLE NECESSITY: The department is proposing to amend ARM 42.14.106 to include in the existing rules reference to Title 15, chapter 68, MCA, and to provide guidance to sellers who are registering a new location or are registering multiple locations on one application.

Specifically the rule does the following:

- (a) Lists the name of the registration application that needs to be filed and where the applicant can be found.
- (b) Lists the requirements for filing a combined return.
- (c) States that if a seller has multiple locations in various Convention and Visitors Bureau (CVB) areas or counties, the seller is required to complete a separate application for each CVB or county.
- (d) States that a new facility must receive a new state account number.
- (e) States that a seller is not relieved of their withholding responsibilities when they are not registered with the department.

The department is proposing to retain ARM 42.14.106 in subchapter 1 and rename that subchapter "Registration and Permits".

5. The rules proposed to be amended and transferred provide as follows, stricken matter interlined, new matter underlined:

42.14.102 WHO MUST PAY COLLECT THE TAX AND FILE RETURNS

~~(1) Every owner or operator of a facility operating in Montana must collect the lodging facility use tax, rounded to the nearest penny, from the users of facilities and file returns with the department as required in ARM 42.14.107.~~

~~(2) To determine taxability of a facility, the owner or operator should consider the type of operation:~~

If the operation is a: \_\_\_\_\_ Use Step:

Hotel, motel, hostel, public lodginghouse \_\_\_\_\_ (a) and (b)  
—or bed and breakfast facility

Resort, condominium inn, dude ranch, \_\_\_\_\_ (c)  
—guest ranch facility, outfitting facility

Campground	(d)
Dormitory	(e)

(a) Compute the average daily accommodation charge (ADAC). If the ADAC is less than 60% of the allowable state reimbursement for the standard cost of in-state lodging, and the facility is a hotel, motel, hostel, public lodginghouse, or bed and breakfast facility, no further step is required. The owner or operator of the facility is not required to collect the tax. The exemption applies only to a hotel, motel, hostel, public lodginghouse, or bed and breakfast facility.

(b) If the ADAC is more than 60% of the allowable state reimbursement for the standard cost of in-state lodging, and the facility is a hotel, motel, hostel, public lodginghouse or bed and breakfast facility, the second step is to look to the length of the rental period of the lodging facilities.

(i) If it is rented for 30 days or more the lodging facilities are not taxable.

(ii) If it is rented for less than 30 days the lodging facilities are taxable unless specifically exempted by ARM 42.14.103.

(c) If the facility is a resort, condominium inn, dude ranch, guest ranch, or outfitting facility, look at the length of the rental period of the lodging facilities as stated in (2)(b)(i) and (ii).

(d) If the facility is owned or operated by a non-profit or religious organization and the lodging facilities are rented primarily to youth under 18 years of ages for camping, no further step is needed. The facility is exempt from the tax. If not, look at the length of the rental period as stated in (2)(b)(i) and (ii).

(e) If the facility is a dormitory and the lodging facilities are rented to users enrolled in a regular academic program or a program of continuing education, no further step is needed. Charges for the lodging facilities are exempt. See ARM 42.14.103. If not, the tax must be collected on the accommodations charges.

<u>Examples:</u>	<u>Taxable</u>
Health facility	No
Religious camps - primarily for youth	No
- occasionally for youth	Yes
Youth hostel	Yes
Federal campground	Yes
Campground - overnight trade	Yes
- permanent space	No
Rooms rented to government employees	Yes
Dormitory - lodging facilities rental	
to non-enrolled students	Yes
- lodging facilities rental	
to enrolled students	No

A user of a lodging unit in a hotel, motel, hostel, public lodging house, or bed and breakfast facility, whose ADAC is greater than 60% of the allowable state reimbursement is required to pay the lodging facility sales and use tax for the use of a lodging unit rented for a period of less than 30 consecutive days. In calculating the

ADAC you cannot consider double occupancy rates, coupon discount rates, or other promotional rates.

(a) For example - A facility that has 40 units advertises the following rates:

(i) 10 units with one king bed rents for:

\$45.00 per night for single occupancy (one person);

(ii) 30 units with two queen beds rents for:

\$39.00 a night for single occupancy (one person);

(iii) ADAC calculation:

10 units rent for \$45.00/night = \$ 450.00

30 units rent for \$39.00/night = \$1,170.00

Total rate charged for all rooms = \$1,162.00

divided by number of unit 40 = \$ 40.50 ADAC

(iv) Allowable state reimbursement \$ 35.00

7% Lodging Facility Sales and Use Tax \$ 2.45

Total \$ 37.45

60% of allowable state reimbursement \$ 22.45

(b) The ADAC rate of \$40.50 is more than \$22.45 (60% of the allowable state reimbursement), therefore the user is not exempt from paying the lodging facility sales and use tax.

(2) A user of a lodging unit in a resort, condominium, inn, dude ranch, guest ranch, and vacation rental is required to pay the lodging facility sales and use tax for the use of a lodging unit rented for a period of less than 30 consecutive days.

(3) Every owner or operator of a facility shall be liable for all amounts required to be collected as a tax under the provisions of Title 15, chapter 65, MCA. A user of a lodging unit in the outfitting industry is required to pay the lodging facility sales and use tax for the use of a lodging unit in a permanent structure rented for a period of less than 30 consecutive days.

(4) An owner or operator of a facility has the right to request a hearing on a tax liability as provided in 15-1-705, MCA. A user of a lodging unit in a campground is required to pay the lodging facility sales and use tax for the use of a lodging unit rented for a period of less than 30 consecutive days.

(5) If the tax or any portion of the tax is not paid when due, the department may issue a warrant for distraint as provided in Title 15, chapter 1, part 7, MCA. A user of a lodging unit in a nonprofit or religious organization's facility that is not primarily used for camping by youth under 18 years of age, is required to pay the lodging sales and use tax for the use of a lodging unit rented for a period less than 30 consecutive days.

(6) A user of a lodging unit in a dormitory is required to pay the lodging facility sales and use tax for the use of a lodging unit rented for a period of less than 30 consecutive days when the user is not enrolled in a regular academic program or a program of continuing education.

AUTH: 15-65-102, 15-68-801, MCA

IMP: 2-18-501, 15-65-101, 15-65-111, 15-65-112, 15-68-101, 15-68-102, 15-68-501, MCA

REASONABLE NECESSITY: The department is proposing to amend ARM

42.14.102 to include in the existing rules reference to Title 15, chapter 68, MCA, and to provide clear guidance to sellers as to what facilities a user is required to pay the lodging facility sales and use tax.

The amendment to the rule provides the following:

- (a) Eliminates redundant language.
- (b) Provides examples on how to calculate the average daily accommodation charge.
- (c) States that the rental of a lodging unit under 30 consecutive days is subject to the lodging facility sales and use tax.

The department is proposing to transfer ARM 42.14.102 to a new subchapter 3 that references Taxable and Nontaxable Transactions for the User.

42.14.103 EXEMPT FACILITIES/ACCOMMODATION CHARGES LODGING FACILITIES (1) ~~An owner or operator of a facility or campground shall not collect the tax for lodging if the lodging facilities are rented to the user for a period of 30 consecutive days or more. Rental agreements cannot be combined for the purpose of determining the length of the rental period. Intention to rent for a period of 30 or more continuous days is documented by a lease, contract, or historical evidence of continuous rental.~~

~~(2) An owner or operator of a~~ An occupant at a health care facility as that term is defined in 50-5-101, MCA is not required to pay the lodging facility sales and use shall not collect the tax.

~~(3)(2) A user of a Lodging facility use tax for lodging facilities unit at dormitories a dormitory is not required to pay the lodging facility sales and use tax when the furnished to the following are exempt:~~

(a) Persons is enrolled in a regular academic program or a program of continuing education; or

(b) Participants is in an education program to improve the work of the educational institution by developing the professional knowledge and skills of the employees of the institution hosting the program; or

(c) Participants is in an educational program reserved exclusively for students of accredited educational institutions.

~~(4)(3) An owner or operator of a~~ A user of a lodging unit at a hotel, motel, hostel, public lodginghouse, or bed and breakfast facility whose average daily accommodation charge (ADAC) is less than or equal to 60% of the allowable state reimbursement for the standard cost of in state lodging per day is not required to pay collect the lodging facility sales and use tax.

(a) For example - A facility that has 40 units advertises the following rates:

(i) 10 units, with one king bed, rent for:

\$25.00 per night for single occupancy (one person);

\$38.00 per night for double occupancy (two people);

\$150.00 weekly rate; and

\$400.00 monthly rate;

(ii) 30 units, with two queen beds, rent for:

\$20.00 per night for single occupancy (one person);

\$28.00 per night for double occupancy (two people);

\$150.00 weekly rate; and

\$400.00 monthly rate;

(iii) ADAC calculation:

<u>10 units rent for 25.00/night</u>	<u>= \$250.00</u>
<u>30 units rent for 20.00/night</u>	<u>= \$600.00</u>
<u>Total rate charged for all rooms</u>	<u>= \$850.00</u>
<u>divided by number of units</u>	<u>40 = 21.25 ADAC</u>

(iv) <u>Allowable state reimbursement</u>	<u>\$ 35.00</u>
<u>7% Lodging Facility Sales and Use Tax</u>	<u>\$ 2.45</u>
<u>Total</u>	<u>\$ 37.45</u>
<u>60% of allowable state reimbursement</u>	<u>\$ 22.45</u>

(b) The ADAC rate of \$21.25 is less than \$22.45 (60% of the allowable state reimbursement rate), therefore the facility is exempt from collecting the lodging facility sales and use tax from the user.

~~(5)(4) An owner or operator of a youth camp~~ A user at a nonprofit or religious organization's facility that is primarily used by youth (under the age of 18) for camping shall not collect is not required to pay the lodging sales and use tax.

~~(6) An accommodation charge for lodging furnished federal government entities is exempt from the tax if and only if the accommodation charge is billed and directly paid by the governmental entity.~~

~~(7) Enrolled members of a federally recognized Indian tribe, who stay in a facility located within the exterior boundaries of the enrolled member's Indian reservation, are exempt from the tax. The owner or operator must record the individual's enrollment number on the record of the accommodation charge.~~

~~(8) Foreign diplomats, entitled under international law or a bilateral treaty, are exempt from the lodging facility tax upon showing of a tax-exempt card issued by the U.S. state department as follows:~~

~~(a) a blue stripe at the bottom indicates the bearer is entitled to full tax exemption; and~~

~~(b) a yellow stripe indicates there is some type of restriction on the full tax exemption, which will be indicated in the yellow stripe area.~~

~~(9)(5) An owner or operator~~ The user of a camping area which is temporarily located pursuant to a permit issued by an agency of the U.S. government is not required to ~~collect~~ pay the tax.

AUTH: 15-65-102, 15-68-801, MCA

IMP: 2-18-501, 15-65-101, 15-65-111, 15-68-101, 15-68-102, MCA

REASONABLE NECESSITY: The department is proposing to amend ARM 42.14.103 to include in the existing rules reference to Title 15, chapter 68, MCA, and to change the content of this rule to only address which facilities are exempt from the lodging facility sales and use tax. The department proposes to move exempt sales that were previously in this rule to ARM 42.14.104, which is amended to read exempt lodging sales.

The amended rule also provides an example of a facility that is exempt from the lodging facility sales and use tax for comparing the average daily accommodation charge and the allowable state reimbursement rate.

The department is proposing to transfer ARM 42.14.103 to a new subchapter 3 that references Taxable and Nontaxable Transactions for the User.

42.14.104 MULTIPURPOSE FACILITIES EXEMPT LODGING SALES (1) A user is not required to pay the lodging facility sales and use tax for lodging if the lodging unit is rented for a period of 30 consecutive days or more. Nonconsecutive rental agreements cannot be combined for the purpose of determining the length of the rental period. Intention to rent for a period of 30 or more continuous days is documented by a lease, contract, or historical evidence of continuous rental.

(2) A user of a lodging unit is not required to pay the lodging facility sales and use tax if the accommodation charge is billed directly to the federal government and paid directly by the federal government. Users who are individually billed and pay for a lodging unit and who are subsequently reimbursed by the federal government are not exempt from paying the lodging facility sales and use tax.

(3) An enrolled member of a federally recognized Indian tribe, who stays in a facility located within the exterior boundaries of the enrolled member's Indian reservation, is exempt from paying the lodging facility sales and use tax. The seller must record the individual's enrollment number on the record.

(4) A foreign diplomat, entitled under international law or a bilateral treaty, is exempt from the lodging facility tax upon showing of a tax-exempt card issued by the U.S. State Department as follows:

(a) a blue stripe at the bottom indicates the bearer is entitled to full tax exemption; or

(b) a yellow stripe indicates there is some type of restriction on the full tax exemption, which will be indicated in the yellow stripe area.

(5) A lodging facility room used for the purpose other than lodging (such as meeting rooms) is not subject to the tax.

~~(2) A lodging facility room used for lodging and another purpose is subject to the tax.~~

~~(3) Rooms supplied with beds are presumed to be rented for purposes of lodging unless the contrary is conclusively established by the owner or operator.~~

AUTH: 15-65-102, 15-68-801, MCA

IMP: 15-65-101, 15-65-111, 15-68-101, 15-68-102, 15-68-206, MCA

REASONABLE NECESSITY: The department is proposing to amend ARM 42.14.104 to include in the existing rules reference to Title 15, chapter 68, MCA, and to change the title of the rule to include other forms of lodging sales that are exempt from the lodging facility sales and use tax. Previously the department combined exempt lodging sales with exempt facilities in ARM 42.14.103. In amending these rules the department is placing all exempt facilities in ARM 42.14.103 and all exempt sales in ARM 42.14.104.

The department is proposing to transfer ARM 42.14.104 to a new subchapter 3 that references Taxable and Nontaxable Transactions for the User.

42.14.105 COMBINED CHARGE FOR SERVICES (1) When lodging facility use taxes sales are combined with food, beverage, recreation, or other charges

which are a substantial portion of the charge, the ~~owner or operator~~ seller may shall ~~allocate the lodging facility use tax~~ collect the lodging facility sales and use tax by establishing an accommodation charge using one of the following methods:

(a) ~~a flat rate of the allowable state reimbursement for the standard cost of in-state lodging each day for each person;~~

(b) 25% of all charges each day for each person; or

(c) a charge justified by reasonable documentation.

(2) As required by 15-65-113, MCA, and 15-68-502, MCA, ~~an owner or operator~~ a seller must maintain and have available for inspection, records to substantiate the items referred to in (1)(a) through (c). The department may request the ~~owner or operator of a facility~~ seller to substantiate the method used and itemize each charge to verify the correct amount of tax.

(3) Lodging facility sales and use taxes do not apply to include separately stated ~~service~~ charges which are not an integral part of the use or occupancy of the room or campground space, such as but not limited to:

(a) ~~separately stated~~ telephone;

(b) Wi-Fi access;

(c) faxes/copies;

~~(b)~~(d) television;

~~(c)~~(e) food;

~~(d)~~(f) beverage; or

(g) pet charge; or

~~(e)~~(h) personal laundry charges.

(4) The department may disallow ~~an owner or operator's~~ a seller's method of allocating the lodging facility sales and use tax under (1) if:

(a) the department has reasonable cause to believe that the method of allocation was chosen solely to qualify the facility for a tax exemption as provided in ARM 42.14.103; or

(b) a charge allocated under (1)(c) is not supported by reasonable documentation or itemization.

(5) Lodging facility sales and use taxes include amounts charged for bathhouse facilities or temporary use of tangible personal property used in conjunction with the room, such as a charge for an extra bed.

(6) If campgrounds charge for water, electrical or sewer hookups, and bathhouse facilities, those charges are included in the amount that is subject to tax.

(7) If the facility charges for electricity as a separate or additional charge, this charge must be included in the amount that is subject to the tax.

AUTH: 15-65-102, 15-68-801, MCA

IMP: 2-18-501, 15-65-111, 15-65-113, 15-68-102, 15-68-502, MCA

REASONABLE NECESSITY: The department is proposing to amend ARM 42.14.105 to include in the existing rules reference to Title 15, chapter 68, MCA.

In addition, the rule lists various charges that are incurred by users of lodging facilities but are not included as part of the taxable balance of the lodging facility sales and use tax. Some examples are Wi-Fi access and pet charges.

The department is proposing to transfer ARM 42.14.105 to a new subchapter

2 that references the Collection, Reporting, and Payment Requirements for the Seller.

42.14.107 QUARTERLY REPORTS PAYMENTS – DUE DATES

COLLECTING, REPORTING, AND PAYING THE TAX (1) A seller of a lodging unit located in Montana must collect the lodging facility sales and use tax, rounded to the nearest dollar, from the user and file a return with the department as required in ARM 42.14.107, except for a seller exempt under ARM 42.14.103 and for sales exempt under ARM 42.14.104.

~~(2) Every owner or operator seller, except for a seller identified in (4), is required to make complete and file Form LFT or LFT-C with the Department of Revenue, P.O. Box 5835, Helena, MT, 59604-5835, for each calendar quarter or portion of a quarter in operation, a report to the Department of Revenue, P.O. Box 5805, Helena, MT, 59604-5805. The report must include gross lodging facility use taxes.~~

~~(2)(3) The owner or operator seller shall remit the amount of this the tax with the quarterly report Form LFT or LFT-C. The report will cover quarterly periods ending March 31, June 30, September 30, and December 31, and must be postmarked no later than is due on or before the last day of the month following the close of the quarter. Reports must be made on forms supplied by the department.~~

~~(4) A seller who has obtained a seasonal permit is required to only complete and file form LFT or LFT-C for the quarters they are opened for business.~~

~~(3)(5) If a seller has no revenue to report for a quarter, and the seller does not have a seasonal permit, the seller must file a quarter return reporting zero revenue and tax for the quarter tax was not collected, the report should so state.~~

~~(4) The department may not grant an extension to remit the tax.~~

~~(5) If the due date for filing falls on a holiday or weekend, the due date for the return shall be the next business day following such holiday or weekend.~~

~~(6) The owner or operator must file a final quarterly report for the last quarter of operation and state the last date of business. Failure to do so will result in a liability to the owner or operator for an estimated tax, penalty, and interest. A seller who is required to file Form LFT or LFT-C may file and pay electronically their quarterly return through the department's web site at <https://tap.dor.mt.gov>. When filing electronically the return and payment is considered filed on the confirmation date provided upon submitting the return.~~

AUTH: 15-65-102, 15-68-502, 15-68-801, MCA

IMP: 15-1-208, 15-65-112, 15-65-444, 15-65-115, 15-68-502, 15-68-513,

MCA

REASONABLE NECESSITY: The department is proposing to amend ARM 42.14.107 to include in the existing rules reference to Title 15, chapter 68, MCA, and to address filing requirements for seasonal permit holders, electronic filing, and for sellers electing to file a combined return.

The amended rule establishes that the seller of a lodging facility needs to round to the nearest dollar on the tax returns. In addition, the rule provides a new department address for sellers to file the lodging facility sales and use tax. The

amended rule also states the filing requirements for seasonal sellers.

Lastly, the rule provides the web site for electronic filing of the tax returns.

The department is proposing to transfer ARM 42.14.107 to a new subchapter 2 that references the Collection, Reporting, and Payment Requirements for the Seller.

42.14.108 PENALTIES AND INTEREST (1) Upon request, the late pay and late file penalty may be waived pursuant to ARM 42.3.101 through ~~42.3.114, 42.3.102, 42.3.103, 42.3.104, 42.3.105, 42.3.106, 42.3.107, 42.3.108, 42.3.109, 42.3.110, 42.3.111, 42.3.113, 42.3.115,~~ and 42.3.120.

AUTH: 15-65-102, 15-68-801, MCA

IMP: ~~15-65-114,~~ 15-65-115, 15-68-514, MCA

REASONABLE NECESSITY: The department is proposing to amend ARM 42.14.108 to bring the reference for the administrative rules that address waivers current and to add the reference to Title 15, chapter 68, MCA in the implementing cites.

The department is proposing to transfer ARM 42.14.108 to a new subchapter 2 that references the Collection, Reporting, and Payment Requirements for the Seller.

42.14.109 RECORDS REQUIRED - AUDIT (1) Each ~~owner or operator of a facility~~ seller shall maintain records necessary to document gross receipts for the lodging facility sales and use tax. ~~An owner or operator~~ A seller may be required to substantiate gross receipts reported for a particular quarter. For audit purposes, the ~~owner or operator~~ seller may be required to reconstruct the reported gross receipts from the original lodging facility sales and use tax receipts.

(2) Such records shall include specific documentation of exempt charges.

(3) The ~~owner or operator of a facility~~ seller must notify the user of the 4% lodging facility use tax and the 3% lodging facility sales tax. ~~Beginning June 30, 1988, the~~ The tax shall be separately stated on the receipt, invoice, or other document provided to the user to ensure there is a record of the amount of tax charged.

(4) The records shall be maintained by the ~~owner or operator of a facility~~ seller for a period of five years and shall be subject to audit by the department for that period.

AUTH: 15-65-102, 15-68-801, MCA

IMP: 15-65-113, 15-68-502, 15-68-513, MCA

REASONABLE NECESSITY: The department is proposing to amend ARM 42.14.109 to include in the existing rules reference to Title 15, chapter 68, MCA.

The department is proposing to transfer ARM 42.14.109 to a new subchapter 2 that references the Collection, Reporting, and Payment Requirements for the Seller.

42.14.110 FAILURE TO FURNISH REQUESTED INFORMATION (1) The department, for the purpose of determining the correctness of any return, may request additional information to verify amounts or items on the return.

(2) If a return is not filed or information is not supplied, the department will estimate the tax from available information.

AUTH: 15-65-102, 15-68-801, MCA

IMP: 15-65-113, 15-65-115, 15-68-502, MCA

REASONABLE NECESSITY: The department is proposing to amend ARM 42.14.110 to update the authority and implementing cites for both Title 15, chapter 65 and 68, MCA.

The department is proposing to transfer ARM 42.14.110 to a new subchapter 2 that references the Collection, Reporting, and Payment Requirements for the Seller.

6. The department proposes to repeal the following rule:

42.14.111 SUMMARY REPORT REQUIRED which can be found on page 42-1412 of the Administrative Rules of Montana.

AUTH: 15-65-102, MCA

IMP: 15-65-121, MCA

REASONABLE NECESSITY: The department is proposing to repeal ARM 42.14.111 because it deals with the requirements between two agencies rather than the general public and the direction provided in this rule is better served in a memorandum of understanding with the Department of Commerce.

7. 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: Cleo Anderson, Department of Revenue, Director's Office, P.O. Box 7701, Helena, Montana 59604-7701; telephone (406) 444-5828; fax (406) 444-4375; or e-mail canderson@mt.gov and must be received no later than November 5, 2010.

8. Cleo Anderson, Department of Revenue, Director's Office, has been designated to preside over and conduct the hearing.

9. An electronic copy of this Notice of Public Hearing is available through the department's site on the World Wide Web at [www.mt.gov/revenue](http://www.mt.gov/revenue), under "for your reference"; "DOR administrative rules"; and "upcoming events and proposed rule changes." The department strives to make the electronic copy of this Notice of Public Hearing conform to the official version of the notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the notice and the electronic version of the notice, only the official printed text will be considered. In addition, although the department strives to keep its web site accessible at all times, concerned

persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems.

10. 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 notices regarding particular subject matter or matters. 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 person in 7 above or faxed to the office at (406) 444-4375, or may be made by completing a request form at any rules hearing held by the Department of Revenue.

11. The bill sponsor contact requirements of 2-4-302, MCA, apply and have been fulfilled. The primary bill sponsor to the legislation, chapter 544, L. 2003, Senator Bob DePratu was contacted on September 10, 2010, by U.S. mail.

/s/ Cleo Anderson  
CLEO ANDERSON  
Rule Reviewer

/s/ Dan R. Bucks  
DAN R. BUCKS  
Director of Revenue

Certified to Secretary of State September 13, 2010

BEFORE THE DEPARTMENT OF REVENUE  
OF THE STATE OF MONTANA

In the matter of the adoption of New        )   NOTICE OF PUBLIC HEARING ON  
Rules I through XI relating to rental        )   PROPOSED ADOPTION  
vehicle sales and use tax                    )   

TO: All Concerned Persons

1. On October 26, 2010, at 3:00 p.m., a public hearing will be held in the Third Floor Reception Area Conference Room of the Sam W. Mitchell Building, at Helena, Montana, to consider the adoption of the above-stated rules.

Individuals planning to attend the hearing shall enter the building through the east doors of the Sam W. Mitchell Building, 125 North Roberts, Helena, Montana.

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, contact the Department of Revenue no later than 5:00 p.m., October 12, 2010, to advise us of the nature of the accommodation that you need. Please contact Cleo Anderson, Department of Revenue, Director's Office, P.O. Box 7701, Helena, Montana 59604-7701; telephone (406) 444-5828; fax (406) 444-4375; or e-mail canderson@mt.gov.

3. The proposed new rules do not replace or modify any section currently found in the Administrative Rules of Montana. The proposed new rules provide as follows:

NEW RULE I DEFINITIONS The following definitions apply to this subchapter:

(1) "Sales price" as defined in 15-68-102, MCA, includes base rental charges received in money or otherwise, including all receipts, cash, credit, and property or services of any kind or nature.

(2) "Seller" means a seller as defined in 15-68-101, MCA.

(3) "User" means a person who contracts with a rental vehicle company to rent a vehicle for the intended purpose for which it is designed.

AUTH: 15-68-801, MCA

IMP: 15-68-101, MCA

REASONABLE NECESSITY: The department is proposing to adopt New Rule I to define terms used within the rules contained in this subchapter.

The department is proposing to place New Rule I in new subchapter 10 that will be titled Registration and Permits.

NEW RULE II REGISTRATION AND PERMIT (1) Every seller required to

collect the rental vehicle sales and use tax must register and file Form GenReg, provided by the department or available on the department's web site at <http://www.mt.gov/revenue> and apply for a state account identification number for each location operating in Montana.

(2) A seller who has multiple locations in Montana may file one application, listing separately each location.

(3) A seller who has acquired an existing facility from a previous owner shall not use the predecessor's state account identification number. The seller must register and file Form GenReg to obtain a new state account identification number upon acquiring the existing business.

(4) A seller who establishes a new facility separate from an existing facility shall not use the existing account identification number. The seller must register each facility separately and file Form GenReg to obtain a new state account identification number before operating the new facility.

(5) When completing Form GenReg, each seller must provide the federal employer identification number assigned to them by the Internal Revenue Service. For a sole proprietorship, this number may be a social security number if the sole proprietor is not required to apply for a federal employer identification number. Any entity change requiring a new federal employer identification or social security number requires a new facility registration.

(6) No registration is considered complete unless the federal employer identification or social security number appears on the application.

(7) A seller who fails to register with the department for reporting and remitting the rental vehicle sales and use tax is not relieved from the collection and reporting requirements.

AUTH: 15-68-801, MCA

IMP: 15-68-401, 15-68-402, MCA

REASONABLE NECESSITY: The department is proposing to adopt New Rule II to provide the seller instructions on how to register their business, receive a seller's permit when registering one single business or multiple businesses.

The department is proposing to place New Rule II in new subchapter 10 that will be titled Registration and Permits.

NEW RULE III SEASONAL REGISTRATION AND PERMIT (1) A person who is engaged in the business of renting motor vehicles to the general public and is not opened for business all 12 months of a calendar year may apply for a seasonal seller's permit.

(2) A person may apply for a seasonal seller's permit by completing Form GenReg indicating that the business is seasonal and listing the calendar months the business operates.

(3) If the seller operates at any time within the four, three-month quarters of January through March; April through June; July through September; and October through December, they cannot apply for a seasonal seller's permit.

(a) For example: A seller is operating and opened for business April 15 through October 11 of each year. This seller can apply for a seasonal seller's permit

as they operate and are opened for business within only three, three-month quarters (April through June; July through September, and the partial month of October.)

(b) A seller is operating and opened for business March 15 through October 11 of each year. This seller cannot apply for a seasonal seller's permit as they operate and are opened for business within each of the four, three-month quarters (March 15 through March 31, April through June; July through September; and October through October 11.)

AUTH: 15-68-401, 15-68-801, MCA

IMP: 15-68-401, MCA

REASONABLE NECESSITY: The department is proposing to adopt New Rule III to further clarify the requirements and procedures when applying for a seasonal seller's permit.

The department is proposing to place New Rule III in new subchapter 10 that will be titled Registration and Permits.

NEW RULE IV WHO MUST COLLECT THE TAX FROM THE USER AND FILE RETURNS (1) Every seller shall be liable for the amount required to be collected as a tax from the user except for a user which is exempt from the tax as stated in [NEW RULE XI].

(2) A seller, commonly known as a car rental business that rents light vehicles to travelers for use in Montana must collect the rental vehicle sales and use tax from the user.

(3) A seller, commonly known as a rental service store that rents moving vans, flat bed trailers, or semi-trailers for local or long distance hauling that is used in Montana must collect the rental vehicle sales and use tax from the user.

(4) A seller, commonly known as a marina or sporting goods store who rents motorboats for use in Montana must collect the rental vehicle sales and use tax from the user.

AUTH: 15-68-801, MCA

IMP: 15-68-101, 15-68-102, 15-68-501, MCA

REASONABLE NECESSITY: The department is proposing to adopt New Rule IV to provide guidance to the rental vehicle industry and the user as to what commonly known rental services are subject to the four percent rental vehicle sales tax.

The department is proposing to place New Rule IV in new subchapter 11 that will be titled Collection, Reporting, and Payment Requirements for the seller.

NEW RULE V QUARTERLY RETURNS AND PAYMENTS (1) Every seller, except for a seller identified in (3), is required to complete and file Form RVT or RT-C with the Department of Revenue, P.O. Box 5835, Helena, MT 59604-5835, for each calendar quarter or portion of a quarter in operations.

(2) The seller shall remit the amount of the tax with Form LFT or LFT-C. The report will cover quarterly periods ending March 31, June 30, September 30, and

December 31, and is due on or before the last day of the month following the close of the quarter.

(3) A seller who has obtained a seasonal permit is required to only complete and file form RVT or RVT-C for the quarters they are opened for business.

(4) If a seller has no revenue to report for a quarter, and the seller does not have a seasonal permit, the seller must file a quarter return reporting zero revenue and tax for the quarter.

(5) A seller who is required to file Form RVT or RVT-C may file and pay electronically their quarterly return through the department's web site at <https://tap.dor.mt.gov>. When filing electronically the return and payment is considered filed on the confirmation date provided upon submitting the return.

AUTH: 15-68-502, 15-68-801, MCA

IMP: 15-1-208, 15-68-502, 15-68-513, MCA

REASONABLE NECESSITY: The department is proposing to adopt New Rule V to provide the seller with instructions on when, where, and how to file their quarter rental vehicle tax return. In addition, the department encourages taxpayers to file electronically through our Taxpayer Access Point (TAP). Therefore, we want to identify where they can access our web site to register and file electronically.

The department is proposing to place New Rule V in new subchapter 11 that will be titled Collection, Reporting, and Payment Requirements for the seller.

NEW RULE VI COMBINED TAX RETURN (1) A seller doing business in multiple locations may elect to file a combined tax return (Form RVT-C) separately stating each location's gross sales, exemptions, and tax.

(2) Prior to filing a combined return, the seller must request in writing this election to the department. This request must include the complete name, address, and permit number of each location that will be included in the combined return.

(3) Upon authorization by the department, the seller can proceed with filing a combined return.

(4) Once the seller elects to file a combined return and has received authorization from the department, the seller cannot elect to file separate returns for each business location in the future without receiving prior approval from the department.

(5) If a location has no revenue to report for a quarter, the seller must include the location in the combined return reporting zero revenue and tax for the quarter.

(6) The seller must identify quarterly a new location that is included in the return.

(7) The seller must identify quarterly which location is no longer included in the combined return.

AUTH: 15-68-801, MCA

IMP: 15-68-502, MCA

REASONABLE NECESSITY: The department is proposing to adopt New Rule VI to streamline the reporting and filing of quarterly returns by the seller. This

rule allows the seller to combine the revenues and tax for each separate location that is owned, managed or booked by the seller into one return. This streamlining approach complements the department's taxpayer access point electronic filing program and will reduce the amount of time necessary for the seller to complete a quarterly return and for the department to process the quarterly return.

The department is proposing to place New Rule VI in new subchapter 11 that will be titled Collection, Reporting, and Payment Requirements for the seller.

NEW RULE VII FAILURE TO FURNISH REQUESTED INFORMATION

(1) The department, for the purpose of determining the correctness of any return, may request additional information to verify amounts or items on the return.

(2) If a return is not filed or information is not supplied, the department will estimate the tax from available information.

AUTH: 15-68-801, MCA

IMP: 5-68-502, MCA

REASONABLE NECESSITY: The department is proposing to adopt New Rule VII to provide notice to the seller that if records are not maintained, the department has the right to estimate the tax based on available information.

The department is proposing to place New Rule VII in new subchapter 11 that will be titled Collection, Reporting, and Payment Requirements for the seller.

NEW RULE VIII RECORDS REQUIRED - AUDIT (1) Each seller shall maintain records necessary to document gross receipts for the rental vehicle sales and use tax. A seller may be required to substantiate gross receipts reported for a particular quarter. For audit purposes, the seller may be required to reconstruct the reported gross receipts from the original rental vehicle sales and use tax receipts.

(2) Such records shall include specific documentation of exempt charges.

(3) The seller must notify the user of the four percent rental vehicle sales and use tax.

(4) The tax shall be separately stated on the receipt, invoice, or other document provided to the user to ensure there is a record of the amount of tax charged.

(5) The records shall be maintained by the seller for a period of five years and shall be subject to audit by the department for that period.

AUTH: 15-68-801, MCA

IMP: 15-68-502, 15-68-513, MCA

REASONABLE NECESSITY: The department is proposing to adopt New Rule VIII to provide information to the sellers as to what records are to be maintained by them to substantiate their return.

The department is proposing to place New Rule VIII in new subchapter 11 that will be titled Collection, Reporting, and Payment Requirements for the seller.

NEW RULE IX PENALTIES AND INTEREST (1) Upon request, the late pay

or late file penalties may be waived pursuant to ARM 42.3.101 through 42.3.111, 42.3.113, 42.3.115, and 42.3.120.

AUTH: 15-68-801, MCA

IMP: 15-68-514, MCA

REASONABLE NECESSITY: The department is proposing to adopt New Rule IX to provide information to the seller on establishing reasonable cause for waiver of penalty and interest and to inform the seller that upon request the department may waive the late file penalty when requested if payment of tax and interest is paid within 30 days of their first notice of a deficiency.

The department is proposing to place New Rule IX in new subchapter 11 that will be titled Collection, Reporting, and Payment Requirements for the seller.

NEW RULE X RENTAL VEHICLES SALES SUBJECT TO THE TAX (1) A user is required to pay the rental vehicle sales and use tax on the sales price for a rental vehicle used in Montana. This includes, but is not limited to:

- (a) automobiles, including vans, sport utility vehicles, or trucks have a capacity of one ton or less;
- (b) motorcycles;
- (c) motor-driven cycles, which include motorcycles or scooters with a motor that produces five horsepower or less;
- (d) quadricycles, including a four-wheeled motor vehicle designed for on-road or off-road use, that has a motor that produces 50 horsepower or less;
- (e) motorboats, including a canoe, kayak, personal watercraft, rubber raft or pontoon, propelled by any motor or engine of any description;
- (f) sailboats, including any vessel that uses a sail and wind as its primary source of propulsion;
- (g) off-highway vehicles, including motorcycles, quadricycles, dune buggies, amphibious vehicles, deriving power from any source other than muscle or wind;
- (h) a truck, trailer, or semi-trailer that has a gross vehicle weight of less than 22,000 pounds, used to transport personal property, such as a flat bed trailer used to transport machinery.

AUTH: 15-68-801, MCA

IMP: 15-68-101, 15-68-102, 15-68-501, MCA

REASONABLE NECESSITY: The department is proposing to adopt New Rule X to provide guidance to the rental vehicle industry and the user as to what commonly known rental services are subject to the four percent rental vehicle sales tax.

The department is proposing to place New Rule X in new subchapter 12 that will be titled Taxable and Nontaxable Transactions for the User.

NEW RULE XI EXEMPT RENTAL VEHICLE CHARGES (1) A user is not required to pay the rental vehicle sales and use tax on the rental of farm vehicles, machinery, equipment, travel trailers, motor homes, airplanes, snowmobiles, golf

carts, and sail boards.

(2) A user is not required to pay the rental vehicle sales and use tax when the vehicle is rented to the same user for a period of 30 consecutive days or more. Nonconsecutive rental agreements cannot be combined for the purpose of determining the length of the rental period. Intention to rent for a period of 30 or more continuous days is documented by a lease, contract, or historical evidence of continuous rental.

(3) The federal government is not required to pay the rental vehicle sale and use tax if the rental charge is billed directly to the federal government and paid directly by the federal government. A charge that is individually billed and paid by the user who later is reimbursed by the federal government is not exempt from the rental vehicle sales and use tax.

(4) An enrolled member of a federally recognized Indian tribe, who rents a vehicle within the exterior boundaries of the enrolled member's Indian reservation, does not have to pay rental vehicle tax. The seller must record the individual's enrollment number on the record.

(5) A foreign diplomat, entitled under international law or a bilateral treaty, does not have to pay the rental vehicle tax upon showing of a tax-exempt card issued by the U.S. State Department as follows:

(a) a blue stripe at the bottom indicates the bearer is entitled to full tax exemption; or

(b) a yellow stripe indicates there is some type of restriction on the full tax exemption, which will be indicated in the yellow stripe area.

(6) The isolated rental of vehicles by a person who is not regularly engaged in the business of renting vehicles is not required to collect the rental vehicle sales and use tax from the user.

AUTH: 15-68-801, MCA

IMP: 15-68-101, 15-68-102, MCA

REASONABLE NECESSITY: The department is proposing to adopt New Rule XI to provide the seller and the user clearer guidance as to what users are exempt from paying the rental vehicle sales and use tax to the seller.

The department is proposing to place New Rule XI in new subchapter 12 that will be titled Taxable and Nontaxable Transactions for the User.

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: Cleo Anderson, Department of Revenue, Director's Office, P.O. Box 7701, Helena, Montana 59604-7701; telephone (406) 444-5828; fax (406) 444-4375; or e-mail canderson@mt.gov and must be received no later the November 5, 2010.

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reference"; "DOR administrative rules"; and "upcoming events and proposed rule changes." The department strives to make the electronic copy of this Notice of Public Hearing conform to the official version of the notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the notice and the electronic version of the notice, only the official printed text will be considered. In addition, although the department strives to keep its web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems.

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 notices regarding particular subject matter or matters. 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 person in 4 above or faxed to the office at (406) 444-4375, or may be made by completing a request form at any rules hearing held by the Department of Revenue.

8. The bill sponsor contact requirements of 2-4-302, MCA, apply and have been fulfilled. The primary bill sponsor to the legislation, chapter 544, L. 2003, was contacted on September 10, 2010 by regular U.S. mail.

/s/ Cleo Anderson  
CLEO ANDERSON  
Rule Reviewer

/s/ Dan R. Bucks  
DAN R. BUCKS  
Director of Revenue

Certified to Secretary of State September 13, 2010

BEFORE THE DEPARTMENT OF ADMINISTRATION  
OF THE STATE OF MONTANA

In the matter of the adoption of New Rule I, the amendment of ARM 2.21.3702, 2.21.3703, 2.21.3707, 2.21.3708, 2.21.3709, 2.21.3719, 2.21.3720, 2.21.3721, 2.21.3723, 2.21.3724, 2.21.3726, 2.21.3728, 2.21.3735, the amendment and transfer of ARM 2.21.3705, and the repeal of ARM 2.21.3704 and 2.21.3715 pertaining to recruitment and selection	)	NOTICE OF ADOPTION, AMENDMENT, AMENDMENT AND TRANSFER, AND REPEAL
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TO: All Concerned Persons

1. On June 10, 2010, the Department of Administration published MAR Notice No. 2-21-438 regarding a public hearing to consider the proposed adoption, amendment, amendment and transfer, and repeal of the above-stated rules at page 1368 of the 2010 Montana Administrative Register, Issue Number 11. Prior to publication of the notice, the department failed to provide the sponsor notification required by 2-4-302, MCA, for New Rule I.

The department has notified the primary legislative sponsor of the proposed rule. A letter was mailed to the sponsor at the address on file with the Secretary of State regarding New Rule I, implementing the Military Selective Service Act, fulfilling the sponsor notification requirement. On July 29, 2010, the department published an amended notice of public hearing addressing the sponsor notification at page 1633 of the Montana Administrative Register, Issue Number 14.

2. On August 30, 2010, the department held a public hearing on the proposed adoption, amendment, amendment and transfer, and repeal.

3. 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: The department received a comment asking why the terms "without consideration of race, color, religion, creed, political ideas, sex, age, marital status, physical or mental disability, national origin or sexual orientation" were removed from ARM 2.21.3702.

RESPONSE #1: The department's objective is not to repeat information included in another policy. The department replaced the references to 49-3-201, MCA, which addressed nondiscrimination, with language stating "This policy, consistent with applicable state and federal laws, establishes minimum standards for equitable and consistent treatment of applicants and employees in recruitment and

selection." Prohibition of illegal discrimination is included in the Equal Employment Opportunity, Nondiscrimination, and Harassment Prevention, ARM 2.21.4001, et seq.

COMMENT #2: The department received a comment requesting the term "agency managers" used throughout the policy be defined and examples provided.

RESPONSE #2: The department will not define "agency manager" since organizational structures in state government are so varied. Agencies should determine who their managers are in each recruitment and selection decision-making process.

COMMENT #3: The department received a comment suggesting changing the word "both" to "etc." in ARM 2.21.3703(1)(c).

RESPONSE #3: The department will not change this rule. ARM 2.21.3703(1) refers to minimum employment application requirements. Agency management may request additional materials.

COMMENT #4: The department received a comment recommending deleting ARM 2.21.3707(3), which allows agency managers to consider temporary employees in an internal recruitment. The commentor said there may be situations that temporary employees (on a case-by-case basis) are assigned to positions without a competitive process and could apply for permanent positions in a very limited pool.

RESPONSE #4: The department will not delete this rule section, but agrees that temporary employees considered for internal recruitment should have been hired through a competitive process. The department is adding this requirement to the rule. The department is amending ARM 2.21.3708(3) to require agency managers to post temporary jobs externally unless the agency director or designee decides to fill immediately. This language replaces the "agency decides on a case-by-case basis" language.

COMMENT #5: The department received a comment suggesting defining temporary assignments referred to in ARM 2.21.3707(4). The commentor also asked if directors have the authority to make temporary assignments permanent without a competitive process.

RESPONSE #5: The department addressed a long-standing practice of reassigning employees to temporary assignments with this rule. The department will not define temporary assignments. Agencies should have the flexibility to address agency needs when using reassignments and not be limited to a definition. The rule states temporary assignments may not exceed two years without a competitive process; therefore, directors could not make the temporary assignments permanent without a competitive process.

COMMENT #6: The department received a comment suggesting changing agency policy to agency standard procedures in ARM 2.21.3707(5) for consistency.

RESPONSE #6: The department agrees and is changing (5).

COMMENT #7: The department received a comment suggesting a generic reference to the Recruitment and Selection Manual in ARM 2.21.3719(2)(b) to cover development of future documents and methods.

RESPONSE #7: The department agrees and is changing the word "Manual" to "resources."

COMMENT #8: The department received a comment suggesting changing "annually review and update their selection procedures" to "review and update their selection procedures as vacancies occur" in ARM 2.21.3719(4). The commentor also suggested changing "procedures" to "procedures and materials" where used in the rule.

RESPONSE #8: The department agrees with the first suggestion and is changing ARM 2.21.3719(4). The term "selection procedure" is inclusive; therefore, it is unnecessary to add "and materials."

COMMENT #9: The department received a comment suggesting the sentence in ARM 2.21.3720(2) should be moved to ARM 2.21.3720(1) for clarity where needed.

RESPONSE #9: The department is clarifying ARM 2.21.3720(1), but left the sentence in (2) as is for emphasis.

COMMENT #10: The department received a request to add the words "job related" to the language "unique backgrounds and experiences of each applicant" in ARM 2.21.3721(2).

RESPONSE #10: The department will not change the rule as it is unnecessary and restrictive to add "job related" when referring to the applicant's background and experience.

COMMENT #11: The department received a request to clarify the new rule to explain what happens if a new employee does not provide the required information.

RESPONSE #11: The new rule follows a series of criteria that an agency must consider when it hires a male between the ages of 18 and 26. Section (4) addresses what happens if the information is not provided, but this section cannot be moved to (1) because the criteria in (2) and (3) must be considered before (4) is applied.

4. The department has adopted New Rule I (ARM 2.21.3711) as proposed.

5. The department has amended ARM 2.21.3702, 2.21.3703, 2.21.3708, 2.21.3709, 2.21.3721, 2.21.3723, 2.21.3724, 2.21.3726, 2.21.3728, and 2.21.3735 as proposed.

6. The department amended and transferred ARM 2.21.3705 to 2.21.3710 as proposed.

7. The department has amended ARM 2.21.3707, 2.21.3719, and 2.21.3720 as proposed, but with the following changes, stricken matter interlined, new matter underlined:

2.21.3707 INTERNAL RECRUITMENT (1) through (2)(c) remain as proposed.

(3) Agency managers may consider temporary employees hired through a competitive process in an internal recruitment; however, student interns and short-term workers are not eligible to compete.

(4) remains as proposed.

(5) Agency managers shall post internal vacancy announcements according to agency ~~policy~~ standard procedures. The internal vacancy announcements should contain information similar to that required in ARM 2.21.3709, Vacancy Announcements.

AUTH: 2-18-102, MCA

IMP: 2-18-102, MCA

2.21.3719 DEVELOPMENT OF SELECTION PROCEDURES (1) through (2)(a) remain as proposed.

(b) For further guidance, agency managers may refer to the ~~r~~Recruitment and ~~s~~Selection Manual resources found at the State Human Resources Division web site: <http://hr.mt.gov/hrpp/guides.mcp> and also available from the State Human Resources Division, Department of Administration, Room 130 Mitchell Building, 125 Roberts Street, P.O. Box 200127, Helena, MT 59620-0127, or telephone (406) 444-3871.

(3) remains as proposed.

(4) Agency managers may use any selection procedure or combination of procedures that best assess the applicant against the job qualifications. Agencies shall ~~annually~~ review and update their selection procedures as vacancies occur.

AUTH: 2-18-102, MCA

IMP: 2-18-102, MCA

2.21.3720 ADMINISTRATION OF SELECTION PROCEDURES (1) During each step in the selection processes, agency managers shall ~~consistently~~ apply consistent selection procedures regarding:

(a) through (2) remain as proposed.

AUTH: 2-18-102, MCA  
IMP: 2-18-102, MCA

8. The department has repealed ARM 2.21.3704 and 2.21.3715 as proposed.

By: /s/ Janet R. Kelly  
Janet R. Kelly, Director  
Department of Administration

By: /s/ Michael P. Manion  
Michael P. Manion, Rule Reviewer  
Department of Administration

Certified to the Secretary of State September 13, 2010.

BEFORE THE DEPARTMENT OF JUSTICE  
OF THE STATE OF MONTANA

In the matter of the amendment of ) NOTICE OF AMENDMENT  
ARM 23.3.148 pertaining to release )  
of driving records )

TO: All Concerned Persons

1. On May 27, 2010, the Department of Justice published MAR Notice No. 23-3-216 pertaining to the public hearing on the proposed amendment of the above-stated rule at page 1237 of the 2010 Montana Administrative Register, Issue Number 10.

2. The department has amended the following rule as proposed: ARM 23.3.148.

3. 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: Does "one business entity," as used in the rule, encompass a whole insurance company, including a company's separate insurance departments such as fire and auto?

RESPONSE #1: An insurance company is considered one business entity under the rule, regardless of whether the record or abstract is used for separate departments.

COMMENT #2: Can "business entity" be clarified to cover larger trade name entities to prevent greater and unnecessary costs to Montana policyholders?

RESPONSE #2: As noted in response to comment # 1, "business entity" under the rule covers larger trade name entities, including separate departments such as fire and auto, and thus further clarification is unnecessary.

COMMENT #3: The rule will prevent vendors from offering monitoring services, which are allowed by 61-11-515, MCA, which alert insurers to any updates made to previously purchased Motor Vehicle Division ("MVD") records.

RESPONSE #3: Nothing in the rule prohibits a driver monitoring service with appropriate alerts to underlying requestors, a service that currently exists from the department for a fee of 15 cents per record per month. See 61-11-105(5) and (6) MCA. Instead, the rule will prevent information aggregators from acquiring MVD records and then reselling the records to multiple users.

COMMENT #4: 61-11-515, MCA, specifically contemplates that MVD records will be sold and thus used for multiple purposes.

RESPONSE #4: While 61-11-515, MCA, does contemplate the sale of MVD records, it does not state that these records may be sold for multiple purposes or to multiple entities. By limiting the sale of MVD records to a "single use," this rule meets the purpose of the Montana Driver Privacy Protection Act ("the Act"), "to create a more restrictive state version of the federal prohibition on release and use of certain personal information from state motor vehicle records [and] to protect an individual's privacy . . ." 61-11-502, MCA. It also fulfills the rulemaking requirement of "providing for oversight of sale or disclosure of personal information to third parties." 61-11-516(3), MCA.

COMMENT #5: The rule would not add any additional protection for driver information beyond what already exists in the Act and the Montana insurance code.

RESPONSE #5: On the contrary, this rule will provide additional protections to the privacy and accuracy of drivers' information by ensuring that a MVD record represents the current status of a driver at the time the record is requested.

COMMENT #6: This rule will generate increased costs to insurers, and consequently for consumers of insurance products.

RESPONSE #6: The department disagrees for the reasons stated in responses 1 and 3 above. The rule should not directly affect insurers, but instead will prevent resellers from acquiring a MVD record and then reselling the information to multiple business entities.

By       /s/ Steve Bullock        
STEVE BULLOCK  
Attorney General  
Department of Justice

      /s/ J. Stuart Segrest        
J. STUART SEGREST  
Rule Reviewer

Certified to the Secretary of State September 13, 2010.

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

In the matter of the amendment of ) NOTICE OF AMENDMENT  
ARM 37.78.102 pertaining to )  
Temporary Assistance for Needy )  
Families (TANF) )

TO: All Concerned Persons

1. On July 15, 2010, the Department of Public Health and Human Services published MAR Notice No. 37-514 pertaining to the public hearing on the proposed amendment of the above-stated rule at page 1597 of the 2010 Montana Administrative Register, Issue Number 13.

2. The department has amended the above-stated rule as proposed.

3. No comments or testimony were received.

4. The department intends to apply this rule retroactively to August 1, 2010, which is needed to provide services at the existing level within the budget restrictions to HB 2. A retroactive application of the proposed rule does not result in a negative impact to any affected party.

/s/ Francis X. Clinch  
Rule Reviewer

/s/ Anna Whiting Sorrell  
Anna Whiting Sorrell, Director  
Public Health and Human Services

Certified to the Secretary of State September 13, 2010.

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

In the matter of the amendment of ) NOTICE OF AMENDMENT  
ARM 37.80.101 pertaining to child )  
care assistance )

TO: All Concerned Persons

1. On July 15, 2010, the Department of Public Health and Human Services published MAR Notice No. 37-515 pertaining to the public hearing on the proposed amendment of the above-stated rule at page 1600 of the 2010 Montana Administrative Register, Issue Number 13.

2. The department has amended the above-stated rule as proposed.

3. No comments or testimony were received.

4. The department intends to apply this rule retroactively to August 1, 2010, which is needed to provide services at the existing level within the budget restrictions to HB 2. A retroactive application of the proposed rule does not result in a negative impact to any affected party.

/s/ Francis X. Clinch  
Rule Reviewer

/s/ Anna Whiting Sorrell  
Anna Whiting Sorrell, Director  
Public Health and Human Services

Certified to the Secretary of State September 13, 2010.

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

In the matter of the amendment of ) NOTICE OF AMENDMENT  
ARM 37.5.117, 37.5.331, 37.79.201, )  
37.79.202, 37.79.206, 37.79.207, )  
37.79.301, 37.79.302, 37.79.303, )  
37.79.326, and 37.79.801 pertaining )  
to Healthy Montana Kids Plan )

TO: All Concerned Persons

1. On August 12, 2010, the Department of Public Health and Human Services published MAR Notice No. 37-516 pertaining to the public hearing on the proposed amendment of the above-stated rules at page 1768 of the 2010 Montana Administrative Register, Issue Number 15.

2. The department has amended ARM 37.5.117, 37.5.331, 37.79.201, 37.79.202, 37.79.206, 37.79.207, 37.79.301, 37.79.302, 37.79.303, and 37.79.801 as proposed.

3. The department has amended the following rule as proposed, but with the following changes from the original proposal, new matter underlined, deleted matter interlined.

37.79.326 DENTAL BENEFITS (1) The maximum dental benefits paid under the basic dental plan will be 85% of the billed services received up to ~~\$1,000~~ \$1,200 paid per benefit year for each enrollee. For example, ~~\$1,176~~ \$1,412 in services received would result in ~~\$1,000~~ \$1,200 paid.

(a) remains as proposed.

(b) Providers may bill the enrollee, parent, or guardian for services received in excess of ~~\$1,176~~ \$1,412 per benefit year.

(2) through (4) remain as proposed.

(5) Enrollees with significant dental needs beyond those covered in the basic dental plan may, with prior authorization, receive additional services through the HMK coverage group Extended Dental Plan (EDP). The EDP program is dependent on legislative appropriation for the program.

(a) and (b) remain as proposed.

(c) The maximum basic and EDP payments combined is ~~\$2,000~~ \$2,200 (~~\$1,000~~ \$1,200 basic plan and \$1,000 EDP) for a benefit year.

(6) and (7) remain as proposed.

AUTH: 53-4-1004, 53-4-1005, 53-4-1009, 53-4-1105, MCA

IMP: 53-4-1003, 53-4-1004, 53-4-1005, 53-4-1009, 53-4-1104, 53-4-1105, MCA

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: The department should mirror the state employee benefit plan and amend ARM 37.79.326 to raise the maximum dental benefit year payment to \$1,200.

RESPONSE #1: The department agrees with the commenter. Based on the Centers for Medicare and Medicaid Services (CMS) guidance, and to be compliant with federal regulations outlined in the Children's Health Insurance Program Reauthorization Act (CHIPRA), Healthy Montana Kids (HMK) is amending ARM 37.39.326. HMK is a dental benchmark plan modeled after the state of Montana dependent coverage plan.

COMMENT #2: Representative Mary Caferro commented in support of the rule changes. In particular, she supports including medically necessary ambulance services as a covered service, increasing the annual dental benefit, and allowing otherwise eligible public employees to enroll their children in HMK.

RESPONSE #2: The department appreciates the comment and support.

5. The department intends the rule amendments to be applied effective October 1, 2010.

/s/ Geralyn Driscoll  
Rule Reviewer

/s/ Anna Whiting Sorrell  
Anna Whiting Sorrell, Director  
Public Health and Human Services

Certified to the Secretary of State September 13, 2010.

BEFORE THE DEPARTMENT OF REVENUE  
OF THE STATE OF MONTANA

In the matter of the amendment of ) NOTICE OF AMENDMENT  
ARM 42.18.205, 42.18.206, )  
42.18.207, and 42.18.208 relating to )  
Appraiser Certification )

TO: All Concerned Persons

1. On July 29, 2010, the department published MAR Notice No. 42-2-833 regarding the proposed amendment of the above-stated rules at page 1685 of the 2010 Montana Administrative Register, issue no. 14.

2. A public hearing was held on August 24, 2010, to consider the proposed amendment. Ms. Mary Whittinghill, President of the Montana Taxpayers Association, appeared and testified at the hearing. Oral and written testimony received at the hearing, and subsequent to, is summarized as follows along with the response of the department:

COMMENT NO. 1: Ms. Whittinghill stated she understands the division staffing issues and the time requirements of the employees who must prepare exhaustive narratives and the additional burden on management to grade those narratives. She further finds it is unfortunate there wasn't a compromise in the rule amendment where employees would conduct some type of narrative to demonstrate their ability to independently conduct an appraisal.

RESPONSE NO. 1: While a written narrative is useful as a tool to determine an appraiser's ability to independently conduct an appraisal, it is only one tool. There are a number of ways the department assures that each appraiser is properly trained and capable of independently conducting an appraisal. For example, the department follows the same process used in the fee appraisal industry, which includes the successful completion of course instruction. In addition, the department uses ongoing mentoring and supervision by managers and lead appraisal staff to quality check and ensure that all employees are producing a credible appraisal that meets IAAO standards and methodology.

COMMENT NO. 2: Ms. Whittinghill has a concern with the language that the annual training will be offered if funding is available and a significant number of employees require the training. She commented that in the past, when funding was scarce, the division used their IAAO certified employees to conduct the training for other employees eliminating the need to bring in outside instructors for the initial courses. When funding became available, they could then conduct higher level classes with outside instructors. She further suggested, in the past, the department opened the courses to fee appraisers and other interested persons for a charge to help recoup expenses.

RESPONSE NO. 2: The department understands that employee training which allows the department to provide good service to the citizens of the state is important, not only in the appraisal field, but in all services that the department provides. Ms. Whittinghill suggests some good alternatives for training that the department will consider. The department will continue to also provide training to its employees as a high priority, but must be prepared to respond if there are serious funding restrictions.

COMMENT NO. 3: Ms. Whittinghill stated the quality of the work of the division in the recent appraisal cycle was among the best that she had ever seen, and such quality is dependent on the appropriate training of the employees. Therefore, it is incumbent on the department to provide training to ensure appraisal consistency and valuation procedures that are consistent with a recognized national association.

RESPONSE NO. 3: The department appreciates Ms. Whittinghill's praise of its employees and agrees with the importance of providing employees with appropriate training.

COMMENT NO. 4: Ms. Whittinghill stated that with the Legislature starting to examine shorter appraisal cycles and the department experiencing staff turnover, it is critical to offer training to the appraisal staff in these specialized areas, because the department will not find employees with this type of training short of hiring fee appraisers or others working in this field.

RESPONSE NO. 4: The department agrees with Ms. Whittinghill.

3. The department amends ARM 42.18.205, 42.18.206, 42.18.207, and 42.18.208 as proposed.

4. An electronic copy of this adoption notice is available through the department's site on the World Wide Web at [www.mt.gov/revenue](http://www.mt.gov/revenue), under "for your reference"; "DOR administrative rules"; and "upcoming events and proposed rule changes." The department strives to make the electronic copy of this adoption notice conform to the official version of the notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the notice and the electronic version of the notice, only the official printed text will be considered. In addition, although the department strives to keep its web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems.

/s/ Cleo Anderson  
CLEO ANDERSON  
Rule Reviewer

/s/ Dan R. Bucks  
DAN R. BUCKS  
Director of Revenue

Certified to Secretary of State September 13, 2010

BEFORE THE DEPARTMENT OF REVENUE  
OF THE STATE OF MONTANA

In the matter of the adoption of Rule I ) NOTICE OF ADOPTION AND  
(ARM 42.22.1317) and amendment of ) AMENDMENT  
ARM 42.22.101 and 42.22.1316 )  
relating to centrally assessed )  
appraiser certification requirements )

TO: All Concerned Persons

1. On July 29, 2010, the department published MAR Notice No. 42-2-834 regarding the proposed adoption and amendment of the above-stated rules at page 1695 of the 2010 Montana Administrative Register, issue no. 14.

2. A public hearing was held on August 24, 2010, to consider the proposed adoption and amendment. Ms. Mary Whittinghill, President of the Montana Taxpayers Association, appeared at the hearing. Oral testimony received at the hearing and written comments subsequently received, are summarized as follows along with the response of the department:

COMMENT NO. 1: Ms. Whittinghill seeks clarification on the definition of industrial appraiser if it is not already defined in this chapter. She further suggested ARM 42.22.1316(3) be amended to insert industrial appraiser instead of centrally assessed appraiser.

RESPONSE NO. 1: The department has defined "industrial appraiser" in ARM 42.22.101(1). The department agrees with Ms. Whittinghill's comment regarding the error in ARM 42.22.1316(3) and has made that correction as shown below.

COMMENT NO. 2: Ms. Whittinghill commented at the hearing that, related to the availability of funding, it should be a priority of the department to make sure that funding is available for employee training. She further added that in the past, when funding was scarce, employees of the department were trained and IAAO certified in order to train other employees. She stated that it is important to taxpayers that the department ensures that employees conducting appraisals have the training necessary to come to reasonable conclusions of value for all properties in Montana, for every tax.

RESPONSE NO. 2: The department understands that employee training which allows the department to provide good service to the citizens of the state is important, not only in the appraisal field, but all services that the department provides. Ms. Whittinghill suggests some good alternatives for training that the department will consider. The department will continue to also provide training to its employees as a high priority, but must be prepared to respond if there are serious funding restrictions.

COMMENT NO. 3: In addition to testifying at the hearing, Ms. Whittinghill provided written comments. Ms. Whittinghill stated opposition to the requirement that state appraisers attend the WSATA Committee on Centrally Assessed Properties (WSATA-CCAP) School for the purpose of taking training courses 101, 102, and 103, or their equivalents because they utilize information contained in the 2009 rewrite of the WSATA Appraisal Handbook, which she indicated was controversial from the beginning to the end of the process used by the department. She further commented the rule requires new appraisers to attend the WSATA School, which utilizes the WSATA Appraisal Handbook as its primary resource, state funding of such training will likely ensure that tax litigation continues unabated. The funding of such training is incompatible with effective tax administration. Ms. Whittinghill suggested at the hearing that the department consider having state appraisers attend the Wichita unit valuation training courses instead. In replay, the department indicated the training courses do not reflect the views of the states. Ms. Whittinghill commented that "the planning committee contains representatives from the states, while the WSATA training courses do not consider industry input."

RESPONSE NO. 3: The department respectfully disagrees with Ms. Whittinghill's position. The WSATA Appraisal Handbook, as defined in its forward, is for educational purposes and was approved for use by the 14 western states that comprise WSATA. The appraisal school, taught and administered by WSATA CCAP, teaches a course dealing with the valuation of centrally assessed or unit valued property. CCAP, through its by-laws, makes the appraisal school available to state and other jurisdictional appraisers on the campus of Utah State University. This sort of tax-type specific training cannot be found at any other organizations in the United States.

The Wichita School is not specific to appraisers working for or employed by state, federal, or local governments. The Wichita School may be an additional tool for training centrally assessed appraisers. The department's use of the WSATA Appraisal Handbook and school reflects its established practice. It would be incorrect for the department to fail to describe this practice in this rule.

COMMENT NO. 4: Ms. Whittinghill indicated that the department's comments related to the WSATA Handbook during the hearing overstate the extent to which content related issues raised by other parties were given fair consideration prior to the Handbook's fall 2009 publication. She further stated that although a draft copy of the Handbook may have been provided to the International Association of Assessing Officers (IAAO) and to the American Society of Appraisers (ASA), this does not mean that the text was subjected to scrutiny by nationally recognized appraisal organizations, that a legitimate peer review process would have involved far more, and that the department's admission that no comments were received from either IAAO or ASA confirms that a formal review process did not occur.

Ms. Whittinghill requests the department to consider the comments stated in a September 8, 2009 letter to the Western States Association of Tax Administrators (WSATA) from the Western States Association of Tax Representatives (WSATR). In reference to the letter, she states that the department and others involved in the

drafting of the updated WSATA Handbook received nearly 70 pages of comments solely from WSATR, that other parties raised additional issues in separate correspondence, and that all of these parties expressed concerns about the Handbook containing incomplete, unbalanced and factually inaccurate content. She further states that the Handbook was published without addressing the vast majority of the issues raised.

Ms. Whittinghill further requests that, because the WSATA Appraisal Handbook did not receive unanimous approval of the member states; and that WSATR representatives requested but were not provided the information, that the actual vote, by state, should be included in the department's response to the comments on this rule action. She further stated that since the department oversaw and took the lead in the rewrite, that this information should be readily available.

RESPONSE NO. 4: The department agrees that the IAAO and ASA provided WSATA with no comments on the WSATA Appraisal Handbook. WSATA did receive comments from other organizations such as WSATR. The WSATA membership, including the state of Montana, thoroughly and properly considered all of the comments received. Along with WSATA members reviewing the comments received, WSATA retained Michael Goodwin and Peter Crossett, two nationally recognized experts in the centrally assessed appraisal field, to review and provide a written report on the comments received. Mr. Goodwin and Mr. Crossett's prepared report included recommended changes to the WSATA Appraisal Handbook as well as providing a detailed response to each comment received when possible. The WSATA Executive Committee concurred with Mr. Goodwin and Mr. Crossett's report and adopted the WSATA Appraisal Handbook. The WSATA Appraisal Handbook is a copyrighted document; therefore, the department does not control its distribution. Therefore, the department is limited to only reference the WSATA Appraisal Handbook in the rule.

Ms. Whittinghill also stated that the WSATA membership did not have a unanimous vote to adopt the WSATA Appraisal Handbook. This is true. The WSATA Executive Committee vote was nine states voted to approve the handbook (Arizona, Idaho, Montana, New Mexico, Nevada, Oregon, Texas, Washington, and Wyoming); no states voted against the adoption of the handbook; and three states abstained on the vote (Alaska, Colorado, and Utah). California and Hawaii did not cast a vote.

3. Based on the comments received, the department further amends ARM 42.22.1316 as shown below:

42.22.1316 INDUSTRIAL PROPERTY CERTIFICATION REQUIREMENTS

(1) through (2)(b) remain the same.

(3) Upon commencement of employment with the department as an ~~unit~~ valuation or centrally assessed industrial property appraiser, the employee shall undertake a one-year period of on-the-job appraisal work during which time the employee will begin the process of meeting the requirements set forth in (1) and (2). For employees new to state government, this one-year period will run concurrently with and in addition to the automatic six-month probation period set forth in

department policy 3.1.4. The commencement of the year experience requirement will coincide with the employee's notification of being assigned ~~unit or centrally assessed~~ industrial property appraisal responsibilities. All work will be supervised by the department. Failure to perform the appraisal work satisfactorily may result in immediate termination of employment.

(4) remains the same.

AUTH: 15-1-201, MCA

IMP: 15-7-107, 15-7-111, MCA

4. The department adopts New Rule I (ARM 42.22.1317) and amends ARM 42.22.101 as proposed.

5. An electronic copy of this adoption notice is available through the department's site on the World Wide Web at [www.mt.gov/revenue](http://www.mt.gov/revenue), under "for your reference"; "DOR administrative rules"; and "upcoming events and proposed rule changes." The department strives to make the electronic copy of this adoption notice conform to the official version of the notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the notice and the electronic version of the notice, only the official printed text will be considered. In addition, although the department strives to keep its web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems.

/s/ Cleo Anderson  
CLEO ANDERSON  
Rule Reviewer

/s/ Dan R. Bucks  
DAN R. BUCKS  
Director of Revenue

Certified to Secretary of State September 13, 2010

BEFORE THE DEPARTMENT OF REVENUE  
OF THE STATE OF MONTANA

In the matter of the amendment of ) NOTICE OF AMENDMENT  
ARM 42.12.401, 42.12.405, )  
42.12.406, 42.12.408, 42.12.412, and )  
42.12.414 relating to restaurant beer )  
and wine licenses and lottery process )

TO: All Concerned Persons

1. On July 29, 2010, the department published MAR Notice No. 42-2-835 regarding the proposed amendment of the above-stated rules at page 1701 of the 2010 Montana Administrative Register, issue no. 14.

2. A public hearing was held on August 19, 2010, to consider the proposed amendment. No one appeared at the hearing to testify and no written comments were received.

3. The department amends ARM 42.12.401, 42.12.405, 42.12.406, 42.12.408, 42.12.412, and 42.12.414 as proposed.

4. An electronic copy of this adoption notice is available through the department's site on the World Wide Web at [www.mt.gov/revenue](http://www.mt.gov/revenue), under "for your reference"; "DOR administrative rules"; and "upcoming events and proposed rule changes." The department strives to make the electronic copy of this adoption notice conform to the official version of the notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the notice and the electronic version of the notice, only the official printed text will be considered. In addition, although the department strives to keep its web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems.

/s/ Cleo Anderson  
CLEO ANDERSON  
Rule Reviewer

/s/ Dan R. Bucks  
DAN R. BUCKS  
Director of Revenue

Certified to Secretary of State September 13, 2010

BEFORE THE DEPARTMENT OF REVENUE  
OF THE STATE OF MONTANA

In the matter of the adoption of Rule I ) NOTICE OF ADOPTION  
(42.2.901), New Rule II (42.2.902), )  
New Rule III (42.2.903), New Rule IV )  
(42.2.904) and New Rule V (42.2.905) )  
relating to the Montana school )  
districts' election to waiver protested )  
taxes )

TO: All Concerned Persons

1. On July 29, 2010, the department published MAR Notice No. 42-2-836 regarding the proposed adoption of the above-stated rules at page 1708 of the 2010 Montana Administrative Register, issue no. 14.

2. A public hearing was held on August 20, 2010, to consider the proposed adoption. Mary Whittinghill, President of Montana Taxpayers Association appeared at the hearing but did not testify. No written comments were received.

3. The department adopts New Rule I (42.2.901), New II (42.2.902), New Rule III (42.2.903), New Rule IV (42.2.904), and New Rule V (42.2.905) as proposed.

4. An electronic copy of this adoption notice is available through the department's site on the World Wide Web at [www.mt.gov/revenue](http://www.mt.gov/revenue), under "for your reference"; "DOR administrative rules"; and "upcoming events and proposed rule changes." The department strives to make the electronic copy of this adoption notice conform to the official version of the notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the notice and the electronic version of the notice, only the official printed text will be considered. In addition, although the department strives to keep its web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems.

/s/ Cleo Anderson  
CLEO ANDERSON  
Rule Reviewer

/s/ Dan R. Bucks  
DAN R. BUCKS  
Director of Revenue

Certified to Secretary of State September 13, 2010

BEFORE THE DEPARTMENT OF REVENUE  
OF THE STATE OF MONTANA

In the matter of the adoption of New Rule I (42.12.314) and amendment of ARM 42.12.302, 42.12.312, 42.12.313, and 42.12.323 relating to special licenses and permits ) NOTICE OF ADOPTION AND AMENDMENT

TO: All Concerned Persons

1. On July 29, 2010, the department published MAR Notice No. 42-2-837 regarding the proposed adoption and amendment of the above-stated rules at page 1712 of the 2010 Montana Administrative Register, issue no. 14.

2. A public hearing was held on August 19, 2010, to consider the proposed adoption and amendment. Ms. Kristi Blazer, representing the Montana Beer and Wine Distributors Association, Mr. Tony Herbert, representing the Montana Brewers Association, and Mr. Bill Campbell, Jr., representing Joe's Family Steakhouse, appeared at the hearing. Ms. Blazer testified and her comments and the department's responses are referenced below. No written comments were received.

COMMENT NO. 1: Ms. Kristi Blazer suggested that "ordinary retail price" be defined in the rule.

RESPONSE NO. 1: The department appreciates Ms. Blazer's comments and has subsequently added a definition of "ordinary retail price" in ARM 42.12.302, which is the definition rule for this subchapter.

3. Based on the comments received at the hearing, the department amends ARM 42.12.302 to define the term "ordinary retail price" as shown below:

42.12.302 DEFINITIONS The following terms will be used in this subchapter:

(1) through (7) remain the same.

(8) "Ordinary retail price" means the everyday price established by the retailer for the sale of alcoholic beverages to consumers. For distilled spirits and fortified wine, the price cannot be less than the department's posted price.

(8) through (11) remain the same but are renumbered (9) through (12).

AUTH: 16-1-303, MCA

IMP: 16-4-201, 16-4-202, 16-4-301, MCA

3. The department adopts New Rule I (42.12.314) and amends ARM 42.12.312, 42.12.313, and 42.12.323 as proposed.

4. An electronic copy of this adoption notice is available through the department's site on the World Wide Web at [www.mt.gov/revenue](http://www.mt.gov/revenue), under "for your

reference"; "DOR administrative rules"; and "upcoming events and proposed rule changes." The department strives to make the electronic copy of this adoption notice conform to the official version of the notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the notice and the electronic version of the notice, only the official printed text will be considered. In addition, although the department strives to keep its web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems.

/s/ Cleo Anderson  
CLEO ANDERSON  
Rule Reviewer

/s/ Dan R. Bucks  
DAN R. BUCKS  
Director of Revenue

Certified to Secretary of State September 13, 2010

BEFORE THE DEPARTMENT OF REVENUE  
OF THE STATE OF MONTANA

In the matter of the amendment of ) NOTICE OF AMENDMENT  
ARM 42.18.121 and 42.18.122 )  
relating to Montana appraisal manual )  
for residential, commercial, and )  
industrial property )

TO: All Concerned Persons

1. On July 29, 2010, the department published MAR Notice No. 42-2-839 regarding the proposed amendment of the above-stated rules at page 1720 of the 2010 Montana Administrative Register, issue no. 14.

2. A public hearing was held on August 25, 2010, to consider the proposed amendment. No one appeared at the hearing to testify and no written comments were received.

3. The department amends ARM 42.18.121 and 42.18.122 as proposed.

4. An electronic copy of this adoption notice is available through the department's site on the World Wide Web at [www.mt.gov/revenue](http://www.mt.gov/revenue), under "for your reference"; "DOR administrative rules"; and "upcoming events and proposed rule changes." The department strives to make the electronic copy of this adoption notice conform to the official version of the notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the notice and the electronic version of the notice, only the official printed text will be considered. In addition, although the department strives to keep its web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems.

/s/ Cleo Anderson  
CLEO ANDERSON  
Rule Reviewer

/s/ Dan R. Bucks  
DAN R. BUCKS  
Director of Revenue

Certified to Secretary of State September 13, 2010

BEFORE THE DEPARTMENT OF REVENUE  
OF THE STATE OF MONTANA

In the matter of the amendment of ) NOTICE OF AMENDMENT  
ARM 42.17.101 and 42.17.204 )  
relating to withholding taxes )

TO: All Concerned Persons

1. On August 12, 2010, the department published MAR Notice No. 42-2-840 regarding the proposed amendment of the above-stated rules at page 1776 of the 2010 Montana Administrative Register, issue no. 15.

2. A public hearing was held on September 2, 2010, to consider the proposed amendment. No one appeared and no comments were received.

3. The department amends ARM 42.17.101 and 42.17.204 as proposed.

4. An electronic copy of this adoption notice is available through the department's site on the World Wide Web at [www.mt.gov/revenue](http://www.mt.gov/revenue), under "for your reference"; "DOR administrative rules"; and "upcoming events and proposed rule changes." The department strives to make the electronic copy of this adoption notice conform to the official version of the notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the notice and the electronic version of the notice, only the official printed text will be considered. In addition, although the department strives to keep its web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems.

/s/ Cleo Anderson  
CLEO ANDERSON  
Rule Reviewer

/s/ Dan R. Bucks  
DAN R. BUCKS  
Director of Revenue

Certified to Secretary of State September 13, 2010

BEFORE THE DEPARTMENT OF REVENUE  
OF THE STATE OF MONTANA

In the matter of the adoption of New ) NOTICE OF ADOPTION  
Rule I (42.4.2402), New Rule II )  
(42.4.2403), and New Rule III )  
(42.4.2404) relating to Insure Montana )  
tax credit )

TO: All Concerned Persons

1. On August 12, 2010, the department published MAR Notice No. 42-2-841 regarding the proposed adoption of the above-stated rules at page 1779 of the 2010 Montana Administrative Register, issue no. 15.

2. A public hearing was held on September 2, 2010, to consider the proposed adoption. No one appeared and no comments were received.

3. The department adopts New Rule I (42.4.2402), New Rule II (42.4.2403), and New Rule III (42.4.2404) as proposed.

4. An electronic copy of this adoption notice is available through the department's site on the World Wide Web at [www.mt.gov/revenue](http://www.mt.gov/revenue), under "for your reference"; "DOR administrative rules"; and "upcoming events and proposed rule changes." The department strives to make the electronic copy of this adoption notice conform to the official version of the notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the notice and the electronic version of the notice, only the official printed text will be considered. In addition, although the department strives to keep its web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems.

/s/ Cleo Anderson  
CLEO ANDERSON  
Rule Reviewer

/s/ Dan R. Bucks  
DAN R. BUCKS  
Director of Revenue

Certified to Secretary of State September 13, 2010

BEFORE THE SECRETARY OF STATE  
OF THE STATE OF MONTANA

In the matter of the amendment of ) NOTICE OF AMENDMENT  
ARM 44.6.104 and 44.6.105 )  
pertaining to filing fees charged by )  
the Business Services Division for )  
federal tax liens and Uniform )  
Commercial Code documents )

TO: All Concerned Persons

1. On August 12, 2010, the Secretary of State published MAR Notice No. 44-2-164 pertaining to the public hearing on the proposed amendment of the above-stated rules at page 1789 of the 2010 Montana Administrative Register, Issue Number 15.

2. The Secretary of State has amended the following rule as proposed: ARM 44.6.104.

3. The Secretary of State has amended the following rule as proposed, but with the following changes from the original proposal, new matter underlined, deleted matter interlined:

44.6.105 FEES FOR FILING DOCUMENTS -- UNIFORM COMMERCIAL CODE (1) through (3) remain as proposed.

(4) Certification of copies, \$2.00, unless copies accompany a search certificate, then the certification fee is included in the fee for the search certificate.

AUTH: 2-15-405, 30-9A-526, MCA

IMP: 30-9A-501, 30-9A-502, 30-9A-525, 71-3-125, MCA

4. The Secretary of State has thoroughly considered the comment received. The comment received and the Secretary of State's response follows:

COMMENT #1: The Secretary of State received the following e-mailed comment from David Niss on behalf of the State Administration and Veterans' Affairs Interim Committee regarding the proposed amendment to ARM 44.6.105:

"[P]roposed subsection (4) of the text provides that there is no separate \$2.00 charge for certification of copies if a search certificate has been paid for, and seems to state that if a search certificate has been paid for, then the \$2.00 for certified copies is included in the search certificate . It seems highly unlikely that the \$2.00 fee could be included in the certificate itself. What seems more likely is that the \$2.00 fee is considered to be paid as part of the fee for the search certificate. While this is a small point, I suggest this change just from the standpoint of accuracy of the language in the proposed amendment."

RESPONSE #1: The Secretary of Statement concurs and has added the words "fee for the" before search certificate for clarification.

/s/ JORGE QUINTANA  
Jorge Quintana  
Rule Reviewer

/s/ LINDA MCCULLOCH  
Linda McCulloch  
Secretary of State

Dated this 13th day of September, 2010.

BEFORE THE DEPARTMENT OF NATURAL RESOURCES  
AND CONSERVATION OF THE STATE OF MONTANA

In the matter of the Petition of Katrin R. Chandler, Betty J. Lannen, Polly Rex, Joseph Miller, and the Clark Fork Coalition, seeking a Declaratory Ruling declaring that the current administrative rule definition of "combined appropriation" set forth in ARM 36.12.101(13) be declared invalid and the department initiate rulemaking to amend the definition	)	DECLARATORY RULING AND ORDER DENYING REQUEST TO AMEND RULE
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To: All Concerned Persons

1. Petitioner's names and address are: Katrin R. Chandler, 31 Mason Road, Absarokee, MT 59001; Betty J. Lannen, 232 Nye Road, Absarokee, MT 59001; Polly Rex, P.O. Box 68, Absarokee, MT 59001; Joseph Miller, E.H. Miller Ranch, 2094 Heeb Road, Manhattan, MT 59741; and Karen Knudsen, Executive Director of the Clark Fork Coalition, 140 S. 4th Street West, Unit 1, Missoula, MT 59801.

2. The administrative rule as to which petitioner requests a declaratory ruling is ARM 36.12.101(13), which provides the department's definition for "combined appropriation".

3. The question presented for declaratory ruling by the department is that the current administrative rule definition of "combined appropriation" set forth in ARM 36.12.101(13) be declared invalid and that the department initiate rulemaking to amend the definition.

4. Declaratory Ruling:

Procedural History

1. The Department issued an Order on January 28, 2010 that bifurcated the issues raised in the Petition. In that Order, the Department granted the Petition for Declaratory Ruling and deferred consideration of the request for rulemaking until after the Petition for Declaratory Ruling was considered.

2. On March 9, 2010, the Department issued a Notice of Appointment of Hearing Examiner, Order Scheduling Briefing from all Interested Parties, and Setting Public Hearing on Petition for Declaratory Ruling. The Department determined that the issue raised was of statewide importance and would have statewide implication. To provide input to all interested persons statewide, the Department provided opportunity to file briefs or statements of position (filed by April 30, 2010), response briefs or statements of position (filed by June 4, 2010), or give comments during a public hearing (held June 17, 2010). The March 9, 2010 Notice was mailed first-class to all persons on the Water Resources Division's interested parties and rule-making list, posted on the Department's website (www.dnrc.mt.gov), and published

in newspapers of general circulation, including Helena, Bozeman, Billings, Great Falls and Missoula.

3. Briefs or statements of position were filed with the Department by:

- a. Petitioners;
- b. Alstad and Lannen;
- c. Art Hayes of the Brown Cattle Company;
- d. Cottonwood Environmental Law Center;
- e. Missoula County, Board of County Commissioners;
- f. Montana Department of Fish, Wildlife and Parks;
- g. Montana Water Well Drillers Association;
- h. Mountain Water Company;
- i. Northern Plains Resources Council;
- j. Richard Hixon, City Engineer for Bozeman;
- k. Stillwater Protective Association;
- l. Tongue River Water Users Association;
- m. Trout Unlimited; and
- n. Comments and signature page by a group of Ranchers, including Gate, Scaff, and Scott.

4. All briefs and statements of position were posted on the Department website following receipt.

5. Response briefs were filed with the Department by:

- a. Petitioners;
- b. Montana Water Well Drillers Association;
- c. Montana Association of Realtors and Montana Building Industry Association; and
- d. Trout Unlimited.

6. All response briefs were posted on the Department website following receipt.

7. Comments were presented at the June 17, 2010 public hearing from those in support of the Petition, those opposed to the Petition, and those who did not have a position on the Petition but wanted to comment on the issue.

8. Comments given at the public hearing in support of the Petition were presented by:

- a. Matthew Bishop, Western Environmental Law Center, Attorney for Petitioner;
- b. Laura Zeimer, Trout Unlimited Attorney;
- c. Meg Casey, Trout Unlimited Summer Associate;
- d. Brianna Randall, Clark Fork Coalition;
- e. Katrin Regina Chandler, Petitioner;
- f. Polly Rex, Petitioner; and
- g. Steve Brown, Mountain Water Company.

9. Comments given at the public hearing in opposition to the Petition were presented by:

- a. Abigail St. Lawrence, Montana Association of Realtors and Montana Building Industry Association;
- b. Ronda Wiggers, Montana Water Well Drillers Association;
- c. Will Hayes, Hayes Drilling, Montana Water Well Drillers Association; and
- d. Rick Byrne, Great Falls well driller.

10. One comment was given at the public hearing neither in support of nor in opposition to the Petition, but to inform the Department of the Department of Transportation's use of exempt wells and interest in the issue. The comment was presented by:

- a. Jolyn Eggart, Department of Transportation Attorney.

#### Preliminary Procedural Issue

11. As a preliminary procedural matter, in response briefs the Montana Water Well Drillers Association and the Montana Association of Realtors and Montana Building Industry Association question the authority of an administrative agency to issue a declaratory ruling as to the validity of the agency's administrative rule.

12. The Montana Administrative Procedure Act, Section 2-4-501, MCA addresses declaratory rulings by agencies and states in full:

- a. Each agency shall provide by rule for the filing and prompt disposition of petitions for declaratory rulings as to the applicability of any statutory provision or of any rule or order of the agency. A copy of declaratory ruling must be filed with the secretary of state for publication in the register. A declaratory ruling or the refusal to issue such a ruling shall be subject to judicial review in the same manner as decisions or orders in contested cases.

13. The attorney general has prepared model rules of practice for agencies to use as a guide for declaratory rulings under the Montana Administrative Procedure Act. Section 2-4-202, MCA. The model rules are set out in Rules 1.3.101 through 1.3.233, ARM. The Department has adopted the model rules. Rule 36.2.101, ARM. Model Rule 1.3.226, ARM covers agency declaratory rulings and provides: "A party may seek a declaratory ruling from the agency when doubt exists as to how a statute or rule administered by an agency affects the party's legal rights".

14. The Montana Association of Realtors and Montana Building Industry Association argue that the agency is limited to issuing a declaratory ruling that a rule is inapplicable in a specific factual context and is prohibited from considering whether the rule is consistent and not in conflict with applicable law. Response Brief, Montana Association of Realtors and Montana Building Industry Association, Dated June 3, 2010, p. 2. In other words, even though the Petitioners allege individual harm and violation of their legal rights based on the agency's interpretation of the statute contained in the rule, the agency is prohibited from ruling on the applicability of a rule generally (i.e. validity) and must limit declaratory rulings to specific application of rule to individual factual circumstances. The Montana Water Well Drillers Association and the Montana Association of Realtors and Montana Building Industry Association argue that to consider the validity of a rule that an action must be brought to the district court under Section 85-2-506, MCA. Response Brief, Montana Association of Realtors and Montana Building Industry Association, Dated June 3, 2010, p. 2; Response Brief, Montana Water Well Drillers Association, Dated June 4, 2010, p. 2.

15. The Department has express authority to adopt suitable rules for the administration of the Water Use Act. Section 85-1-201, MCA. The agency has the power necessary for effective exercise of powers and duties expressly confirmed. State ex Rel. Dragstedt v. State Board of Education, 103 Mont. 336 (1936). The agency must adopt rules in accordance with Sections 85-2-302 through 2-4-305,

MCA of the Montana Administrative Procedure Act. The agency has a duty to ensure its rules continue to be consistent with statutory language and legislative intent and, if not, adopt, modify or repeals its rules. Section 2-4-314(1), MCA. The Petitioner initiated, through Petition for Declaratory Ruling, the Department's review of the validity of the current administrative rule based the general applicability of the rule that can affect Petitioners' legal rights. A declaratory ruling in this instance is consistent with Section 2-4-501, MCA, Rule 1.3.226, ARM, and the rulemaking authority expressly conferred on the agency.

16. Petitioner could have brought this action in district court under Section 2-4-506, MCA, but chose to Petition the Department for a declaratory ruling. Section 2-4-506(3), MCA states that: "A declaratory judgment may be rendered [by the court] whether or not the plaintiff has requested the agency to pass upon the *validity* or applicability of the rule in question" (emphasis added). Although it is by negative implication, the statute anticipates that persons with legal rights that are alleged to be affected by the rule may petition the agency for declaratory ruling on the validity of the rule. The Department finds that it has the authority to issue a declaratory ruling on the validity of its administrative rule.

17. The Department agrees with the Montana Water Well Drillers Association and the Montana Association of Realtors and Montana Building Industry Association, that the requisite rulemaking process under the Montana Administrative Procedure Act, including published notice and opportunity to comment, was not incorporated in this declaratory ruling proceeding. The Department clearly has power to adopt, modify or a rule under Sections 85-2-302 through 2-4-305, MCA. However, if the declaratory ruling requires subsequent rulemaking in accordance with the ruling, this two step process does not make the relief requested from the agency substantially different than what could be sought in district court under Section 2-4-506, MCA.

#### Issue for Declaratory Ruling

18. The sole issue to be decided by Declaratory Ruling was set forth in the March 9, 2010 Notice as follows:

a. Whether the 'combined appropriation' administrative rule definition (Rule 36.12.101(13) ARM) is consistent with applicable law under the Montana Water Use Act, Section 85-2-101 et.seq, MCA.

#### Department's Declaratory Ruling

19. The Department rules that:

a. the "combined appropriation" administrative rule definition (Rule 36.12.101(13), ARM) is consistent and not in conflict with applicable law under the Water Use Act, Section 85-2-101 et. seq, MCA, for reasons discussed below.

20. The Department further rules that:

a. while the current "combined appropriation" administrative rule definition (Rule 36.12.101(13), ARM) is consistent and not in conflict with the Water Use Act, Section 82-2-101 et.seq, MCA, increasing demands on water resources in Montana warrant repeal of Rule 36.12.101(13), ARM. The Department will, within eight months, initiate rulemaking to propose repeal of Rule 36.12.101(13), ARM and adoption of a new "combined appropriation" administrative rule definition pursuant to Section 2-4-302, MCA, for reasons discussed below.

### Reasons for Department's Declaratory Ruling

21. Petitioner has requested that the Department declare the definition of "combined appropriation" contained in Rule 36.12.101(13), ARM invalid.

22. An agency rule is not valid unless the rule is consistent and not in conflict with the statute and is reasonably necessary to effectuate the purpose of the statute. Section 2-4-305(6), MCA; Montana Trout Unlimited v. Montana Department of Natural Resources and Conservation, 331 Mont. 483, 493, 133 P.3<sup>rd</sup> 224, 231 (2006). An agency rule must be consistent and not in conflict with the statute it implements. Safeway, Inc. v. Montana Petroleum Release Compensation Board, 281 Mont. 189, 194, 931 P.2d 1327, 1330 (1997). In order for a rule to be invalid, the rule must be plainly and palpably inconsistent with the statute. Moe v. Wesen, 172 F.Supp. 259, 263 (Mont. 1959), citing, Boske v. Comingore, 177 U.S. 459, 470 (1900).

23. The statute at issue in this proceeding deals with exceptions to water right permit requirements as set forth in Section 85-2-306(3)(a), MCA.<sup>1</sup> Providing for exceptions to the permitting process was a legislative decision. The language of the statute reads:

a. Outside the boundaries of a controlled ground water area, a permit is not required before appropriating ground water by means of a well or developed spring with a maximum appropriation of 35 gallons a minute or less, not to exceed 10 acre-feet a year, except that a combined appropriation from the same source from two or more wells or developed springs exceeding this limitation requires a permit.

24. The current administrative rule at issue is the definition of "combined appropriation" (Rule 36.12.101(13), ARM), that reads:

a. "Combined appropriation" means an appropriation of water from the same source aquifer by two or more groundwater developments, that are physically manifold into the same system.

25. First, we review the plain language of the statute and whether the administrative rule is inconsistent or in conflict with the plain language of the statute. Powell County v. Country Village, 352 Mont. 291, 296 (2009). The statute does not define "combined appropriation." Section 85-2-306(3)(a), MCA. The Petitioners argue that the term "combined appropriation" in the statute is inconsistent with and in conflict with the "physically manifold" requirement contained in the administrative rule definition (Rule 36.12.101(13), ARM). The Department's administrative rule definition interprets and makes specific the statutory term "combined appropriation" to implement the provisions of the statute. Petitioners point out a variety of definitions for "combined" that they say support the contention that the administrative rule is inconsistent and in conflict with the plain language of the statute. Petition for Declaratory Ruling, p. 12. However, a common, perhaps the most common definition, of "combined" is physically joined together.<sup>2</sup> Therefore, the 'physically manifold' requirement under the administrative rule is not inconsistent or in conflict with the plain language of the statute, and certainly not plainly and palpably inconsistent with the statutory language.

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<sup>1</sup> Wells under 35 gallons per minute (gpm) and less than 10 acre-feet per year are exceptions to the permitting process but are commonly called "exempt wells" and that term will be used herein.

<sup>2</sup> Webster's Ninth New Collegiate Dictionary (1989).

26. To be consistent and not in conflict with the plain language of the statute, the administrative rule must also not insert words that are not contained in the statute or omit words that are contained in the statute. Montana Trout Unlimited v. Montana Department of Natural Resources and Conservation, 331 Mont. 483, 494, 133 P.3<sup>rd</sup> 224, 232 (2006). In this instance, the administrative rule is more specific in that the statute refers to the "same source" and the rule refers to the "same source aquifer." Ground water aquifers are the specific source of water supply for ground water wells. The addition of "same source aquifer" to the language in the administrative rule clarifies the term "same source" in the statute and does not add to or change the plain language of the statute. This language is consistent with and not in conflict with the plain language of the statute. The rule does not assume that wells pump from the same source aquifer. More than one well, each from different aquifers, even if physically manifold would not be a "combined appropriation." Nothing in the treatment of wells from different aquifers adds to or omits words contained in the statute. The language is consistent with and not in conflict with the plain language of the statute.

27. The statute refers to "wells or developed springs". The administrative rule does not refer to developed springs. Developed springs are defined in the Department's rules as ground water, so to repeat the statutory "developed springs" language would be redundant and confusing. Rule 36.12.101(62), ARM. Therefore, developed springs are treated in the same fashion as ground water wells, and the administrative rule language is consistent with and not in conflict with the plain language of the statute.

28. The Department finds that the definition of "combined appropriation" (Rule 36.12.101(13), ARM) is consistent with and not in conflict with the plain language of the statute (Section 85-2-306(3)(a), MCA).

29. Second, we review whether the rule is reasonably necessary to effectuate the purpose of the statute. Section 2-4-305(6), MCA.; Montana Trout Unlimited v. Montana Department of Natural Resources and Conservation, 331 Mont. 483, 493, 133 P.3<sup>rd</sup> 224, 231 (2006). This requires an evaluation the legislative intent and the purpose the statute. In the Matter of the Formation of East Bench Irrigation District, 350 Mont. 309, 316, 207 P.2d 1097, 1102 (2009)(statute construed "to ascertain the legislative intent and to give effect to the legislative will").

30. The Water Use Act was passed in 1973 in response to the adoption of the 1972 Montana Constitution. The 1972 Constitution required that the legislature "shall provide for the administration, control, and regulation of water rights and shall establish a system of centralized records, in addition to the present system of local record." Art. IX, Sec. 3(4), Mont. Const.; Montana Trout Unlimited v. Montana Department of Natural Resources and Conservation, 331 Mont. 483, 485, 133 P.3<sup>rd</sup> 224, 226 (2006). The Water Use Act specifies that after July 1, 1973, a permit from the State of Montana is required in order to obtain a right to use water. Section 85-2-301, MCA. Generally, "a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or related distribution works except by applying for and receiving a permit from the department." Section 85-2-

302(1), MCA. There are some exceptions to permitting requirements enacted by the legislature, including the exempt well provision at issue here.<sup>3</sup>

31. When the Water Use Act was enacted in 1973 the language concerning exempt wells read, in pertinent part:

Outside the boundaries of a controlled groundwater area, a permit is not required before appropriating groundwater for domestic, agricultural, or livestock purposes by means of a well with a maximum yield of less than one hundred (100) gallons per minute. . . .

a. Sec. 16(4), Ch. 452, L. 1973; RMC, Sec. 89-880(4)(1973). There is no specific discussion in the legislative history concerning this provision. However, the legislative intent can be gleaned from looking at the overall structure of the Water Use Act.

32. The Water Use Act provides a framework for administration, control, and regulation of water rights. Pre-July 1, 1973 water rights were recognized and confirmed and a system to adjudicate those rights was initiated. Art. IX, Sec. 3(1), Mont. Const.; Sections 85-5-201 through 85-2-282, MCA. After July 1, 1973 the legislature set forth a permit system to acquire a water right as previously discussed. The legislature decided that water uses under 100 gpm did not need to go through advance approval in order to obtain a water right. RMC, Sec. 89-880(4)(1973). Montana is a rural state and small wells are often located in remote areas. Exempt ground water wells typically serve small dispersed uses with low probability of adverse affect to neighboring water rights. It is apparent that the legislature intended to allow small ground water appropriations for discrete purposes, especially to provide for domestic and stock uses, without the burden and expense of going through the permitting process. While still under the prior appropriation doctrine, these small appropriations would not go through an initial approval process but are subject to enforcement based on priority date the same as any other water right under the prior appropriation doctrine.

33. This legislative intent is evidenced by similar treatment of domestic and stock uses in the adjudication process. In the adjudication process "[c]laims for existing rights for livestock and individual as opposed to municipal domestic uses based upon instream flow or ground water sources . . . are exempt from the filing requirements of 85-2-221(1). Such claims may, however, be voluntarily filed" Section 85-2-222, MCA. Although exempted from the claim filing process, these pre-1973 water rights for individual domestic and stock uses are recognized and confirmed and are subject to enforcement based on priority date the same as any other water right under the prior appropriation doctrine. Art. IX, Sec. 3(1), Mont. Const. This is entirely consistent with how post-1973 exempt wells are treated under the Water Use Act.

34. The Montana Water Use Act treatment of exempt ground water wells is also in line with the water appropriation structure in many other western states.

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<sup>3</sup> Exceptions to the permitting process are set forth in Section 85-2-306, MCA. These exceptions are currently limited to ground water wells or developed springs of less than 35 gpm and less than 10 acre-feet per year and impoundments or pits used by livestock on non-perennial streams with a 15 acre-foot capacity and a maximum appropriation of 30 acre-feet per year. It is important to note that these uses are "exempt" from the permitting process, but if the appropriator follows the statutory procedures for filing the requisite notice of completion under Section 85-2-306, MCA (Form 602), the appropriator has a protectable water right under the prior appropriation doctrine and use of the water is also subject to enforcement under the prior appropriation doctrine. There are also exceptions to the permitting process that are temporary in nature and do not establish water rights under the prior appropriation doctrine. Sections 82-2-113(3) and 85-2-369, MCA.

Most western states following the prior appropriation doctrine provide an exemption from the permitting process targeted at domestic and stock use through a flow rate and/or volume limits for the exception or a statutory preference in permitting or enforcement under the prior appropriation system for domestic or stock use.<sup>4</sup> See, Petition for Declaratory Ruling, Exhibit 12.

35. The legislature intended that small ground water uses, primarily to provide for individual domestic and stock uses, could continue to be appropriated under the Water Use Act without the burden and expense of going through the permitting process. It follows that the purpose of the exempt well statute is to establish the dividing line below which ground water wells are excepted from the permitting process and above which a permit is required. There was no administrative rule concerning exempt well provision based on the 1973 language because the statute was very specific. Any well used for domestic, agricultural, or livestock purposes with a maximum yield of less than 100 gpm did not need a permit.<sup>5</sup>

36. In 1987, the exempt well statute, Section 85-2-306(1), MCA (1987), was amended to read:

a. Groundwater may be appropriated only by a person who has either exclusive property rights in the groundwater development works or the written consent of the person with those property rights. Outside the boundaries of a controlled ground water area, a permit is not required before appropriating ground water for domestic, agricultural, or livestock purposes by means of a well with a maximum yield of less than 100 gallons per minute, *except that a combined appropriation from the same source from two or more wells or developed springs exceeding this limitation requires a permit.* . . . (Amended language emphasized.) Sec. 2, Ch. 535, L. 1987 (H.B. 642).

37. Legislative history on the 1987 amendment to Section 85-2-306(1), MCA, is limited. However, it is clear that the legislature was concerned with appropriators using the exempt well statute to avoid applying for a permit, especially for irrigated agriculture. The testimony at the hearing on House Bill 642 articulated concerns with irrigation.<sup>6</sup> A single well or developed spring pumping at 100 gpm without a volume limitation is more than adequate to provide for domestic and stock uses. Irrigated agriculture was really the only common beneficial use of water that would use multiple wells of this size for the same purpose in contravention of legislative

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<sup>4</sup> There is no statutory preference for any specific beneficial use of water in Montana.

<sup>5</sup> In 1974, the legislature amended RMC, 89-880(4) to delete the phrase "for domestic, agricultural, or agricultural purposes." Sec. 2, Ch. 238, L. 1974. The relevant portion of the S.B. 650 stated: "An act to amend Section[] . . . 89-880 . . . by providing for an exemption from the permit requirements for all wells less than one-hundred (100) gallons a minute . . ."

<sup>6</sup> The only testimony on Section 2 of H.B. 642 was from a lobbyist, but he speaks to the concern about use of the exempt well statute for irrigation. "Ted Doney, an attorney who specializes in water law represented the Water Development Association. . . Mr. Doney disliked the word "combined" because he didn't know what the word meant in the bill. He thought it meant that two wells that were irrigating the same tract but not physically connected. Mr.Doney would rather the bill would read 'wells from the same source'." Senate Natural Resources Committee, March 23, 1987, Page 9. Rep. Spaeth, the sponsor of House Bill 642, supported the amendment. *Id.* at p. 10. The Petitioners and Trout Unlimited cite to testimony on H.B. 642 offered by Mr. Flynn, on behalf of the Department of Fish, Wildlife and Parks. However, Mr. Flynn's testimony was on Section 7 of the bill that concerned subordinating the priority dates of the Missouri River water reservations (including instream flow water reservations) to *permits* issued by the Department. (Trout Unlimited also testified in opposition to Section 7.) House Natural Resources Committee Minutes, H.B. 642, Exhibits 5 and 6 (February 13, 1987). The legislature passed Section 7 of H.B. 642 despite the concerns Mr. Flynn expressed. Section 85-2-331, MCA (1987). There is no basis to show that Section 2 of H.B. 642 was added as a result of Mr. Flynn's testimony.

intent.<sup>7</sup> By limiting the use of the groundwater well exception to one well or developed spring less than 100 gpm from the same source, the legislature restricted the use of exempt wells for agricultural use. The legislative history and the effect of the legislative amendment show that the legislative intent was to prevent irrigated agriculture on a significant level to avoid permitting process through the use of exempt wells while maintaining the exemption to the permitting statute for small ground water development.

38. In 1987, the Department adopted an administrative rule to implement Section 85-2-306(1)(1987). The 1987 administrative rule definition read: "Combined appropriation" means an appropriation of water from the same source aquifer by two or more groundwater developments, the purpose of which, in the department's judgment, could have been accomplished by a single appropriation. Groundwater developments need not be physically connected nor have a common distribution system to be considered a "combined appropriation". They can be separate developed springs or wells to separate parts of a project or development. Such wells and springs need not be developed simultaneously. They can be developed gradually or in increments. The amount of water appropriated for the entire project or development in the same source aquifer is the "combined appropriation".

39. Rule 36.12.101(7), ARM (1987). The administrative rule definition of "combined appropriation" reflected the 1987 amended statutory language, and the legislative intent that multiple 100 gpm wells not be used for larger scale irrigation operations or other large water consumptive uses.

40. The most significant change to the exempt well statute occurred in 1991. The legislature amended Section 85-2-306(1), MCA to read:

a. Ground water may be appropriated only by a person who has a possessory interest in the property where the water is to be put to beneficial use and exclusive property rights in the ground water development, works or, if another person has rights in the ground water development works, the written consent of the person with those property rights. Outside the boundaries of a controlled ground water area, a permit is not required before appropriating ground water by means of a well or developed spring with *a maximum appropriation of 35 gallons a minute or less, not to exceed 10 acre-feet a year*, except that a combined appropriation from the same source from two or more wells or developed springs exceeding this limitation requires a permit. . . .

Sec. 4, Ch. 805, L. 1991 (S.B 266)(emphasis added).

41. The 1991 amendment significantly lowered the threshold on the amount of water that could be appropriated without going through the permitting process. The amendment not only changed the flow rate limit from 100 gpm to 35 gpm, but also added a *volume limit* of 10 acre-feet per year. Even though water could be appropriated for any beneficial use under the exempt well statute, introducing a volume limit had the direct effect of limiting the use of the exempt wells for larger water uses with correspondingly larger impacts.

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<sup>7</sup> "The first exception, for wells and developed springs with a maximum appropriation of less than 100 gpm, covers the vast majority of new wells in Montana, although many irrigation wells will exceed 100 gpm. A typical household well will yield less than 20 gpm. The exemption does not apply within the boundaries of a controlled groundwater area . . . , at present there is only one such area, near Terry in eastern Montana." Montana Water Law Handbook, Ted J. Doney, p. 95 (1981). Mr. Doney was Chief Legal Counsel at the Department when the Water Use Act was passed and was involved in drafting the Act.

42. Senate Bill 266, sponsored by Senator Grosfield at the request of the Department, as introduced did not contain amendments to Section 85-2-306, MCA. S.B. 266, 1991 Leg. Sess. (introduced February 4, 1991). S.B. 266 primarily dealt with changes to the statutory definition of ground water. During the hearing before the House Natural Resources Committee, Rep. O'Keefe raised questions about the use of ground water for *irrigation* and the interrelationship with surface water and the potential impact to surface water rights. Mr. Fritz (from the Department) responded there may be a problem if the upstream water user's well is less than 100 gallons per minute.<sup>8</sup> In the closing by the bill sponsor at the House hearing, "Sen. Grosfield said Rep. O'Keefe brought up the 100 gallon per minute limit threshold, which is addressed on Page 9 of the bill. The 100 gallon limit language was struck and a new line was inserted that is tighter.<sup>9</sup> *There was some discussion in the Senate committee about whether the threshold should be lowered. The most common figure heard was 35 gallons per minute.* The Department's position has been that 100 gallons per minute is a reasonable threshold." S.B. 266, House Natural Resources Committee, March 14, 1991, Page 15 of 23 (emphasis added). No amendments were made to S.B. 266 concerning the exempt well provision before the bill passed out of the House Natural Resources Committee. However, during a Free Conference Committee on S.B. 266, the Committee inserted Section 4 to the bill amending the Section 85-2-306(1), MCA to change exempt wells from a maximum of 100 gpm to 35 gpm not to exceed 10 acre feet per year.<sup>10</sup> Both Senator Grosfield and Rep. O'Keefe served on the Free Conference Committee. The Free Conference Committee report was adopted by both the House and Senate on April 25, 1991 and the bill was signed by the Governor on May 17, 1991.

43. The 1991 amendment again addressed the legislature's primary concern that the exempt well provision could be used to irrigate larger parcels of land with correspondingly larger impacts to water resources. A single well with a flow of 100 gpm without a volume limitation can irrigate in excess of 20 acres. With a 35 gpm and 10 acre-feet per year limitation, only about 4 acres of land can be irrigated from a single well.<sup>11</sup> The 1991 statutory amendment of Section 85-2-306(3), MCA effectively closed the door on multiple wells with separate distribution systems for irrigation. Separate wells with separate distribution systems every 4 acres was simply not economical or practical for irrigation on a commercial level.

44. In response to the 1991 statutory amendment of Section 85-2-306(1), MCA (1991), the Department changed the administrative rule definition to the current

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<sup>8</sup> "Rep. O'Keefe asked what protects a water user's right to surface water if an upstream water user decides to tap into existing groundwater to build a well for irrigation. The language describing the interrelationship with surface water seems to be struck. Mr. Fritz [from the Department] said there may be a problem in the permitting process if the upstream user's well is less than 100 gallons per minute. There is always recourse if it is believed someone has adversely impacted the water supply. If use is under 100 gallons per minute, the certificate does not go through the permit process. In such a case, any adverse impact would have to be addressed in the courts.

Rep. O'Keefe said that is one problem. He asked how the change affects the downstream user's right to object to the upstream user's use of the water, and if the downstream user has to show the upstream user's activities will have an adverse impact. Mr. Fritz said SB 266 and the definition do not change the burden of proof or process if groundwater use is more than 100 gallons per minute. The upstream user would have to apply for a permit and the downstream user would still have the right to object to it." S.B. 266, House Natural Resources Committee, March 14, 1991, Page 14 of 23.

<sup>9</sup> Page 9 of S.B. 266 contained a change to the definition of well, removing the language referring to 100 gallons a minute and adding a reference to "the limitation contained in 85-2-306(1)," thereby bringing the exempt well provision under the heading of the bill.

<sup>10</sup> Free Conference Committee on Senate Bill No. 266, Report No. 1, April 24, 1991.

<sup>11</sup> 10 acre-feet per year can irrigate between 3 and 8 acres depending on climatic area and irrigation efficiency, with around 4 acres being a typical size base on climatic areas and common irrigation efficiencies in Montana. Rule 36.12.115, ARM.

rule. Montana Administrative Register, June 24, 1993; Rule 36.12.101(13), ARM. Use of exempt wells for irrigation had been the legislature's primary concern. Under Section 85-2-306(3)(a), MCA after the 1991 amendment, the only way to evade the permit process to irrigate larger parcels was to physically connect multiple wells with a single distribution system. Individual small wells with separate distribution systems would not be practical or economically feasible for irrigated agriculture. However, individual small wells that were physically combined or manifold together to create a single water development and distribution system could still evade the permitting process and be inconsistent with the legislative purpose of the statute if not addressed by rule. Thus, the current rule prevents irrigation or, any larger water consumptive uses, from avoiding the permitting process by drilling more than one 35 gpm well and "combining" or manifolding the wells together to operate as a single water development sharing a common distribution system. The fact that there are no manifold small wells to serve irrigation shows that the rule effectively prevented this practice. The Department's "combined appropriation" administrative rule definition (Rule 36.12.101(13), ARM) is consistent with legislative intent and is reasonably necessary to effectuate the purpose of the statute. Section 2-4-305(6), MCA

45. The vast majority of the 110,024 exempt wells are single wells of less than 35 gpm and 10 acre-feet per year for domestic use.<sup>12</sup> The exempt well statute and the administrative rule apply statewide. For areas where the statewide approach does work because the area is experiencing local problems with exempt wells, the Water Use Act is structured to address problems on a site specific basis through controlled ground water areas.<sup>13</sup>

46. This administrative rule definition of "combined appropriation" (Rule 36.12.101(13), ARM) has been in place for 17 years.<sup>14</sup> The administrative rule has been easy for the public to understand and the Department's Regional Offices to administer consistently.<sup>15</sup> The purpose of the exempt well statute is to provide for small uses of water with limited potential for impact to the water resource, typically for domestic and stock uses, without the burden and expense of the permit process. The legislature intended that larger, more water consumptive uses, especially irrigated agriculture, go through the permitting process. The definition of "combined appropriation" in Rule 36.12.101(13), ARM is reasonably necessary to prevent large water consumptive uses from circumventing the permit process by inappropriately using the exempt well statute. This administrative rule was rationally aimed at the practicality and economic feasibility of water use development and has successfully

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<sup>12</sup> Petition for Declaratory Ruling, Exhibit 12.

<sup>13</sup> Section 85-2-506, MCA. Currently there are 15 controlled groundwater areas. Other statutory provisions can also address local impact, such as special zoning districts

<sup>14</sup> Deference to the agency's interpretation of the statute was not accorded in this Declaratory Ruling and we do not rule on whether deference to an agency interpretation in an administrative proceeding is appropriate. We do point out that the rule was adopted 17 years ago, there has been no objection to the rule from Legislative Administrative Rules Committee, and that the exempt well statute and the Department's rule has been discussed and considered by the legislature a substantial number of times. See, Petitioners Brief, Exhibits 9 and 25.

<sup>15</sup> In response to a comment from the Legislative Rules Committee, the Department responded "Rule 36.12.101 was amended to more concisely define what is considered a combined appropriation. The past definition was too ambiguous and therefore difficult to administer 85-2-306(1) fairly and consistently throughout the state. It required the department to make assumptions when determining whether developments were considered combined appropriations. The amended rule clearly defines what is a combined appropriation without any supposition." Montana Administrative Register, June 24, 1993.

prevented wells for irrigated agriculture and other large water consumptive uses from using the exempt well statute to acquire a water right.

47. The Department finds that the definition of "combined appropriation" (Rule 36.12.101(13), ARM) is consistent and not in conflict with the plain language and the purpose of the statute and is reasonably necessary to effectuate the purpose of the statute. Section 85-2-306(3), MCA. Therefore, the Department rules that the "combined appropriation" administrative rule definition (Rule 36.12.101(13), ARM) is consistent and not in conflict with applicable law under the Water Use Act, Section 85-2-101 et.seq, MCA, and the certificates of water right issued pursuant to the statute and the rule are valid.

48. Having ruled that the current administration rule definition of "combined appropriation" (Rule 36.12.101(13), ARM) is valid and the certificates of water right issued by the Department for exempt wells under the rule are valid, the Department acknowledges that Petitioners raise issues that the Department has been reviewing for some time. See, Department Order, Petition for Rulemaking by Gallatin County Commission (2006). The legislature's primary concern in amending the exempt well statute in 1987 and 1991 was to limit larger appropriations of water, especially for irrigation. However, the proliferation of exempt wells for individual domestic purposes developed in a way that was not anticipated at the time the legislation was passed needs to be addressed.<sup>16</sup> The legislative intent that exempt wells be small dispersed uses with low probability of adverse affect to neighboring water rights must continue to be reflected in the Department's rule. Specifically, the Department is concerned that the administrative rule of "combined appropriation" continues to serve the purposes of the Water Use Act into the future.

49. Since the last amendment to the exempt well statute in 1991, there have been changes to Water Use Act that have a bearing on Section 85-2-306(3)(a), MCA. Prior to 1991 there were one legislatively authorized basin closure<sup>17</sup> for the Milk River basin<sup>18</sup> and three basin closures adopted through administrative rule.<sup>19</sup> Over the course of years the legislature has enacted permanent or temporary basin closures for the Teton River Basin (Section 85-2-330, MCA (1993)), the Upper Clark Fork River Basin (Section 85-2-336, MCA (1995)), the Jefferson River and Madison River Basins (Section 85-2-341, MCA (1993)), the Upper Missouri River Basin (Section 85-2-343, MCA (1993)), and the Bitterroot River Basin (Section 85-2-344, MCA (1999)). There are also legislatively approved basin closures in compacts for the Northern Cheyenne Reservation (Section 85-20-301, MCA (1991)), the Rocky Boy's Reservation (Section 85-20-601, MCA (1997)), the Crow Reservation (Section 85-20-901, MCA (1999)), the Blackfeet Reservation (Section 85-20-1501, MCA (2009)), U.S. Fish and Wildlife Service (Section 85-2-701, MCA (1991)), U.S. National Park Service (Section 85-20-401, MCA (1994)). Since 1991, the Department has also closed 7 more basins through rulemaking, including the

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<sup>16</sup> Petition for Declaratory Ruling, Exhibit 12.

<sup>17</sup> Basin closure is the term often used for legislative or Department actions under Section 85-2-319(1), MCA ("With regard to a highly appropriated basin or subbasin, . . . the legislature may by law preclude permit applications or the department may by rule reject permit applications or modify or condition permits already issued.")

<sup>18</sup> Section 85-2-321, MCA. Department Order closing the Mainsteam of the Milk River to surface water appropriations (January 1, 1983).

<sup>19</sup> Basin closures for surface water appropriations for Grant Creek Basin (Rule 36.12.1011, ARM, January 26, 1990). Rock Creek Basin (Rule 36.12.1013, ARM, February 9, 1990), and Walker Creek Basin (Rule 36.12.1014, ARM, September 28, 1990).

Musselshell River, and issued another legislatively authorized order closing the southern tributaries of the Milk River.<sup>20</sup>

50. As a result of basin closures, appropriation of surface water is restricted in a significant portion of Montana. Many of the basin closures allowed for continued appropriation of ground water. However, following the Supreme Court ruling in 2006 in Montana Trout Unlimited v. Montana Department of Natural Resources and Conservation, 331 Mont. 483, 133 P.3<sup>rd</sup> 224 (2006) and subsequent changes to the Water Use Act (i.e., Section 85-2-360, MCA) it has become increasingly difficult to obtain a permit for either surface water or ground water.

51. Exempt wells are still allowed in closed basins. Because permits for surface water or ground water permits may not be available or may be very costly to obtain due to mitigation requirements, it is likely that more people will look to exempt wells as a means to appropriate water. Where it has been impractical or not cost-effective in the past to obtain water through multiple small exempt wells not physically attached, it may become so where there are no other practical or cost-effective means to obtain water. While the current "combined appropriation" administrative rule definition has been effective and simple to administer, increased pressure to use the exempt well statute will likely lead to more people attempting to use this provision in new and creative ways that are not consistent with the purpose of the statute. In the face of changing times, the administrative rule needs to be more flexible to determine whether two or more wells are a "combined appropriation" prohibited by the statute.

52. The Department will, within eight months, initiate rulemaking to propose repeal of Rule 36.12.101(13), ARM and adoption of a new "combined appropriation" administrative rule definition and any other necessary rules pursuant to Section 2-4-302, MCA. The decision on Petitioners' request to adopt a new administrative rule definition for "combined appropriation" (Rule 36.12.101(13), ARM) will be addressed in a separate agency order. The Department is evaluating a new "combined appropriation" administrative rule definition that would allow an exempt well to serve up to twelve residential lots with a maximum appropriation of 35 gallons a minute or less, not to exceed 10 acre-feet a year. The Department will consider other factors such as closed basins and geographic area.

53. Agency Response to Comments (Attachment 1) is incorporated herein by this reference.

Dated this 17<sup>th</sup> day of August, 2010.

/s/ Joe Lamson  
JOE LAMSON  
Hearings Examiner

## 5. Order Denying Request to Amend Rule 36.12.101(13):

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<sup>20</sup> Towhead Gulch (Rule 36.12.1015, ARM, January 17, 1992), Musselshell River (Rule 36.12.1016, ARM, June 26, 1992), Sharrott Creek Basin (Rule 36.12.1017, ARM, July 16, 1993), Willow Creek Basin (Rule 36.12.1018, ARM, September 23, 1994), Truman Creek Basin (Rule 36.12.1019, ARM, February 9, 1995), Sixmile Creek Basin (Rule 36.12.1020, ARM, December 8, 1995), Houle Creek Basin (Rule 36.12.1021, ARM, September 20, 1996), and Department Order Sothern Tributaries of the Milk River (September 1, 1991).

Procedural History

1. The Department issued an Order on January 28, 2010 that bifurcated the issues raised in the Petition. In that Order, the Department granted the Petition for Declaratory Ruling and deferred consideration of the request for amending the rule until after the Petition for Declaratory Ruling was considered. The Declaratory Ruling has now issued.

Declaratory Ruling Issued

2. On August 17, 2010, the Hearing Examiner ruled in the Declaratory Ruling that:

a. the "combined appropriation" administrative rule definition (Rule 36.12.101(13), ARM) is consistent and not in conflict with applicable law under the Water Use Act, Section 85-2-101 et. seq, MCA, for reasons discussed in its Declaratory Ruling.

3. The Hearing Examiner further ruled that:

a. while the current "combined appropriation" administrative rule definition (Rule 36.12.101(13), ARM) is consistent and not in conflict with the Water Use Act, Section 82-2-101 et.seq, MCA, increasing demands on water resources in Montana warrant repeal of Rule 36.12.101(13), ARM. The Department will, within eight months, initiate rulemaking to propose repeal of Rule 36.12.101(13), ARM and adoption of a new "combined appropriation" administrative rule definition pursuant to Section 2-4-302, MCA, for reasons discussed in its Declaratory Ruling.

Decision on Rulemaking

4. Because the Hearing Examiner has ruled that the Department will initiate rule making to propose repeal of the current rule and initiate rulemaking regarding the "combined appropriation" rule; the Department is Denying the Petitioners Request to Amend the existing rule. The Department will undertake rule making as directed by the Hearing Examiner's Ruling and will notice the Petitioners and all interested parties at the time it initiates rulemaking.

THEREFORE; the request of the Petitioners to Amend the Rule is Denied.

IT IS SO ORDERED.

Dated this 30<sup>th</sup> day of August, 2010.

/s/ Thomas Schultz

THOMAS SCHULTZ, Acting Administrator

Water Resources Division

Department of Natural Resources

and Conservation

P.O. Box 201601

Helena, Montana 59620-1601

(406) 444-6605

6. Certificate of Service for Declaratory Ruling and Order Denying Request to Amend Rule 36.12.101(13):



## **NOTICE OF FUNCTION OF ADMINISTRATIVE RULE REVIEW COMMITTEE**

### **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 and Insurance Commissioner; and
- Office of Economic Development.

#### **Education and Local Government Interim Committee:**

- State Board of Education;
- Board of Public Education;
- Board of Regents of Higher Education; and
- Office of Public Instruction.

#### **Children, Families, Health, and Human Services Interim Committee:**

- Department of Public Health and Human Services.

#### **Law and Justice Interim Committee:**

- Department of Corrections; and
- Department of Justice.

#### **Energy and Telecommunications Interim Committee:**

- Department of Public Service Regulation.

**Revenue and Transportation Interim Committee:**

- Department of Revenue; and
- Department of Transportation.

**State Administration and Veterans' Affairs Interim Committee:**

- Department of Administration;
- Department of Military Affairs; and
- Office of the Secretary of State.

**Environmental Quality Council:**

- Department of Environmental Quality;
- Department of Fish, Wildlife, and Parks; and
- 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 a soft back, bound publication, issued twice-monthly, containing notices of rules proposed by agencies, notices of rules adopted by agencies, and interpretations of statutes and rules by the Attorney General (Attorney General's Opinions) and agencies (Declaratory Rulings) issued since publication of the preceding register.

### Use of the Administrative Rules of Montana (ARM):

- |                  |   |
|------------------|---|
| Known<br>Subject | 1. Consult ARM Topical Index.<br>Update the rule by checking the accumulative table 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.                     |

## ACCUMULATIVE TABLE

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 March 31, 2010. This table includes those rules adopted during the period April 1, 2010, through June 30, 2010, and any proposed rule action that was pending during the past six-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 March 31, 2010, this table, and the table of contents of this issue of the MAR.

This table indicates the department name, title number, rule numbers in ascending order, catchphrase or the subject matter of the rule, and the page number at which the action is published in the 2010 Montana Administrative Register.

To aid the user, the Accumulative Table includes rulemaking actions of such entities as boards and commissions listed separately under their appropriate title number.

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## BOARD 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 appointees and upcoming or current vacancies on those boards and councils.

In this issue, appointments effective in August 2010 appear. Vacancies scheduled to appear from October 1, 2010, through December 31, 2010, are listed, as are current vacancies due to resignations or other reasons. Individuals interested in serving on a board should refer to the bill that created the board for details about the number of members to be appointed and necessary qualifications.

Each month, the previous month's appointees are printed, and current and upcoming vacancies for the next three months are published.

### IMPORTANT

Membership on boards and commissions changes constantly. The following lists are current as of September 1, 2010.

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.

**BOARD AND COUNCIL APPOINTEES FROM AUGUST 2010**

<u>Appointee</u>	<u>Appointed by</u>	<u>Succeeds</u>	<u>Appointment/End Date</u>
<b>Board of Crime Control (Justice)</b>			
Commissioner Mike Anderson Havre Qualifications (if required): public member	Governor	Wallem	8/5/2010 1/1/2013
Commissioner Laura Obert Townsend Qualifications (if required): local government representative	Governor	Anderson	8/5/2010 1/1/2013
<b>Board of Nursing (Labor &amp; Industry)</b>			
Ms. Barbara Lundemo Sidney Qualifications (if required): advanced practice registered nurse	Governor	Reichert	8/23/2010 7/1/2013
Mr. Kohn N. Gregory Billings Qualifications (if required): public representative	Governor	Hanson	8/23/2010 7/1/2014
Ms. Lanette Perkins Missoula Qualifications (if required): registered nurse	Governor	Pollington	8/23/2010 7/1/2014
Ms. Brenda Schye Fort Peck Qualifications (if required): public representative	Governor	reappointed	8/23/2010 7/1/2014

**BOARD AND COUNCIL APPOINTEES FROM AUGUST 2010**

<u>Appointee</u>	<u>Appointed by</u>	<u>Succeeds</u>	<u>Appointment/End Date</u>
<b>Board of Nursing</b> (Labor & Industry) cont.			
Ms. Kathleen Sprattler Billings	Governor	reappointed	8/23/2010 7/1/2014
Qualifications (if required): licensed practical nurse			
<b>Board of Public Accountants</b> (Labor & Industry)			
Mr. Tony Ennenga Kalispell	Governor	Lynch	8/24/2010 7/1/2014
Qualifications (if required): Certified Public Accountant			
Mr. Michael Johns Deer Lodge	Governor	reappointed	8/24/2010 7/1/2014
Qualifications (if required): Certified Public Accountant			
Ms. Kathy VanDyke Bozeman	Governor	Paul	8/24/2010 7/1/2014
Qualifications (if required): public representative			
<b>Community Service Commission</b> (Labor & Industry)			
Mr. Doug Braun Billings	Governor	reappointed	8/4/2010 7/1/2013
Qualifications (if required): representative of organized labor			
Ms. Stefani Hicswa Miles City	Governor	Barcus	8/4/2010 7/1/2013
Qualifications (if required): representative of a national service program			

**BOARD AND COUNCIL APPOINTEES FROM AUGUST 2010**

<u>Appointee</u>	<u>Appointed by</u>	<u>Succeeds</u>	<u>Appointment/End Date</u>
<b>Community Service Commission</b> (Labor & Industry) cont.			
Director Keith Kelly Helena Qualifications (if required): agency representative	Governor	reappointed	8/4/2010 7/1/2013
Mr. Austin Lyle Helena Qualifications (if required): youth representative	Governor	Pflum	8/4/2010 7/1/2013
Ms. Kimberly Miske Wibaux Qualifications (if required): representative of local government	Governor	reappointed	8/4/2010 7/1/2013
Mr. Adam Vauthier Anaconda Qualifications (if required): representative of a non-profit organization	Governor	Rice	8/4/2010 7/1/2013
<b>Montana Agriculture Development Council</b> (Agriculture)			
Director Dore Schwinden Helena Qualifications (if required): Director Department of Commerce	Governor	not listed	8/1/2010 0/0/0
<b>Petroleum Tank Release Compensation Board</b> (Environmental Quality)			
Mr. Jerry M. Breen Choteau Qualifications (if required): independent petroleum marketing industry representative	Governor	Cross	8/11/2010 6/30/2013

## BOARD AND COUNCIL APPOINTEES FROM AUGUST 2010

<u>Appointee</u>	<u>Appointed by</u>	<u>Succeeds</u>	<u>Appointment/End Date</u>
<b>Petroleum Tank Release Compensation Board</b> (Environmental Quality) cont.			
Mr. Karl Hertel Moore	Governor	reappointed	8/11/2010 6/30/2013
Qualifications (if required): insurance industry representative			
Mr. Roger A. Noble Kalispell	Governor	reappointed	8/11/2010 6/30/2013
Qualifications (if required): independent petroleum marketing industry representative			
<b>Public Defender Commission</b> (Administration)			
Mr. Richard Gillespie Helena	Governor	reappointed	8/4/2010 7/1/2013
Qualifications (if required): an attorney nominated by the Montana State Bar who represents criminal defense lawyers			
Mr. Raymond Kuntz Red Lodge	Governor	Sherwood	8/4/2010 7/1/2013
Qualifications (if required): an attorney nominated by the Montana Supreme Court			
Ms. Margaret Novak Chester	Governor	Veazey	8/4/2010 7/1/2013
Qualifications (if required): member of an organization advocating on behalf of indigent persons			
Mr. William Snell Billings	Governor	reappointed	8/4/2010 7/1/2013
Qualifications (if required): employee of an organization providing addictive behavior counseling			

## BOARD AND COUNCIL APPOINTEES FROM AUGUST 2010

<u>Appointee</u>	<u>Appointed by</u>	<u>Succeeds</u>	<u>Appointment/End Date</u>
<b>Public Safety Officer Standards and Training Council (Justice)</b>			
Mr. Harold F. Hanser Billings	Governor	Wallem	8/6/2010 1/1/2013
Qualifications (if required): Board of Crime Control representative			
<b>Research and Commercialization Technology Board (Commerce)</b>			
Mr. Major Robinson Billings	Governor	Dolson	8/6/2010 7/1/2012
Qualifications (if required): Native American representative			
<b>Tourism Advisory Council (Commerce)</b>			
Ms. Rhonda Fitzgerald Whitefish	Governor	reappointed	8/23/2010 7/1/2013
Qualifications (if required): resident of Glacier Country			
Mr. Bill McGladdery Butte	Governor	reappointed	8/23/2010 7/1/2013
Qualifications (if required): resident of Goldwest Country			
Mr. Stan Ozark Glasgow	Governor	reappointed	8/23/2010 7/1/2013
Qualifications (if required): resident of Missouri Country			
Ms. Michelle Robinson Billings	Governor	reappointed	8/23/2010 7/1/2013
Qualifications (if required): resident of Custer Country			

**VACANCIES ON BOARDS AND COUNCILS -- OCTOBER 1, 2010 THROUGH DECEMBER 31, 2010**

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
<b>9-1-1 Advisory Council</b> (Administration) Mr. Leo C. Dutton, Helena Qualifications (if required): Montana Sheriff's and Peace Officers Association's representative	Director	10/6/2010
<b>Board of Barbers and Cosmetologists</b> (Labor and Industry) Ms. Delores Lund, Plentywood Qualifications (if required): public representative	Governor	10/1/2010
Ms. Maxine Collins, Helena Qualifications (if required): manicurist	Governor	10/1/2010
<b>Board of Occupational Therapy Practice</b> (Labor and Industry) Ms. Cindy Stergar, Butte Qualifications (if required): public representative	Governor	12/31/2010
Mr. Tim Tracy, Kalispell Qualifications (if required): Occupational Therapist	Governor	12/31/2010
<b>Board of Outfitters</b> (Labor and Industry) Mr. John Wilkinson, Miles City Qualifications (if required): fishing and hunting outfitter	Governor	10/1/2010
<b>Board of Speech-Language Pathologists and Audiologists</b> (Labor and Industry) Ms. Sharon Dinstel, Colstrip Qualifications (if required): speech-language pathologist	Governor	12/31/2010
Mr. James L. Sias, Ronan Qualifications (if required): consumer representative	Governor	12/31/2010

**VACANCIES ON BOARDS AND COUNCILS -- OCTOBER 1, 2010 THROUGH DECEMBER 31, 2010**

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
<p><b>Board of Speech-Language Pathologists and Audiologists</b> (Labor and Industry) cont.                      Ms. Cheri Fjare, Big Timber                      Qualifications (if required): speech-language pathologist</p>	Governor	12/31/2010
<p><b>Historical Preservation Review Board</b> (Historical Society)                      Ms. Rebecca Hanna, Choteau                      Qualifications (if required): paleontologist</p>	Governor	10/1/2010
<p>Ms. Rosalyn LaPier, Missoula                      Qualifications (if required): historical researcher</p>	Governor	10/1/2010
<p><b>Montana Alfalfa Seed Committee</b> (Agriculture)                      Mr. Tom Matchett, Billings                      Qualifications (if required): alfalfa seed grower</p>	Governor	12/21/2010
<p>Mr. Tom Neibur, Malta                      Qualifications (if required): alfalfa seed grower with alfalfa leaf-cutting bees</p>	Governor	12/21/2010
<p><b>Resource Conservation Advisory Council</b> (Natural Resources and Conservation)                      Ms. Marieanne Hanser, Billings                      Qualifications (if required): South Central Montana</p>	Director	12/31/2010
<p>Mr. Robert Fossum, Richland                      Qualifications (if required): Eastern Montana</p>	Director	12/31/2010
<p>Mr. Buzz Mattelin, Culbertson                      Qualifications (if required): Conservation Districts</p>	Director	12/31/2010

**VACANCIES ON BOARDS AND COUNCILS -- OCTOBER 1, 2010 THROUGH DECEMBER 31, 2010**

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
<b>Resource Conservation Advisory Council</b> (Natural Resources and Conservation) cont. Mr. Dave Schwarz, Terry Qualifications (if required): Conservation Districts	Director	12/31/2010
Ms. Lauraine Johnson, Plains Qualifications (if required): Western Montana	Director	12/31/2010
Mr. O. Ramsey Offerdal, Conrad Qualifications (if required): North Central Montana	Director	12/31/2010
Mr. Pete Dallaserra, Butte Qualifications (if required): general public	Director	12/31/2010
<b>Statewide Independent Living Council</b> (Public Health and Human Services) Mr. Bob Maffit, Helena Qualifications (if required): Independent Living Center representative	Governor	12/1/2010
Ms. Nickie Fee, Great Falls Qualifications (if required): public representative	Governor	12/1/2010
Ms. Evelyn Oats, Box Elder Qualifications (if required): Section 121 representative	Governor	12/1/2010
Ms. Melodie Bowen, Great Falls Qualifications (if required): public representative	Governor	12/1/2010
Ms. Lisa Moorehead, Bigfork Qualifications (if required): public representative	Governor	12/1/2010

**VACANCIES ON BOARDS AND COUNCILS -- OCTOBER 1, 2010 THROUGH DECEMBER 31, 2010**

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
<b>Statewide Independent Living Council</b> (Public Health and Human Services) cont. Mr. Dave Swanson, Billings Qualifications (if required): Independent Living Center representative	Governor	12/1/2010
Mr. Chris Cragwick, Missoula Qualifications (if required): public representative/disabilities community/youth member	Governor	12/1/2010
Ms. Kathy Bean, Helena Qualifications (if required): agency representative	Governor	12/1/2010
Ms. Donell Neiss, Missoula Qualifications (if required): public representative/disabilities community	Governor	12/1/2010
<b>Statewide Interoperability Executive Advisory Council</b> (Administration) Director Mike Ferriter, Helena Qualifications (if required): Director of the Department of Corrections	Governor	11/13/2010
Director Janet Kelly, Helena Qualifications (if required): Director of the Department of Administration	Governor	11/13/2010
Director Mary Sexton, Helena Qualifications (if required): Director of the Department of Natural Resources and Conservation	Governor	11/13/2010
Mr. Chuck Winn, Bozeman Qualifications (if required): municipal government representative	Governor	11/13/2010
Mr. Leo C. Dutton, Helena Qualifications (if required): county law enforcement representative	Governor	11/13/2010

**VACANCIES ON BOARDS AND COUNCILS -- OCTOBER 1, 2010 THROUGH DECEMBER 31, 2010**

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
<b>Statewide Interoperability Executive Advisory Council</b> (Administration) cont.		
Director Jim Lynch, Helena Qualifications (if required): Director of the Department of Transportation	Governor	11/13/2010
Ms. Sheena Wilson, Helena Qualifications (if required): Governor's office representative	Governor	11/13/2010
Commissioner Kathy Bessette, Havre Qualifications (if required): county government representative	Governor	11/13/2010
Ms. Anna Whiting-Sorrell, Helena Qualifications (if required): Director of the Department of Public Health and Human Services	Governor	11/13/2010
Mr. Christian Mackay, Helena Qualifications (if required): Executive officer of the Board of Livestock	Governor	11/13/2010
Mr. Joe Maurier, Helena Qualifications (if required): Director of the Department of Fish Wildlife and Parks	Governor	11/13/2010
Atty. General Steve Bullock, Helena Qualifications (if required): attorney general	Governor	11/13/2010
Chief Alan Michaels, Glendive Qualifications (if required): municipal law enforcement representative	Governor	11/13/2010
Mr. Jeff Logan, Missoula Qualifications (if required): paid fire department representative	Governor	11/13/2010

**VACANCIES ON BOARDS AND COUNCILS -- OCTOBER 1, 2010 THROUGH DECEMBER 31, 2010**

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
<b>Statewide Interoperability Executive Advisory Council</b> (Administration) cont.		
Mr. Rick Poss, Lewistown Qualifications (if required): emergency medical community representative	Governor	11/13/2010
Ms. Heather Roos, Miles City Qualifications (if required): 9-1-1 community representative	Governor	11/13/2010
Mr. Ed Joiner, Lame Deer Qualifications (if required): tribal government representative	Governor	11/13/2010
Ms. Brenna Neinast, Havre Qualifications (if required): federal representative	Governor	11/13/2010
Ms. Jodi Camrud, Billings Qualifications (if required): federal representative	Governor	11/13/2010
Commissioner Ed Tinsley, Fort Harrison Qualifications (if required): Administrator Disaster and Emergency Services Division	Governor	11/13/2010
<b>Vocational Rehabilitation Council</b> (Public Health and Human Services)		
Mr. Lynn Winslow, Helena Qualifications (if required): advocacy program representative	Governor	10/1/2010
Rep. Carol Lambert, Broadus Qualifications (if required): statewide independent living council representative	Governor	10/1/2010
Ms. Claudette Vance, Kalispell Qualifications (if required): community rehabilitation program representative	Governor	10/1/2010

**VACANCIES ON BOARDS AND COUNCILS -- OCTOBER 1, 2010 THROUGH DECEMBER 31, 2010**

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
<b>Vocational Rehabilitation Council</b> (Public Health and Human Services) cont. Ms. Nina Cramer, Missoula Qualifications (if required): representative of organized labor	Governor	10/1/2010
Mr. Dick Trerice, Helena Qualifications (if required): state education agency representative	Governor	10/1/2010
Ms. Mary Hall, Missoula Qualifications (if required): parent organization representative	Governor	10/1/2010
Ms. Chanda Hermanson, Helena Qualifications (if required): advocacy program representative	Governor	10/1/2010