

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

In the matter of the adoption of NEW)	NOTICE OF ADOPTION,
RULES I through IV, the amendment)	AMENDMENT AND REPEAL
of ARM 37.95.102, 37.95.103,)	
37.95.106, 37.95.108, 37.95.117,)	
37.95.121, 37.95.127, 37.95.139,)	
37.95.141, 37.95.160, 37.95.161,)	
37.95.162, 37.95.172, 37.95.173,)	
37.95.183, 37.95.184, 37.95.602,)	
37.95.606, 37.95.622, 37.95.623,)	
37.95.703, 37.95.705, 37.95.706,)	
37.95.730, 37.95.1005, and the)	
repeal of ARM 37.95.145, 37.95.150,)	
37.95.166, and 37.95.174, pertaining)	
to the federal Child Care and)	
Development Block Grant)	
Reauthorization Act, disaster and)	
emergency planning, and health and)	
safety requirements for child care)	
facilities)	

TO: All Concerned Persons

1. On November 24, 2017, the Department of Public Health and Human Services published MAR Notice No. 37-811 pertaining to the public hearing on the proposed adoption, amendment, and repeal of the above-stated rules at page 2141 of the 2017 Montana Administrative Register, Issue Number 22.

2. The department has adopted the following rules as proposed: New Rule II (37.95.163). The department has amended the following rules as proposed: ARM 37.95.103, 37.95.108, 37.95.117, 37.95.121, 37.95.127, 37.95.139, 37.95.141, 37.95.160, 37.95.161, 37.95.173, 37.95.184, 37.95.602, 37.95.705, 37.95.706, and 37.95.730. The department has repealed the following rules as proposed: ARM 37.95.145, 37.95.150, 37.95.166, and 37.95.174.

3. The department has adopted the following rules as proposed, but with the following changes from the original proposal, new matter underlined, deleted matter interlined:

NEW RULE I (37.95.126) CHILD CARE FACILITIES: EMERGENCY DISASTER AND ACTION PLANS (1) and (2) remain as proposed.

(3) The facility must conduct ~~eight~~ ten emergency drills per year to include:

(a) ~~six~~ eight fire drills; and

(b) and (4) remain as proposed.

AUTH: 52-2-704, MCA

IMP: 52-2-704, 52-2-723, 52-2-731, 52-2-734, MCA

NEW RULE III (37.95.621) CHILD CARE CENTERS: DIRECTOR QUALIFICATIONS AND RESPONSIBILITIES (1) remains as proposed.

(2) The director must meet the following minimum requirements:

(a) through (c) remain as proposed.

(d) have one of the following:

(i) and (ii) remain as proposed.

(iii) current ECP Practitioner Registry level 2, plus three years of experience in a licensed child care facility or Head Start; ~~or~~

(iv) a bachelor degree or higher ~~in a non-child care field according to ECP criteria in any field~~, plus completion of the 60 hour infant-toddler training and the 60 hour preschool course, or 120 hours of alternate training approved by the department; ~~or~~

(v) a combination of education and experience may be considered. This option must be approved by the CCLP manager.

(3) The director must complete the program management essentials course within 60 days of becoming a director or successfully complete an approved new director orientation such as program essentials.

(3) remains as proposed, but is renumbered (4).

(4) (5) The director or other authorized staff person shall review every incident or accident causing injury to a child, resulting in medical or dental care, and document the appropriate corrective action taken to avoid a reoccurrence.

(5) through (7) remain as proposed, but are renumbered (6) through (8).

AUTH: 52-2-704, MCA

IMP: 52-2-704, 52-2-723, 52-2-731, MCA

NEW RULE IV (37.95.704) GROUP AND FAMILY CHILD CARE: STAFFING QUALIFICATIONS AND RESPONSIBILITIES (1) through (3) remain as proposed.

(4) Substitute teachers who work less than 500 hours per year must meet all the requirements of this rule except for (2)(c).

(5) remains as proposed.

AUTH: 52-2-704, MCA

IMP: 52-2-704, 52-2-723, 52-2-731, MCA

4. The department has amended the following rules as proposed, but with the following changes from the original proposal, new matter underlined, deleted matter interlined:

37.95.102 DEFINITIONS (1) through (13) remain as proposed.

(14) "Facility overview on-the-job training" is a an on-the-job training provided by the facility director or designee to orient a new staff member to facility-specific policies, procedures, and department requirements pertaining to their role.

(15) through (26) remain as proposed.

(27) "Montana ECP Practitioner Registry" or "Practitioner Registry" ~~is an early childhood professional recognition system and career path in Montana.~~ is a statewide registry that is used to help develop and track a knowledgeable and skilled early childhood work force based on an individual's verified professional achievements.

(28) "Night care" or "non-traditional hours" means care provided for a child between the hours of 8 p.m. and 5 a.m.

(29) through (57) remain as proposed.

AUTH: 52-2-704, 53-4-212, 53-4-503, MCA

IMP: 52-2-702, 52-2-703, 52-2-704, 52-2-713, 52-2-723, 52-2-725, 52-2-731, 52-2-735, 52-2-736, 53-2-201, 53-4-211, 53-4-212, 53-4-601, 53-4-611, 53-4-612, MCA

37.95.106 CHILD CARE FACILITIES, REGISTRATION, OR LICENSING

(1) and (2) remain as proposed.

(3) Before a regular child care center license may be granted, the applicant must have the following:

(a) through (e) remain as proposed.

(f) a signed health ~~statement for licensure form~~ attestation for each staff member who has direct contact with the children in care;

(g) through (8) remain as proposed.

AUTH: 52-2-704, 53-4-503, MCA

IMP: 52-2-704, 52-2-722, 52-2-723, 52-2-731, 53-4-504, 53-4-507, MCA

37.95.162 CHILD CARE FACILITIES: REQUIRED ANNUAL TRAINING

(1) remains as proposed.

(2) The training ~~may be obtained through~~ must be approved through MTECP in one of three ways:

(a) sponsors ~~approved~~ verified through the Montana professional development ~~approval~~ system;

~~(b) institutions of higher education that are regionally accredited; or~~

~~(c) (b) successful completion of college-level course work in early childhood, education, or child development by institutions of higher education that are regionally accredited; or~~

(c) individual request.

(3) remains as proposed.

(4) ~~Any person~~ A substitute who provides care to children in a child care facility for less than 500 hours a year is not required to complete annual training or be current on the ECP Practitioner Registry.

(5) ~~Teachers and assistant teachers~~ ECTs at facilities that provide care exclusively to school-age children must complete at least eight hours of continuing education annually and are not required to be on the ECP Practitioner Registry.

AUTH: 52-2-704, MCA
IMP: 52-2-704, 52-2-723, 52-2-731, MCA

37.95.172 CHILD CARE FACILITIES: SUPERVISION AT ALL TIMES

- (1) remains as proposed.
- (2) The provider, director, and ~~all teachers and assistant teachers~~ ECTs must be responsible for direct care, protection, supervision, and guidance of children through active involvement or direct observation.

AUTH: 52-2-704, MCA
IMP: 52-2-704, 52-2-723, 52-2-731, MCA

37.95.183 CHILD CARE FACILITIES: FIRST AID REQUIREMENTS

- (1) through (5) remain as proposed.
- (6) The facility must submit a report to the Child Care Licensing Program (CCLP) within 24 hours after the following ~~types of occurrences~~ events, involving the child care facility, occur on or away from the premises:
 - (a) and (b) remain as proposed.
 - (c) suspected sexual, physical, or emotional abuse by staff, other children, family members, or other adults ~~while they are on the premises;~~
 - (d) through (i) remain as proposed.
 - (j) fire involving the ~~child care facility or on the premises~~ fire department.
- (7) remains as proposed.

AUTH: 52-2-704, MCA
IMP: 52-2-704, 52-2-723, 52-2-731, MCA

37.95.606 CHILD CARE CENTERS, GUIDANCE AND DISCIPLINE

- (1) Early childhood teachers must use appropriate forms of guidance and discipline. Physical punishment, including spanking or other forms of corporal punishment, is strictly prohibited in child care facilities. Discipline must include positive guidance, redirection, and the setting of clear limits that foster the child's ability to become self-disciplined. In addition, all staff must model appropriate behaviors for children in the facility.
- (2) through (4) remain as proposed.

AUTH: 52-2-704, 53-4-503, MCA
IMP: 52-2-723, 52-2-731, 53-4-504, 53-4-508, MCA

37.95.622 CHILD CARE CENTERS: STAFFING QUALIFICATIONS

- (1) remains as proposed.
- (2) An early childhood lead teacher must meet the following requirements:
 - (a) remains as proposed.
 - (b) complete facility overview on-the-job training;
 - (c) through (f) remain as proposed.
- (3) An early childhood assistant teacher must:

- (a) ~~be supervised by an early childhood lead teacher or director~~ receive oversight and guidance from an onsite ECLT or director;
- (b) through (6) remain as proposed.

AUTH: 52-2-704, MCA

IMP: 52-2-704, 52-2-723, 52-2-731, MCA

37.95.623 CHILD CARE CENTERS: CHILD-TO-STAFF RATIOS

- (1) The child-to-staff ratio and maximum group size for a child care center are:
 - (a) 4:1 for children ~~zero months~~ newborn through 23 months with a maximum group size of 12;
 - (b) remains as proposed.
 - (c) 10:1 for children four years ~~through five years~~ with a maximum group size of 24; and
 - (d) 14:1 for ~~six~~ five years and over with a maximum group size of 32.
- (2) When children of different ages are mixed, the ratio and group size for the youngest child in the group must be maintained.
- (3) remains as proposed.
- (4) Group sizes must be maintained except for mealtimes, ~~or periods when children are using their rest equipment~~ outdoor play, rest periods, or when during large group activities, such as educational assemblies, ~~occur~~.

AUTH: 52-2-704, MCA

IMP: 52-2-703, 52-2-704, 52-2-723, 52-2-731, MCA

37.95.703 GROUP AND FAMILY CHILD CARE FACILITIES: DIRECTOR RESPONSIBILITIES AND QUALIFICATIONS (1) remains as proposed.

- (2) The director must meet the following requirements:
 - (a) through (d) remain as proposed.
 - (e) successfully complete a program management course within 60 days of becoming a director;
 - (f) through (5) remain as proposed.
- (6) The director or designee must review every incident or accident causing injury to a child resulting in medical or dental care, and document the appropriate corrective action taken to avoid a reoccurrence.

AUTH: 52-2-704, MCA

IMP: 52-2-704, 52-2-723, 52-2-731, MCA

37.95.1005 INFANT AND TODDLER, SLEEPING (1) remains as proposed.

- (2) Unless the parent has provided medical documentation from a health care provider ordering otherwise, infants must be placed on their back and on a firm surface with no incline to reduce the risk of Sudden Infant Death Syndrome (SIDS).
- (3) Each infant must be provided with a crib or play pen for sleeping. At the discretion of the parent and provider, a cot or mat may be used once a child turns one year of age as long as a safe sleep environment is provided. Children one year

of age through 18 months who are placed on a mat must have a signed permission statement in the file indicating that the parent has given permission for their child to be placed on a mat. ~~In addition~~ When cots or mats are used, an early childhood teacher must remain with the child while they are sleeping.

(a) Infants and toddlers must not be ~~routinely~~ allowed to sleep in a car seat, infant swing, or other infant apparatus.

(b) through (6) remain as proposed.

(7) All pillows, quilts, comforters, heavy blankets, sheepskins, bumper pads, stuffed toys, and other soft products must be removed from the crib and play pen when an infant is laid down for sleep.

~~(a) If a lightweight blanket is used, the child's feet must be placed at the foot of the crib or play pen and the blanket must be tucked along the sides and foot of the mattress. the blanket should not come up higher than the child's chest~~ Blankets of any weight must be removed when infants 12 months of age or under are laid down for sleep.

(b) Sleep sacks and similar safe sleep clothing may be used if the item does not restrict the infant's arms.

(c) Infants under 3 months of age may only be swaddled if medical documentation from a health care provider is on file at the facility.

(d) Infants over 3 months of age must not be swaddled.

~~(8) Each infant and t~~ Toddlers ~~must have been~~ be provided by the parent with a clean washable blanket or other suitable covering for their use while sleeping. Each ~~infant's and toddler's~~ child's bedding must be stored separate from bedding used by other children.

(9) through (11) remain as proposed.

AUTH: 52-2-704, MCA

IMP: 52-2-731, MCA

5. 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: One commenter requested clarification on New Rule I with regards to the number of fire drills required citing that local fire marshals require more.

RESPONSE #1: The department agrees some facilities will be required by the fire department to have more fire drills than what is required by the department. All child care centers must follow rules set forth by building codes in addition to administrative child care rules. The fire code requires Group E (educational) occupancies to have monthly fire drills. There is an exception that allows the fire code official to modify the monthly drills due to extreme weather. If the child care facility is classified as a Group I (institutional) occupancy, they are required to have quarterly inspections for staff only. Child care facilities could be classified as either a Group E or I occupancy depending on the age and number of children in the daycare. In order to minimize the difference in requirements, the department will

increase the number of fire drills to eight. The adopted rule has been revised to reflect this change.

COMMENT #2: One commenter proposed that ARM 37.95.623 be changed to include 5 year old children in the 14:1 ratio.

RESPONSE #2: The department agrees with the comment. It is developmentally appropriate and recommended that 5 year old children who attend school participate with other age groups that are in school. The adopted rule has been revised to reflect this change.

COMMENT #3: One commenter recommended that all potential child care workers undergo drug testing before working in a child care facility.

RESPONSE #3: Statute does not give the department the authority to require drug testing without reasonable belief that the person has engaged in behaviors that may place children at risk of harm (See ARM 37.95.168). In addition, the commenter indicates that CFSD may remove children from parents if the parent is addicted to drugs. However, there is no law that requires all parents to be drug tested and there must be a reason to require the parent to be drug tested. The same is true for child care staff. If a criminal or CPS investigation reveals drug use, the individual may not be approved to work or live in a child care facility. The references for these are found in ARM 37.95.161, 37.95.171, 37.95.173, 37.95.174, and 37.95.176.

COMMENT #4: Several comments were received requesting clarification about whether group size requirements apply to outdoor play environments.

RESPONSE #4: The department agrees with the comment. The group size rule is intended for the indoor environment and does not intend to include outdoor play time. The adopted rule has been revised to reflect this change.

COMMENT #5: Several comments were received requesting clarification of defined space in group sizes.

RESPONSE #5: The department recognizes that the group size definition is broad. However, this requirement needs to be broad as it is new to the child care rules, and must be adaptable to accommodate the many different existing programs and floor plans. Refinements and adjustments will likely be necessary over time. Therefore, interpretive guidelines and individualized plans will be developed to help existing facilities come into compliance without significant financial burden.

COMMENT #6: Two commenters suggested that the term discipline be changed to guidance in ARM 37.95.606. One of the commenters further proposed that the title of ARM 37.95.606 be changed to Guidance and Discipline.

RESPONSE #6: The department agrees with the comments. The adopted rule has been revised to reflect this suggestion.

COMMENT #7: One commenter recommended that the language in ARM 37.95.106 and 37.95.160 referencing staff health statements be made consistent. The commenter proposed that the department use the term "health statement."

RESPONSE #7: The department agrees with the comment. The adopted rule has been revised to reflect this suggestion.

COMMENT #8: Several comments were received regarding the number of annual training hours and current ECP requirements and role type requirements. These comments expressed concern with the connection between MTECP and the proposed changes to the ECP registry.

RESPONSE #8: The department appreciates the comment, but the MTECP is contracted by the department and the department has the authority to guide their work, including setting annual training hours.

COMMENT #9: Two commenters suggested that the language for ARM 37.95.162 be changed to better align with the method that is used to approve training by ECP.

RESPONSE #9: The department agrees with the comment. The adopted rule has been revised to reflect this suggestion.

COMMENT #10: One commenter proposed that only certain types of incidents or accidents are required to have a plan of correction and the rule be changed to identify which types.

RESPONSE #10: The department agrees that not every incident and accident needs a plan of correction. The adopted rule has been revised to reflect this suggestion.

COMMENT #11: Two commenters requested that substitute teachers be exempt from the orientation training specified in New Rule II.

RESPONSE #11: The department appreciates the comment. CCDF requirement requires this for all staff that provide care to children, including substitutes. The department has worked to find ways to ease the burden to providers by offering most the orientation trainings on-line and at no cost.

COMMENT #12: Two commenters requested that programs that serve only children age two and older be excluded from the requirement to take safe sleep and shaken baby syndrome/abusive head trauma training as noted in New Rule II.

RESPONSE #12: The department appreciates the comments. The CCDF State plan states that all early childhood professionals complete this training. Safe sleep and shaken baby syndrome/abusive head trauma training are two of the 11 areas

outlined in the CCDF State Plan which has been federally approved. The department offers both trainings on-line and at no cost.

COMMENT #13: One commenter proposed mandatory inspections for Family, Friend and Neighbor (FFN) homes under ARM 37.95.103.

RESPONSE #13: The department does not agree. The department recognizes the importance of inspections; however, the CCDBG Reauthorization Act authorizes limited exclusions from inspection, and the department contends that the CCDBG and current rules provide the necessary amount of inspection enforcement for all licensed or registered facilities.

COMMENT #14: Several commenters requested that current directors, and other role types be "grandfathered" and not be required to meet the qualifications specified in proposed rules.

RESPONSE #14: While the department will not exempt existing role types from new qualifications, existing role types will be provided time and guidance to transition into full compliance.

COMMENT #15: One commenter stated concern over New Rule I pertaining to the requirement of emergency supply of blankets, water, food, and supplies. The commenter requested that an exception be made for school age programs as they are often located in gyms and lack sufficient storage space.

RESPONSE #15: The department believes that these comments pertain to implementation of the proposed rule and that it is more appropriate for implementation procedures to be set forth through interpretive guidelines, policy, and training. The department will consider any emergency plans that show the intent of the rule is met within the resources available to the facility.

COMMENT #16: One commenter requested additional role types with different qualifications be added to line up with the needs of school age programs.

RESPONSE #16: The department recognizes that not all staff role types will match up with every facility and their unique circumstances. The department has attempted to align role types with titles commonly used in the early childhood development profession. The department believes that school-age programs would benefit from a separate license type with more age appropriate rules, staff requirements and role types; a change to the Montana Child Care Act within statute will be required. The department will work with school age programs to identify appropriate role types for the setting.

COMMENT #17: One commenter proposed role types be aligned with MTECP role types.

RESPONSE #17: The department disagrees with this comment. While the department has attempted to align role types with MTECP terms as much as possible, MTECP is intended to be a tool to approve and track training. Therefore, in some cases, MTECP does not differentiate role types based on the varying responsibilities that are required in rule by the department.

COMMENT #18: Several comments were received regarding time frames for implementation of the rule changes.

RESPONSE #18: The proposed changes will go into effect on the date of adoption. The department will consider requests for transition plans and will communicate time frames with providers following the adoption. Providers will be allowed time and guidance.

COMMENT #19: Two commenters expressed concern with ARM 37.95.1005 and recommended that the department clarify the language regarding supervision of napping infants.

RESPONSE #19: The department agrees with the comment. The adopted rule has been revised to reflect this suggestion.

COMMENT #20: One commenter recommends that the department consider following national standards which recommend no blankets for napping infants. ARM 37.95.1005 allows for a lightweight blanket.

RESPONSE #20: The department agrees with the comment. The adopted rule has been revised to reflect this suggestion.

COMMENT #21: One commenter requested clarification regarding the reporting requirements for incidents that happen outside of the facility noting that ARM 37.95.183 is silent in this area.

RESPONSE #21: The department agrees with the comment. The adopted rule has been revised to reflect this suggestion.

COMMENT #22: One commenter stated that ARM 37.95.183 does not take into consideration the situation of a parent refusing to consent to OTC sunscreen and bug spray. The rule requires providers to take precautions to prevent West Nile virus and sunburn. The commenter also expressed concern about self-reporting and getting cited for doing so.

RESPONSE #22: The department disagrees with this comment. If the parent does not give written consent to OTC sunscreen and bug spray, and the facility chooses to enroll the child, the facility must find alternative methods for protecting the child from West Nile virus and sunburn. With regard to self-reporting, the department has a responsibility to investigate regardless of the source. It is the provider's responsibility to report although it may result in a deficiency.

COMMENT #23: One commenter stated that ARM 37.95.172 pertaining to supervision should be more specific and contain examples. Commenter further recommends that training on supervision be added to new provider orientation requirements.

RESPONSE #23: The department appreciates the comment. Supervision in child care facilities is critical; however, the department believes that this is reflected in the proposed rule. The department is currently revising orientation curriculum, adding additional guidance on supervision practices.

COMMENT #24: One commenter requested clarification on supervision of ECAT.

RESPONSE #24: The department agrees with the comment. The adopted rule has been revised to reflect this change and further clarification will be provided through interpretive guidelines.

COMMENT #25: One commenter requested clarification of "disposal of body fluids" in New Rule II.

RESPONSE #25: The department appreciates the comment. Further clarification should be addressed in orientation training.

COMMENT #26: Several comments were received recommending proposing consistency of role types throughout child care rules.

RESPONSE #26: The department agrees with this comment. The adopted rule has been revised to reflect this change. It should be noted that in definition, ECT encompasses "any staff that provides direct care to children." This includes family and group child care staff as well ECAT and ECLT in centers.

COMMENT #27: Two commenters requested clarification about the term "chapter."

RESPONSE #27: Chapter 95 is where all childcare licensing rules are located within Title 37 of the Administrative Rules of Montana. For example, ARM 37.95.101 is located in Title 37, chapter 95, subchapter 1.

COMMENT #28: One commenter expressed concern about the emergency preparedness and response in the orientation training in New Rule II. Commenter noted that providers have previously been allowed to develop their own emergency preparedness programs and train staff; it was requested that they be able to continue to do so.

RESPONSE #28: The department appreciates the comment. The orientation training has been federally approved through the CCDF State Plan and therefore all teachers will be required to take the approved training.

COMMENT #29: One commenter suggested that experience be documented in hours vs. months and years.

RESPONSE #29: The department disagrees with this comment. CCLP tracks staff based on hire dates and has no method for capturing and tracking the number of hours every staff person works.

COMMENT #30: One commenter requested the removal of "non-child care" from section (2)(d)(iv) in New Rule III, and further suggest removal of the (iv) in the same section. This section offers alternative pathways for meeting the director qualifications.

RESPONSE #30: The department agrees with the first part of this comment. The adopted rule has been revised to reflect this suggestion. The department declines to remove subsection (iv) as this section allows CCLP to consider director qualifications outside of the ECP Practitioner Registry Level.

COMMENT #31: Two commenters proposed to change the term "night care" to "non-traditional hours."

RESPONSE #31: The department agrees in part with this comment. It should be noted that there are rules within this chapter that apply only to care provided at night and do not apply to other non-traditional hours such as weekend care during the day. Therefore, the adopted rule has been revised to include "non-traditional hours" as an alternative term.

COMMENT #32: One commenter proposed that qualifications for group and family child care directors be the same as for child care center directors.

RESPONSE #32: The department disagrees with this comment. The department believes that the expectations and responsibilities in a child care center are much greater than a group or family child care setting. The proposed rule is increasing the qualification for both types of director. In addition, research had shown that Montana needs more child care facilities. The department estimates that this would limit the number of group and family facilities that would be registered and create a child care crisis.

COMMENT #33: Two commenters proposed to change the definition "MTECP Practitioner Registry."

RESPONSE #33: The department agrees in part with this comment. The proposed language includes information not needed in a rule definition. Therefore, the department has paraphrased the proposed language. The adopted rule has been revised to reflect this suggestion.

COMMENT #34: The department received many comments outside the scope of the rulemaking regarding statutory provisions and aspects of federal law.

RESPONSE #34: While the department appreciates the comments, the department does not respond to such comments because they are outside the rulemaking process.

/s/ Flint Murfitt
Flint Murfitt, Attorney
Rule Reviewer

/s/ Sheila Hogan
Sheila Hogan, Director
Public Health and Human Services

Certified to the Secretary of State January 30, 2018.