

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

In the matter of the adoption of New Rule I and the amendment of ARM 37.97.102, 37.97.132, and 37.97.186 pertaining to updating rules for youth care facilities ) NOTICE OF ADOPTION AND AMENDMENT ) ) ) ) )

TO: All Concerned Persons

1. On January 15, 2015, the Department of Public Health and Human Services published MAR Notice No. 37-704 pertaining to the public hearing on the proposed adoption and amendment of the above-stated rules at page 12 of the 2015 Montana Administrative Register, Issue Number 1.

2. The department has amended ARM 37.97.186 as proposed.

3. The department has adopted the following rule as proposed with the following changes from the original proposal. Matter to be added is underlined. Matter to be deleted is interlined.

NEW RULE I (37.97.191) YOUTH CARE FACILITY (YCF): FIRE SAFETY

(1) The department adopts and incorporates by reference ~~group R-3 of the occupancy designation/classification group R-3 of the International Fire Code (IFC), January 1, 2012,~~ which sets forth the fire safety regulations that apply to youth care facilities. A copy of ~~group R-3 of the International Fire Code~~ IFC definitions and requirements for R-3 occupancies may be obtained from the Fire Prevention and Investigation Section of the Department of Justice, 2225 11th Avenue, Helena, Montana, 59620.

(2) remains as proposed.

(3) Smoke detectors approved by a recognized testing laboratory must be located on each level of the facility, at the top of stairways, in any bedroom, in any hallway leading to bedrooms, and in areas requiring separation as set forth in the ~~International Fire Code according to IFC Section 907.2.10~~ 907.2.11, IFC.

(4) through (11) remain as proposed.

AUTH: 52-2-111, 52-2-113, 52-2-603, 52-2-622, MCA  
IMP: 52-2-111, 52-2-603, ~~62-2-622~~ 52-2-622, 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:

37.97.102 YOUTH CARE FACILITY (YCF): DEFINITIONS The following definitions apply to all YCF licensing rules:

(1) through (33) remain as proposed.

AUTH: 41-3-1142, 52-2-111, 52-2-603, 52-2-622, MCA  
IMP: 52-2-113, ~~52-2-602~~ 52-2-603, 52-2-622, 53-2-201, MCA

37.97.132 YOUTH CARE FACILITY (YCF): GENERAL REQUIREMENTS FOR ALL ADMINISTRATORS, STAFF, INTERNS, AND VOLUNTEERS (1) through (7) remain as proposed.

(8) All direct-care staff who transport youth must have a valid driver's license and, while transporting youth, follow all laws applicable to driving in Montana.

AUTH: 52-2-111, 52-2-603, 52-2-622, MCA  
IMP: 52-2-111, 52-2-603, 52-2-622, 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:

Comments to NEW RULE I (ARM 37.97.191)

COMMENT #1: A commenter stated R-3 is an occupancy designation/classification found in the definitions in Chapter 2, not a regulation.

RESPONSE #1: The department agrees with the commenter and the proposed new rule has been modified as suggested by the state fire marshal.

COMMENT #2: A commenter stated the new rule seems reasonable; however, the commenter believes the department failed to take into consideration the cost imposed for requiring staff to be trained on the proper use of fire extinguishers.

RESPONSE #2: The department agrees that the new rule is reasonable and thanks the commenter; however, the department disagrees that the cost of training has not been considered. The department believes the training is minimal and can be provided during the orientation training required of new staff. The department does not describe how this training is to be provided only that it is to be provided; additionally, the rule as written allows providers to develop their own method for that training.

COMMENT #3: A commenter pointed out that a typographical error was made under the Montana Code Annotated (MCA) authority section.

RESPONSE #3: The department corrected the reference to 62-2-622, MCA, by changing it to 52-2-622, MCA.

Comments to ARM 37.97.102

COMMENT #4: A commenter pointed out that one MCA citation had been renumbered and another MCA citation needed to be corrected.

RESPONSE #4: The department corrected the reference to 41-3-1142, MCA by changing it to 52-2-111, MCA. 52-2-602, MCA, was corrected to 52-2-603, MCA.

Comments to ARM 37.97.132

COMMENT #5: One comment was received concerning the definition for "grounds for records." The commenter indicated that investigations and background checks are currently being conducted.

RESPONSE #5: The department believes that the commenter's comment is beyond the scope of this rule change.

COMMENT #6: A commenter wrote that it is unreasonable to require all direct care staff to have a current valid driver's license. The commenter stated that the department does not reimburse providers for the cost of transporting clients. The commenter believes it may be discriminatory if a person has a disability that precludes them from being able to obtain a driver's license; however, the person may provide competent care to youth. The commenter believes the department is overreaching its role with private employers who, in the end, are held responsible for employment laws and the Americans with Disabilities Act (ADA) requirements.

RESPONSE #6: The department agrees that only staff required to transport youth should have a current driver's license. The proposed new rule has been amended. The department disagrees with the comment that the providers are not reimbursed for the cost for transportation. The cost for transportation is included in the provider's daily rate.

COMMENT #7: Two commenters were concerned about staff receiving traffic tickets and how the department would respond. One commenter states the vague nature of this rule allows incredible discretion by the department and licenser. Is one "failure to yield" allowed but a "driving too fast for conditions" grounds for termination? Again, as a private employer, the youth care facility (YCF) may impose employment policies that, for example, require the employee have a driving record that allows them to be insured by the YCF's insurance company or prohibit the use of the employee's personal vehicle to perform job responsibilities; however, these kinds of policies should be established and enforced by the employer. It is the employer, not the department, who assumes the risk and liability for employees who may be required to drive as a job requirement. The commenters urged the department to not adopt this proposed amendment to the rule.

RESPONSE #7: It is not the intent of the department to monitor driver records of staff or driving performance while off duty. The department has amended the proposed rule to require staff to follow all laws applicable to driving in Montana while transporting youth. It is vital that staff drive in a safe and prudent manner while

transporting youth. It is quite reasonable for the department to require staff to follow all laws while transporting youth. The department does not require providers to terminate staff based on a minor rule violation. If the violation places youth at risk the provider would be responsible for correcting the violations in a reasonable manner. Providers continue to be responsible for employing staff that do not place the youth in their care at risk of harm.

Comments to ARM 37.97.186

COMMENT #8: A commenter said the maintenance policy is subjective and the schedule is unnecessary and burdensome on providers by adding time to orientation training. The commenter believes the department is micromanaging requiring additional paperwork and written policies for providers.

RESPONSE #8: The department contends a maintenance policy will ensure all providers and their staff are aware of the responsibility to provide a clean and well maintained home. The rule allows providers to implement a maintenance policy that works best for them which can include monthly inspections as one commenter requires. Direct care staff members are typically responsible for the majority of cleaning in YCFs and should be informed of their duties as such and this information should be included in orientation training.

COMMENT #9: A commenter said that a rule requiring adequate housekeeping and maintaining home and furnishings in good repair creates a number of subjective standards open to interpretation, confusion, and challenges in consistent implementation.

RESPONSE #9: The department applies reasonable standards for interpretation and implementation of rules. The department inadvertently removed this requirement when revising the YCF rules in 2011. The department believes it is necessary to reimplement the requirement. Past implementation of the requirement did not cause a significant impact on providers and maintaining equipment and furniture is an ordinary cost of doing business. When conflicts arise, the surveyors review the information with the surveyor's supervisor in order to come to a reasonable conclusion. When violations are cited and the provider disagrees, they have the opportunity to discuss those issues with the department's licensing supervisor.

COMMENT #10: A commenter asked what is the definition for a safe and sufficient quantity for cleaning supplies, as many contain hazardous material.

RESPONSE #10: As stated in the rule, sufficient quantity would mean enough to meet the housekeeping needs of the facility.

Hazardous material, poison, and toxin requirements are outlined in existing sections of the rule and are not within the scope of this proposed rule change.

/s/ Susan Callaghan  
Susan Callaghan, Esq.  
Rule Reviewer

/s/ Richard H. Opper  
Richard H. Opper, Director  
Public Health and Human Services

Certified to the Secretary of State June 1, 2015