

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 IV and the amendment of ARM 37.5.118, 37.5.304, 37.5.307, 37.47.602, 37.47.610, 37.47.613, 37.47.614, and 37.51.216 pertaining to substantiation of abuse and neglect reports and disclosure of information) NOTICE OF PUBLIC HEARING ON PROPOSED ADOPTION AND AMENDMENT

TO: All Concerned Persons

1. On September 17, 2020, at 10:00 a.m., the Department of Public Health and Human Services will hold a public hearing via remote conferencing to consider the proposed amendment of the above-stated rule. Because there currently exists a state of emergency in Montana due to the public health crisis caused by the coronavirus, there will be no in-person hearing. Interested parties may access the remote conferencing platform in the following ways:

(a) Join Zoom Meeting at: <https://mt-gov.zoom.us/j/95574421357>; meeting ID: 955 7442 1357; or

(b) Dial by telephone +1 646 558 8656; meeting ID: 955 7442 1357. Find your local number: <https://mt-gov.zoom.us/u/ad6NjwGku4>.

2. The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the Department of Public Health and Human Services no later than 5:00 p.m. on September 11, 2020, to advise us of the nature of the accommodation that you need. Please contact Heidi Clark, 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 DECLARATION OF PURPOSE: CHILD ABUSE AND NEGLECT INVESTIGATIONS DETERMINED AS "SUBSTANTIATED" (1) Section 41-3-205, MCA provides that the case records of investigations into child abuse and neglect are confidential.

(2) Section 41-3-205, MCA also provides that persons and entities carrying out background, employment-related, or volunteer-related activities on prospective employees or volunteers who may have unsupervised contact with children may request information from the department. The information that may be provided by the department to such a request is limited to confirmation that the department's

Protective Services Information System has information that indicates the person may pose a risk to children.

(3) The purpose of [New Rule I], [New Rule II], [New Rule III], and [New Rule IV] is to provide a process for which information in a child abuse or neglect investigation may be relied upon by the department in determining that a person may pose a risk to children and can be reported pursuant to 41-3-205, MCA.

(4) It is the policy of the department that any report of child abuse or neglect that is determined as "substantiated" may be disclosed to entities conducting background checks on persons who may have unsupervised access to children.

(5) Substantiated reports may also be used to deny a person a foster care license or employment in any field where a person has or may have unsupervised contact with children.

(6) Nothing in this rule prohibits the department or its personnel from using the facts discovered during an investigation and the associated case record of a child abuse or neglect report investigation, as necessary, to support district court actions under Title 41 of the Montana Code Annotated or an administrative process of the department.

AUTH: 2-4-201, 41-3-208, MCA

IMP: 2-4-201, 41-3-102, 41-3-202, 41-3-205, MCA

NEW RULE II WHEN THE RESULTS OF AN INVESTIGATION OF AN INDIVIDUAL OF REPORTED CHILD ABUSE AND NEGLECT MAY BE DISCLOSED AS POSING A RISK TO CHILDREN

(1) After any investigation of a reported child abuse or neglect has been completed and the safety assessment set forth in 41-3-202, MCA is completed, the investigating worker and the local supervisor must determine how to list the report and investigation in the Protective Information System provided by ARM 37.47.613.

(2) The results of the investigation must be listed as either unsubstantiated, founded, or substantiated.

(3) In order for an investigation to be listed as substantiated against the subject of the report, the investigating worker and the supervisor must determine that the preponderance of the evidence supports a finding that:

- (a) the reported abuse or neglect occurred;
- (b) the subject was the perpetrator of the abuse or neglect; and
- (c) the case file documents sufficient evidence under the totality of the circumstances to find that the subject may pose a risk to children.

(4) The factors considered in determining whether a subject in a child abuse or neglect report may pose a danger to children include but are not limited to:

- (a) the nature of the substantiated abuse or neglect;
 - (b) any prior or subsequent child abuse or neglect reports or investigations involving the perpetrator;
 - (c) any prior or subsequent Youth in Need of Care adjudications in District Court where the perpetrator was determined as an abuser;
 - (d) any prior or subsequent criminal convictions for crimes against children;
- and

(e) the degree to which a child was impacted by any prior or subsequent reported abuse or neglect, or any prior or subsequent criminal convictions.

AUTH: 2-4-201, 41-3-208, MCA

IMP: 2-4-201, 41-3-102, 41-3-202, 41-3-205, MCA

NEW RULE III EFFECT OF A DEPARTMENT DETERMINATION THAT AN INVESTIGATION OF CHILD ABUSE OR NEGLECT IS "SUBSTANTIATED" (1) If after an investigation, fair hearing, or any appeal thereof, the department has determined that the results of an investigation are "substantiated," then the department may:

(a) disclose to any person or entity requesting a background check pursuant to 41-3-205, MCA, that the department has information that indicates that a person may pose a risk to children; and

(b) rely on the information to deny a foster care license pursuant to ARM 37.51.216.

AUTH: 2-4-201, 41-3-208, MCA

IMP: 2-4-201, 41-3-102, 41-3-202, 41-3-205, MCA

NEW RULE IV CHILD ABUSE AND NEGLECT REPORTS DETERMINED AS SUBSTANTIATED PRIOR TO JANUARY 1, 2021 (1) Any child abuse or neglect report or investigation that was determined by the department as substantiated prior to January 1, 2021, may be disclosed to the appropriate persons or entities pursuant to 41-3-205, MCA.

(2) No hearing is available for child abuse or neglect reports that are not determined as substantiated.

AUTH: 2-4-201, 41-3-208, MCA

IMP: 2-4-201, 41-3-102, 41-3-202, 41-3-205, MCA

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

37.5.118 DETERMINATIONS OF REPORTS OF CHILD ABUSE OR NEGLECT: APPLICABLE HEARING PROCEDURES (1) Hearings contesting ~~substantiated~~ reports of child abuse; ~~or neglect or exploitation~~ are determined as reportable pursuant to 41-3-205, MCA, and are available to the extent provided in ARM 37.47.610. The procedures specified in ARM 37.5.304, 37.5.307, 37.5.313, 37.5.322, 37.5.325, 37.5.328, 37.5.331, 37.5.334, and 37.5.337 apply to such hearings, subject to the limitations specified in ARM 37.47.615.

(2) No hearing is available for child abuse or neglect reports that are not determined as ~~unfounded, unsubstantiated, or founded~~ substantiated.

AUTH: 2-4-201, 41-3-208, MCA

IMP: 2-4-201, 2-4-612, 41-3-203, 41-3-204, MCA

37.5.304 DEFINITIONS For purposes of this subchapter, unless the context requires otherwise, the following definitions apply:

- (1) "Adverse action" means:
 - (a) through (m) remain the same.
 - (n) a department's ~~substantiation~~ determination of that a report of child abuse, or neglect, or exploitation under ARM Title 37, chapter 47, subchapter 6 is substantiated pursuant to [New Rule II];
 - (o) a determination by the department that findings of an investigation of abuse or neglect of a vulnerable adult is reportable pursuant to [New Rule II];
 - (o) through (s) remain the same but are renumbered (p) through (t).
 - (2) through (13) remain the same.

AUTH: 41-3-208, 50-53-103, 52-2-111, 52-2-622, 52-2-704, 53-2-201, 53-2-606, 53-4-212, 53-6-111, 53-6-113, 53-7-102, 53-20-305, MCA

IMP: 41-3-202, 41-3-208, 50-53-101, 50-53-102, 50-53-103, 50-53-104, 50-53-106, 50-53-107, 52-2-603, 52-2-704, 52-2-726, 53-2-201, 53-2-606, 53-6-101, 53-6-107, 53-6-111, 53-6-113, 53-20-305, MCA

37.5.307 OPPORTUNITY FOR HEARING (1) through (4) remain the same.

- (5) A hearing request from a claimant must be received in writing within 30 days of the date of mailing of notice of the adverse action regarding:
 - (a) and (b) remain the same.
 - (c) a substantiated report of child abuse, neglect, or exploitation; or
 - (d) a department's determination that an indicated report of abuse, neglect, or exploitation of a vulnerable adult is reportable; or
 - (d) remains the same but is renumbered (e).
 - (6) through (10) remain the same.

AUTH: 2-4-201, 41-3-208, 41-3-1142, 52-2-111, 52-2-112, 52-2-403, 52-2-704, 52-3-304, 52-3-804, 53-2-201, 53-2-606, 53-2-803, 53-3-102, 53-4-111, 53-4-212, 53-4-403, 53-4-503, 53-5-304, 53-6-111, 53-6-113, 53-6-402, 53-7-102, 53-20-305, MCA
IMP: 2-4-201, 41-3-202, 41-3-205, 41-3-1103, 52-2-603, 52-2-704, 52-2-726, 53-2-201, 53-2-306, 53-2-401, 53-2-606, 53-2-801, 53-4-112, 53-4-212, 53-4-404, 53-4-503, 53-4-513, 53-5-304, 53-6-111, 53-6-113, 53-6-402, 53-20-305, MCA

37.47.602 CHILD PROTECTIVE SERVICES: DEFINITIONS For purposes of this subchapter, the following definitions apply:

- (1) through (6) remain the same.
- (7) "Founded report" means that, after an investigation, ~~the investigating worker has determined that there is probable cause to believe that an~~ the department has determined by a preponderance of the evidence that the reported act of child abuse or neglect occurred.
- (8) and (9) remain the same.
- (10) "Substantiated report" means that, after an investigation, ~~the investigating worker~~ department has determined by a preponderance of the evidence that the reported act of child abuse, or neglect, or exploitation occurred, ~~and that the perpetrator of the abuse, neglect, or exploitation may pose a danger to~~

children that the subject of the report may be disclosed to the appropriate entities as a person that may pose a danger to children.

(11) "Unsubstantiated" means that, after an investigation, the department could not determine by the preponderance of the evidence that the reported abuse or neglect occurred.

AUTH: 2-4-201, 41-3-208, 52-3-205, MCA

IMP: 2-4-201, 41-3-102, 41-3-202, 41-3-205, 52-3-205, MCA

37.47.610 CHILD PROTECTIVE SERVICES: RIGHT TO FAIR HEARING TO CONTEST SUBSTANTIATED REPORTS (1) The subject of a child abuse or neglect report that is determined ~~by the department to be~~ as substantiated pursuant to [New Rule II] may request a fair hearing.

(2) remains the same.

(3) Upon receipt of the request for a fair hearing, the department will conduct an informal review of the ~~substantiated report and~~ investigation including the entire case record information.

(a) The informal review is limited to the records and documentation ~~relevant to the case, in the case record~~ and any written material provided by the subject. ~~The informal review is not subject to the provisions of the Montana Administrative Procedure Act, Title 2, chapter 4, MCA.~~

(b) If, after the informal review, the department determines that the results of the investigation are not substantiated report is in error, pursuant to [New Rule II], the department will amend the finding to reflect that the report is ~~unfounded,~~ unsubstantiated, or founded. The subject will be notified of the decision.

(c) If, after the informal review, the department determines that the investigation should be upheld as substantiated report is not in error, pursuant to [New Rule II], the department will notify the department's Office of Fair Hearings so that a fair hearing date and time may be scheduled.

(4) remains the same.

(5) Hearsay statements of the child victim are admissible as evidence in the fair hearing on a ~~substantiated~~ an investigation of child abuse or neglect report. The administrative law judge will determine the weight to give each child victim's hearsay statement. The factors to be considered in determining the weight of the child hearsay statement include:

(a) through (7) remain the same.

(8) A fair hearing is not available for reports that are determined to be ~~unfounded,~~ unsubstantiated, or founded.

AUTH: 2-4-201, 41-3-208, MCA

IMP: 2-4-201, 2-4-612, 41-3-203, 41-3-204, MCA

37.47.613 CHILD PROTECTIVE SERVICES: LISTING OF DETERMINATION IN THE PROTECTION INFORMATION SYSTEM (1) When the department ~~substantiates~~ determines that a report of child abuse, ~~or neglect or exploitation is substantiated pursuant to [New Rule II],~~ the department will initially list its determination in its protective services information system provided in ARM

37.47.315 that the report's final determination is pending. The report will be pending for a period of 30 days from the date of the department's initial notice of its substantiation determination to the subject.

(2) If, after receiving the initial notice of the department's substantiation determination that the results of any child abuse and neglect investigation are substantiated, the subject does not request a fair hearing within the 30-day time period required by ARM 37.47.610(2), the department will list the report in its protective services information system as being substantiated.

(3) remains the same.

(4) Reports of child abuse or neglect that are determined to be ~~unfounded or unsubstantiated~~ will be listed in the department's protective services information system described in ARM 37.47.315, ~~subject to the confidentiality provisions of ARM 37.47.614 until purged in accordance with~~ for a period of three years from the date of the report, subject to the retention period set forth in 41-3-202, MCA.

~~(5) Reports of child abuse or neglect that are determined to be founded will be listed in the department's protective services information system described in ARM 37.47.315 for a period of three years from the date of the report, subject to the confidentiality provisions of ARM 37.47.614 and the retention requirements contained in (8).~~

~~(6)~~ (5) Reports of child abuse or neglect that are determined to be as founded and substantiated will be listed for a reasonable time in the department's protective services information system described in ARM 37.47.315 ~~in perpetuity,~~ subject to the confidentiality provisions of ARM 37.47.614 as determined by the department.

~~(7) Child abuse or neglect reports that are received by the department but are not investigated will be listed in the department's protective services information system described in ARM 37.47.315 for informational purposes for a period of one year from the date of the report.~~

~~(8) Informational and founded reports that are associated with a prior or subsequent child abuse or neglect report that is investigated and determined as unsubstantiated or substantiated will be retained in the department's protective services information system described in ARM 37.47.315 for the applicable time period for the associated report.~~

AUTH: 2-4-201, 41-3-208, MCA

IMP: 2-4-201, 41-3-202, 41-3-204, MCA

37.47.614 USE OF DETERMINATIONS IN CHILD ABUSE OR NEGLECT REPORT INVESTIGATIONS (1) remains the same.

(2) Child abuse or neglect reports that are determined to be ~~unfounded, unsubstantiated, or founded~~ cannot be the sole basis to deny a person a license to provide foster care, kinship care, or to be employed in a capacity where they have unsupervised access to children.

(3) Findings, determinations, and associated case records on child abuse or neglect reports that are determined to be substantiated are confidential, but may be disclosed pursuant to 41-3-205, MCA, and [New Rule II].

(4) remains the same.

(5) Nothing in this rule prohibits the department or its personnel from using the facts discovered during an investigation and the associated case record of a child abuse or neglect report investigation, as necessary, to support district court actions under Title 41 of the Montana Code Annotated or ~~the department's~~ an administrative process of the department.

AUTH: 41-3-205, 41-3-304, MCA
IMP: 41-3-205, 41-3-304, MCA

37.51.216 YOUTH FOSTER HOMES: NEGATIVE LICENSING ACTION

(1) remains the same.

(2) The department, through written notice to the applicant or licensee, may deny, suspend, restrict, or revoke a license upon a finding that:

(a) through (d) remain the same.

(e) the foster parent has been ~~named~~ determined as the perpetrator of child abuse or neglect in a substantiated report of child abuse or neglect;

(f) through (4) remain the same.

AUTH: 52-1-103, 52-2-111, 52-2-601, 52-2-621, 52-2-622, MCA
IMP: 2-4-631, 52-1-103, 52-2-111, 52-2-601, 52-2-621, 52-2-622, MCA

5. STATEMENT OF REASONABLE NECESSITY

The Department of Public Health and Human Services (department) is proposing to adopt New Rules I through IV and make amendments to ARM 37.5.118, 37.5.304, 37.5.307, 37.47.602, 37.47.610, 37.47.613, 37.47.614, and 37.51.216 pertaining to substantiation of abuse and neglect reports and disclosure of information.

The department proposes these changes to reflect statute changes made during the 2019 legislature. These changes are a result of House Bill 502. The proposed rule changes will change the way child abuse and neglect investigations are categorized and reported to prospective employers and licensing agencies, including agencies licensing foster and adoptive homes. The statute requires the department to adopt new rules.

Fiscal Impact

The department does not believe that the proposed new rules will have any fiscal impact.

The department intends for the adoption and amendment of these rules to be effective January 1, 2021.

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: Heidi Clark, 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, and must be received no later than 5:00 p.m., September 25, 2020.

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. The bill sponsor contact requirements of 2-4-302, MCA, apply and have been fulfilled. The primary bill sponsor was notified by phone, email, and mail on August 18, 2020.

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

/s/ Caroline Warne
Caroline Warne
Rule Reviewer

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

Certified to the Secretary of State August 18, 2020.