

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

In the matter of the adoption of NEW) NOTICE OF ADOPTION AND
RULES I through XCVI and the) REPEAL
repeal of ARM Title 37, chapter 95)
pertaining to licensure of day care)
facilities)

TO: All Concerned Persons

1. On October 20, 2023, the Department of Public Health and Human Services published MAR Notice No. 37-1044 pertaining to the public hearing on the proposed adoption and repeal of the above-stated rules at page 1297 of the 2023 Montana Administrative Register, Issue Number 20.

2. The department has adopted the following rules as proposed: NEW RULE I (37.96.101), NEW RULE II (37.96.102), NEW RULE III (37.96.103), NEW RULE IV (37.96.106), NEW RULE V (37.96.107), NEW RULE VI (37.96.108), NEW RULE VII (37.96.111), NEW RULE VIII (37.96.112), NEW RULE IX (37.96.113), NEW RULE X (37.96.114), NEW RULE XI (37.96.117), NEW RULE XII (37.96.118), NEW RULE XIII (37.96.121), NEW RULE XIV (37.96.122), NEW RULE XV (37.96.201), NEW RULE XVI (37.96.202), NEW RULE XVII (37.96.205), NEW RULE XVIII (37.96.206), NEW RULE XIX (37.96.301), NEW RULE XX (37.96.302), NEW RULE XXI (37.96.303), NEW RULE XXII (37.96.306), NEW RULE XXIII (37.96.307), NEW RULE XXIV (37.96.308), NEW RULE XXV (37.96.311), NEW RULE XXVI (37.96.312), NEW RULE XXVII (37.96.313), NEW RULE XXVIII (37.96.401), NEW RULE XXIX (37.96.402), NEW RULE XXX (37.96.403), NEW RULE XXXI (37.96.404), NEW RULE XXXII (37.96.407), NEW RULE XXXIII (37.96.408), NEW RULE XXXIV (37.96.409), NEW RULE XXXV (37.96.410), NEW RULE XXXVI (37.96.413), NEW RULE XXXVII (37.96.414), NEW RULE XXXVIII (37.96.415), NEW RULE XXXIX (37.96.501), NEW RULE XL (37.96.502), NEW RULE XLI (37.96.505), NEW RULE XLII (37.96.506), NEW RULE XLIII (37.96.601), NEW RULE XLIV (37.96.602), NEW RULE XLV (37.96.603), NEW RULE XLVI (37.96.604), NEW RULE XLVII (37.96.607), NEW RULE XLVIII (37.96.608), NEW RULE XLIX (37.96.609), NEW RULE L (37.96.612), NEW RULE LI (37.96.613), NEW RULE LII (37.96.614), NEW RULE LIII (37.96.615), NEW RULE LIV (37.96.618), NEW RULE LV (37.96.619), NEW RULE LVI (37.96.620), NEW RULE LVII (37.96.623), NEW RULE LVIII (37.96.624), NEW RULE LIX (37.96.701), NEW RULE LX (37.96.704), NEW RULE LXI (37.96.705), NEW RULE LXII (37.96.708), NEW RULE LXIII (37.96.801), NEW RULE LXIV (37.96.802), NEW RULE LXV (37.96.805), NEW RULE LXVI (37.96.806), NEW RULE LXVII (37.96.809), NEW RULE LXVIII (37.96.810), NEW RULE LXIX (37.96.901), NEW RULE LXX (37.96.902), NEW RULE LXXI (37.96.903), NEW RULE LXXII (37.96.904), NEW RULE LXXIII (37.96.907), NEW RULE LXXIV (37.96.908), NEW RULE LXXV (37.96.909), NEW RULE LXXVI (37.96.910), NEW RULE LXXVII (37.96.913), NEW

RULE LXXVIII (37.96.914), NEW RULE LXXIX (37.96.915), NEW RULE LXXX (37.96.918), NEW RULE LXXXI (37.96.1001), NEW RULE LXXXII (37.96.1002), NEW RULE LXXXIII (37.96.1003), NEW RULE LXXXIV (37.96.1004), NEW RULE LXXXV (37.96.1005), NEW RULE LXXXVI (37.96.1008), NEW RULE LXXXVII (37.96.1101), NEW RULE LXXXVIII (37.96.1102), NEW RULE LXXXIX (37.96.1103), NEW RULE XC (37.96.1104), NEW RULE XCI (37.96.1107), NEW RULE XCII (37.96.1108), NEW RULE XCIII (37.96.1111), NEW RULE XCIV (37.96.1112), NEW RULE XCV (37.96.1113), and NEW RULE XCVI (37.96.1116).

3. The department has repealed the following rules as proposed: ARM Title 37, chapter 95.

4. The department has thoroughly considered the comments and testimony received. A summary of the comments received, and the department's responses are as follows:

COMMENT 1: A commenter stated a preschool definition should be added to NEW RULE I(4)(d), including hours per week a preschool can be open to not be licensed.

RESPONSE 1: The department will keep current proposed text. The proposed rule is consistent with 52-2-703(4)(b), MCA, which excludes from the definition of day-care facility "any group facility established chiefly for educational purposes that limits its services to children who are 3 years of age or older." Since preschools likely fall into this exclusion, contained in NEW RULE I(4)(d), the department declines to amend this proposed definition.

COMMENT 2: A commenter stated NEW RULE I(10) should include gender, gender identify, sexual orientation, and pregnancy.

RESPONSE 2: The proposed definition is consistent with Montana state law and federal Child Care and Development Fund (CCDF) requirements. (See 49-1-102, MCA; 45 CFR § 98.48). Accordingly, the department declines to add any additional language.

COMMENT 3: A commenter stated NEW RULE I(12) reads that the only reason a family child care provider would become registered is to receive subsidy payments and does not list Child and Adult Food Program (CACFP) or STARS to Quality.

RESPONSE 3: The department appreciates the comment. The proposed definition is illustrative, and does not serve as an exhaustive list of the benefits that come with being a registered facility. The department believes the proposed language provides clarity without being dispositive.

COMMENT 4: A commenter stated NEW RULE I(20)(b) should only refer to child care centers, since they are the only provider type licensed.

RESPONSE 4: The department agrees that child care centers are required to be licensed. However, school-age and drop-in care facilities may choose to be licensed. Accordingly, it is appropriate not to limit NEW RULE I(20)(b) to child care centers. Proposed NEW RULE I(20)(b) specifically defines a condition that may be placed on a facility's license, regardless of whether the license is required or voluntary. The department believes proposed NEW RULE I(20)(b) is accurate and applies only to licensing.

COMMENT 5: A commenter requested clarification on whether a homeschooled child would be included in the total counted children in a child care home setting under NEW RULE III.

RESPONSE 5: Likely yes. If a homeschooled child is the child of the owner of the facility or a staff member, and is present in the child care space during child care hours, that child would be counted in the applicable child-to-staff-ratios. The exception in (2)(a) allows some flexibility in child-to-staff ratios when an owner's child, who attends school full time, is present in the facility before or after school hours.

COMMENT 6: A commenter stated it was unclear how Family, Friend, and Neighbor (FFN) and Relative Care Exempt (RCE) providers would be approved for registration if they were not subject to a pre-inspection and cannot get a provisional registration in NEW RULE VII(1) and (2).

RESPONSE 6: The department would issue a registration once the FFN or RCE provider meets the requirements outlined in NEW RULE VI.

COMMENT 7: A commenter voiced support for the emphasis on FFN and RCE providers because it will allow more access to the Best Beginnings Child Care Scholarship.

RESPONSE 7: The department thanks the commenter for their support.

COMMENT 8: Many commenters voiced support for the school-age licensing track, commenting that the proposed new license will allow a variety of programs to become licensed, and that the proposal aligns with school-age children's needs.

RESPONSE 8: The department thanks commenters for their support. The department believes the school-age licensing track will make it easier for facilities serving school-age children to meet health and safety requirements without needless regulatory burden.

COMMENT 9: A commenter stated the school-age licensing track will allow more school-age programs to open, thus, opening child care slots for younger children in child care centers and in home-based facilities.

RESPONSE 9: The department appreciates the support. Throughout this process, the department has striven to propose regulations that will increase access to child care without sacrificing quality.

COMMENT 10: A commenter stated that the school-age licensing track will allow them to pursue licensing and accept the Best Beginnings Child Care Scholarship.

RESPONSE 10: The department encourages the school-age programs becoming licensed. Once licensed, a school-age provider would be eligible to enroll children whose families receive Best Beginnings Child Care Scholarships. The department hopes that such licenses will provide access to care to more Montana children, and steady enrollment for providers.

COMMENT 11: A commenter requested clarification on NEW RULE XVI(1)(a) on passive and active learning experiences.

RESPONSE 11: The department reviewed the current proposed text, and does not believe that a change to the regulatory text is needed. The department clarifies that NEW RULE XVI(1) outlines that a licensed or registered child care provider must have a written plan of daily activities and routines, and should include both passive and active learning experiences. The new rule designates activities by age group and indicates all age groups should have dedicated outdoor time. The department believes these minimum requirements help ensure children participate in quality activities during the day, but without imposing undue regulatory burden on providers.

COMMENT 12: A commenter suggested adding a requirement for a consistent child care staff in NEW RULE XVII.

RESPONSE 12: The department's role is to set health and safety standards for child care facilities. This does not require that the same child care staff work with children each day. The department helps ensure children receive safe and quality care without needless regulatory burden on providers. NEW RULE XVII sets forth required routines and activities if providers care for infants and toddlers. However, within the child-to-staff ratios under NEW RULE IV, the staffing decisions necessary for the delivery of the required care remain at the discretion of each individual provider.

COMMENT 13: A commenter suggested adding any conversation within the child's hearing should not involve humiliation, shaming, or insulting in NEW RULE XVIII(1)(b).

RESPONSE 13: The department believes the commenter's suggestion is encompassed in NEW RULE XVIII(1)(b).

COMMENT 14: A commenter supported the list of required documents listed in NEW RULE XXII(3).

RESPONSE 14: The department thanks the commenter for their support.

COMMENT 15: A commenter requested clarification on whether the special dietary instructions listed NEW RULE XXIV(3)(f) replaces the infant feeding schedule.

RESPONSE 15: No, the requirements for infant feeding and the infant feeding schedule are outlined in NEW RULE LXI. The special dietary instructions in NEW RULE XXIV(3)(f) would apply to any child older than an infant. The special dietary needs of infants are addressed in NEW RULE LXI.

COMMENT 16: A commenter requested clarification on what constitutes a mental health emergency in NEW RULE XXVII(3)(f).

RESPONSE 16: The department believes that the proposed list of required notifications in NEW RULE XXVIII(3), read as a whole, is instructive to the commenter: situations that require emergency services or affect the physical or mental health, welfare, or safety of children in care must be reported to the department.

COMMENT 17: A commenter suggested adding language to NEW RULE XXXI(4)(c) to list the department instead of authorized persons.

RESPONSE 17: The department thanks the commenter, but will keep current proposed text. As is clear from the text, department representatives may not be the only authorized persons who may need to access child care facilities.

COMMENT 18: A commenter suggested adding a specific number to NEW RULE XXXII(4) when referencing spacing between children.

RESPONSE 18: The department appreciates the commenter's input, but will keep current proposed text. The department recognizes that every child care facility is configured differently. The proposed rule text allows for customization depending on the layout of a particular facility, while still requiring safe sleeping spaces be maintained for each child.

COMMENT 19: A commenter requested clarification on how the department will monitor if problems occur during an emergency drill if NEW RULE XXXV does not require these problems to be documented.

RESPONSE 19: NEW RULE XXXV provides that, while a child care provider does not need to document if there is a problem during a drill, the child care provider "should identify problems that occurred during a drill and take corrective actions." The department will monitor if the required number of yearly drills are being conducted in each facility. Requiring drills will help ensure providers are practicing, assessing, and adjusting their emergency responses.

COMMENT 20: A commenter suggested removing pacifiers and other attachments to NEW RULE XXXVIII(2)(a)(iv) for a sleeping infant.

RESPONSE 20: The department will keep current proposed text. Under the proposed new rule, the only item allowed in the crib with an infant is a pacifier that does not include a string. This proposed rule recognizes that parents may choose a pacifier as their infant's comfort item during naps or sleep time.

COMMENT 21: A commenter suggested adding language in NEW RULE XLII allowing children under six months old to wear clothing designed to protect from UV rays as an alternative to sunscreen.

RESPONSE 21: NEW RULE XLII(2) requires child care staff to take appropriate precautions to minimize the risk of any child suffering sunburn or suffering heat stroke, and that children under six months old should be kept out of direct sunlight. NEW RULE XLII(2)(a) states that sunscreen must be applied to children over six months old when outdoor conditions dictate. NEW RULE XLII does not require sunscreen use for children under six months old.

COMMENT 22: A commenter supported the addition of NEW RULE X to support child care providers.

RESPONSE 22: The department thanks the commenter for their support.

COMMENT 23: Numerous commenters voiced opposition to NEW RULE LXV, which would exempt children from receiving required vaccinations, in certain circumstances, before enrolling in licensed or registered child care. Commenters gave varying reasons for opposition: personal experience, personal religious views, professional opinion, and parental choice.

RESPONSE 23: The department disagrees. After the conclusion of the 2021 Legislative Session, the department assessed the child care vaccination requirements, in light of the enactment of Senate Bill 215, the Montana Religious Freedom Restoration Act (RFRA), codified at 27-33-101 through 27-33-105, MCA, with which the department is obligated to comply. Montana RFRA prohibits state action that substantially burdens a person's exercise of religion, unless the action is essential to further a compelling state interest and is the least restrictive means of furthering that compelling governmental interest. Many religiously observant families object to certain childhood vaccines on religious grounds because such vaccines were developed using cell lines derived from aborted fetal tissue. Because the child care rules currently provide opportunity for a religious exemption to only one childhood vaccine – while providing for medical exemptions – the department concluded that the failure to provide for a religious exemption for families with a religious objection to any of the required vaccines likely violates Montana RFRA. The proposed rules address this issue, and ensure compliance with Montana RFRA.

COMMENT 24: Numerous commenters voiced support for the religious exemption from immunizations. Commenters gave varying reasons: personal experience, professional opinion, and parental choice.

RESPONSE 24: The department appreciates the support.

COMMENT 25: A commenter requested religion be defined when requesting a religious exemption.

RESPONSE 25: NEW RULE LXV states that an exemption to immunization on religious grounds must be maintained on an Affidavit of Exemption on Religious Grounds Form (HES-113) prescribed by the department for exemptions from school-based immunization requirement. In proposing this rule, the department relied on the statutory requirements for documentation of religious exemptions for school children pursuant to 20-5-405(1), MCA. To help ensure continuity as children transition from child care settings into school, and to avoid imposing any additional burdens, the department declines to impose definitions that are not statutorily required by 20-5-405, MCA.

COMMENT 26: A commenter asked if a child is attending swimming lessons with a swimming instructor, whether the child care facility staff would need to be in the water.

RESPONSE 26: The child care provider would need to comply with the supervision practices for children in and around water as proposed in NEW RULE XXXVI.

COMMENT 27: Commenters stated child care centers should not be required to accept a child with a religious exemption; instead, a child care center should be able to opt out.

RESPONSE 27: The department declines to make the suggested revision. It proposed NEW RULE LXV so a home-based child care provider has the option whether they enroll children who are not vaccinated in accordance with the recommended minimum immunization requirements. (NEW RULE LXIV.) Home-based providers would have to maintain policies and procedures to inform parents and guardians if the child care provider accepts children with exemptions from required vaccines. This proposal would give choice to families with medical or religious exemptions, allow for parental choice in any additional vaccines a parent may choose for their child, and give in-home providers the choice to set policies to align with the needs of their own households.

Under the proposal, child care centers would not have the same flexibility (1) to ensure there are child care settings supporting parents' and guardians' needs and choices regarding vaccinations; and (2) because the concerns that led to the proposal to provide flexibility for in-home providers do not apply to child care centers. Home-based business owners caring for mixed age groups are allowed autonomy in their choice to serve vaccination-exempt children; this will allow home-based providers to make choices for their own health and the health of their family

members and the children in their care, who may not be old enough to be vaccinated. In contrast, child care centers are required to separate children by age group to protect younger children who have not yet had the opportunity to be vaccinated.

The department carefully weighed the needs of children receiving child care, their parents and guardians, and those of providers. It is the position of the department that, consistent with requirements and analyses established by Montana RFRA, NEW RULE LXV balances the medical and religious autonomy of all.

COMMENT 28: Commenters stated a child care center should be required to inform all parents and/or guardians if a child is attending and has a religious exemption.

RESPONSE 28: The department does not support regulations that have the potential to release private medical information about any child receiving child care. A child care center may share a general policy with parents and guardians that the center enrolls children with religious exemptions to immunization requirements. Moreover, the department declines to create notification rules based on the reason for vaccination exemption. Under current child care regulations, a child is not required to have any vaccination which is medically contraindicated. This provision is unchanged in proposed NEW RULE LXV.

COMMENT 29: Commenters stated a child care center will have ages mixing at pick up and drop off or when children are part of a sibling group.

RESPONSE 29: The department recognizes that a sibling group may be mixed at pick up and drop off, like the sibling group mixes when they are at home. Similarly, children of different ages may have incidental contact during pick up and drop off at a child care center. Again, this reflects interactions children have during their daily lives outside of a child care center. Child care centers are required to follow health and safety regulations to minimize the spread of illness, including separating children into age groups.

COMMENT 30: Commenters stated allowing a family or group child care provider to choose to accept a religious exemption was discrimination against religious beliefs.

RESPONSE 30: The department respectfully disagrees. Montana RFRA prohibits state action that substantially burdens a person's exercise of religion, unless the action is essential to further a compelling state interest and is the least restrictive means of furthering that compelling state interest. The department proposed NEW RULE LXV so a home-based child care provider, but not a child care center, has the option whether they enroll children who are not vaccinated in accordance with the recommended minimum immunization requirements (NEW RULE LXIV). Home-based providers would have to maintain policies and procedures to inform parents and guardians if the child care provider accepts children with exemptions from required vaccines. This proposal would give choice to families with medical or religious exemptions, allow for parental choice in any additional vaccines a parent may choose for their child, and give in-home providers the choice to set policies to

align with the needs of their own households. Home-based business owners caring for mixed age groups are allowed autonomy in their choice to serve vaccination-exempt children; this will allow home-based providers to make choices for their own health and the health of their family members and the children in their care, who may not be old enough to be vaccinated. The department heard from some home-based child care providers who have immunocompromised family members that, because of their health concerns, they would be forced to stop providing child care if they had to take unvaccinated children into their homes. This would negatively impact the availability of quality child care in Montana where 60% of Montana counties already qualify as child care deserts. The need to protect the health of vulnerable Montanans and to address the lack of access to quality child care – which prevents many Montanans from working full time – are compelling justifications the department has taken into account in carefully tailoring this rule.

The department carefully weighed the needs of children receiving child care, their parents and guardians, and those of home-based providers. Consistent with the requirements and analyses established by Montana RFRA, proposed NEW RULE LXV balances the medical and religious autonomy of all, and does not unlawfully discriminate against those with religious objections to certain vaccines.

COMMENT 31: A commenter stated the religious exemption from immunizations ignores legislative intent because no religious exemption law was passed.

RESPONSE 31: The department acknowledges that, during the 2023 Legislative Session, Senate Bill 450 (SB 450) proposed a religious and a general, conscience-based exemption to required vaccinations for children attending child care and that the bill ultimately died in committee. The department, however, rejects the idea that the Legislature's consideration of, but failure to adopt, specific legislation on religious exemptions for child care vaccination requirements means that the department is somehow ignoring its statutory obligations or legislative intent. The comment ignores the fact that the Legislature adopted Montana RFRA in 2021, and that the department is obligated to comply with it. Montana RFRA compels the department to adopt a mechanism by which families with a religious objection to certain vaccines can be exempted from the child care vaccination requirement.

Moreover, by the time of the 2023 Legislative Session, the department had already indicated that it had the statutory authority – and the obligation under Montana RFRA – to establish, administratively, a religious exemption from the child care vaccination requirements. The department had twice proposed (and served on the applicable interim committee) rule packages that would have established such an exemption and, in October 2022, it issued guidance on non-enforcement of the vaccination requirements if the failure to comply was a result of a religious objection. In the department's view, no action (or inaction) by the Legislature that does not relieve the department of the obligation to comply with Montana RFRA can undercut the department's need to comply with that statute or constitute binding legislative intent that would preclude the department from establishing a religious exemption from the child care vaccination requirement based on Montana RFRA.

COMMENT 32: A commenter requested clarification of "any state's official parent-maintained immunization record" as defined in NEW RULE LXVI.

RESPONSE 32: The department believes the proposed rule is clear. If any other state in the United States has an official immunization record that can be maintained by a parent or guardian, it may be used as documentation of immunization status for purposes of enrolling a child in Montana child care.

COMMENT 33: A commenter stated a school cannot share immunization records with an after-school program due to FERPA and questioned what would occur in case of an outbreak.

RESPONSE 33: The department proposes a simplified way for immunization records to be maintained when an after-school program is located at a school. If a child care program does not have legal access to immunization records, a parent or guardian would be required to submit immunization records at the time of enrollment in the child care program (or authorize the school to release such records to the child care program).

NEW RULE XLI, Management of Illness, specifies when children must be excluded from child care facilities due to illness, regardless of vaccination status. Licensed or registered child care facilities would be required to adhere to this regulation in the event a child is ill.

COMMENT 34: Commenters stated illnesses will easily be spread to families due to unvaccinated children, causing loss of work time and productivity.

RESPONSE 34: The department notes NEW RULE XLI, Management of Illness, specifies when a child must be excluded due to illness and when a parent or guardian must be notified of symptoms. Additionally, parents and guardians must also exercise their own common sense and judgment on when to keep their children out of child care due to illness.

COMMENT 35: A commenter stated any individual diagnosed with a reportable illness, listed in NEW RULE XLI, Management of Illness, must be excluded until a local health authority clears a person to attend per ARM Title 37, chapter 114.

RESPONSE 35: Proposed NEW RULE XLI would update many exclusion and inclusion criteria (when a child must be sent home because of illness and when they can stay in, or return to, child care) to align with current standards from the American Academy of Pediatrics. It would also align exclusion requirements with House Bill 702 (HB 702) passed in the 2021 Legislative Session, which barred discrimination based on immunization status. HB 702 excludes from the bar on discrimination vaccination requirements set forth for day care facilities pursuant to Title 52, chapter 2, part 7, MCA (Montana Child Care Act). However, other child care rules that do not constitute "vaccination requirements" are subject to HB 702's bar on vaccination status discrimination. Current ARM 37.95.140(8) makes distinctions between people

based on their vaccination status, and the proposed rule would remove this distinction to align with the applicable requirements of HB 702. NEW RULE XLI does not preclude local health authorities from performing their legal duties.

COMMENT 36: A commenter stated local public health authorities must be able to exclude anyone infected with a communicable disease or not entirely immunized from a child care facility when an outbreak occurs.

RESPONSE 36: Please see Response 35.

COMMENT 37: A commenter requested ARM 37.95.140(8) be reinstated, requiring anyone including child care facility staff not immunized to be removed from the child care facility until the outbreak is over.

RESPONSE 37: Current ARM 37.95.140(8) makes distinctions between people based on their vaccination status, and the proposed rules would remove this distinction to align with the applicable requirements of HB 702. For additional analysis, please see Response 35.

COMMENT 38: A commenter stated NEW RULE XLI(3) would require a person be excluded from child care facilities if they are exhibiting any of the listed symptoms, and would also require a health care evaluation before the person could return. The commenter further stated that a person may not seek medical attention if the symptoms are caused by a minor health concern.

RESPONSE 38: The symptoms enumerated in NEW RULE XLI(3) (i.e., uncontrolled coughing, breathing difficulty or wheezing, stiff neck, irritability, persistent crying, poor food or fluid intake, progressive rash with any other symptoms, a seizure, persistent abdominal pain for two or more hours, intermittent abdominal pain associated with fever) are severe and could indicate an illness that both threatens the well-being of the ill child and the other children in care. The proposed changes align with standards from the American Academy of Pediatrics. The department believes proposed NEW RULE XLI(3) helps ensure child care facilities remain healthful without imposing an undue burden on parents and guardians.

COMMENT 39: Commenters disagreed with the removal of written immunization records for child care facility staff.

RESPONSE 39: The department proposes to streamline recordkeeping requirements to decrease the burden on child care programs, to increase the interest in child care staff positions, and to support provider recruitment and retention. Under the current regulations, staff members are required to provide documentation of at least one dose of Tdap vaccine, and for all adults born in or after 1957, one dose of MMR vaccine. The proposed rule change eliminates this minimal staff vaccination documentation requirement. The department found that many would-be child care employees

simply did not have access to this information, which delayed or prevented their hiring. This change would also align child care staff vaccination requirements with staff vaccination requirements applicable in public school settings.

COMMENT 40: A commenter stated registration and license applications should be submitted with a concurrent review by local public health, building, and fire authorities through the Environmental Health Tool Kit.

RESPONSE 40: The department thanks the commenter for the suggestion, but the department will adopt the rule as proposed. The department notes that inspection requirements vary under the proposed rules depending on the facility type. To reduce regulatory burden at the time of license or registration application and renewal, the proposed rules do not apply a one-size-fits-all approach to inspections.

COMMENT 41: A commenter suggested adding language to NEW RULE VII requiring a child care center to obtain a health inspection before licensing.

RESPONSE 41: The department proposes to issue a 90-day provisional license after the pre-inspection is passed. During the 90-day provisional license period, a child care center can get a health inspection. The department believes the issuance of a provisional license allows providers to start caring for children once the department is satisfied that the provider has met baseline safety and quality standards, while still providing time to come into total regulatory compliance. Also, the provisional licensing time gives the department the opportunity to observe the facility in operation during the provisional licensing period. The department made this proposal recognizing that it takes time to arrange the necessary health inspections; this approach allows facilities to offer needed child care slots while working towards complete licensing compliance. Department oversight and the limited time period during which a facility may operate under the provisional license status help ensure children are safely cared for during this time.

COMMENT 42: A commenter disagreed with moving five-year olds into a category that requires a lower staff-to-child ratio, stating that the change will cause issues for child care providers serving this age group.

RESPONSE 42: The department is required to make this rule change in order to implement House Bill 422 (HB 422) from the 2023 Legislative Session. HB 422 made age-based changes to the child-to-staff ratios for children receiving care in child care centers.

COMMENT 43: A commenter stated HB 422 would lead to staff burnout with higher ratios.

RESPONSE 43: HB 422 determines what the maximum child-to-staff ratio must be. However, nothing in HB 422 or the rule changes that the department is adopting to implement HB 422 would preclude any child care provider from using a lower child-

to-staff ratio if it determines that having more staff per child better suits the needs of their business, employees, and children in care.

COMMENT 44: A commenter requested revised language in NEW RULE XXXVIII(6) to add specific steps of wash, rinse, and sanitize with effective sanitizer.

RESPONSE 44: The department believes the proposed rule is clear and concise.

COMMENT 45: A commenter requested revised language in NEW RULE XXXVIII(8), changing from plastic or canvas to non-absorbent, easily cleanable material.

RESPONSE 45: The department believes the proposed rule is concise and includes the acceptable and safe materials for cot and mat surfaces.

COMMENT 46: A commenter requested NEW RULE XLIV(1)(a) be removed because the school equipment may not be used by a school-age program operating out of the school.

RESPONSE 46: In NEW RULE XLIV(1)(a), a license applicant would indicate if the commercial or public space (which could include a school) that is being used by the facility has already had an annual public health inspection. If so, this inspection record should be provided to the department and no additional annual public health inspection is required. The department places the responsibility on the applicant to provide a copy of the public health inspection, but it also allows an opportunity for an applicant to reduce the burden of multiple public health inspections.

COMMENT 47: A commenter asked who would grant a written plan to waive any environmental health chapter in NEW RULE XLIV(2).

RESPONSE 47: The department's Child Care Licensing Bureau would ultimately approve all regulatory waivers. During the waiver request review process, the department will consult with the appropriate public health authorities on any requested waiver of environmental rules.

COMMENT 48: A commenter requested revised language in NEW RULE XLVII(3) to align with school administrative rules because many child care centers do not have an HVAC system.

RESPONSE 48: This rule is intended to address facilities that use centralized ventilation systems and air filters, and not to impose additional requirements on facilities.

COMMENT 49: A commenter requested revised language in NEW RULE XLIX(3) to specify 100°-120°F is the required temperature for hot water at a hand sink that is supplied with both hot and cold water.

RESPONSE 49: The department believes NEW RULE XLIX(3) is clear and concise because it states hand sinks in all licensed and registered facilities must maintain water at a temperature of at least 100°F and not more than 120°F. This would include all hand sinks, so it is unnecessary to specify that hand sinks must be supplied by both hot and cold water with hot water meeting the 100°-120°F temperature requirement.

COMMENT 50: A commenter requested revised language in NEW RULE XLIX to require soap and towels at sinks.

RESPONSE 50: NEW RULE XLVII(2) requires soap and towels at sinks. To keep the proposed rules as concise and nonduplicative as possible, identical requirements will not appear in multiple rules.

COMMENT 51: A commenter suggested adding language in NEW RULE XLIX to include a mandatory bathing area.

RESPONSE 51: NEW RULE LIV outlines requirements if a child care facility chooses to have a bathing area. The department notes that there are other ways of cleaning children that do not require a dedicated bathing facility. This proposed rule outlines minimum requirements for bathing facilities in child care settings that choose to have a bathing area without imposing regulatory requirements that may not be feasible or desirable for those that do not have a dedicated bathing area.

COMMENT 52: A commenter asked if there would be approval for a sanitizer other than bleach.

RESPONSE 52: Unscented household bleach is readily available and inexpensive. The instructions outlined in NEW RULE LII(1)(b) (sanitation as it relates to cleaning and sanitizing toys), NEW RULE LVII (swimming pool sanitization), and NEW RULE LIII (cleaning surfaces used for diapering) are easy to understand and utilize. The department believes these proposed rules outline easily attainable practices without having to imagine every possible variation of available sanitizers.

COMMENT 53: A commenter requested revised language in NEW RULE LI(2) to include the steps to handle laundry outlined in current ARM 37.111.121.

RESPONSE 53: The department believes the proposed rule is clear and concise. The proposed rule is focused on the desired outcome, which is clean laundry that is not contaminated by soiled laundry and which does not present a health hazard to children. This rule decreases the current regulatory burden on child care providers while still establishing minimum safety requirements regarding soiled laundry.

COMMENT 54: A commenter requested revised language in NEW RULE LII(1)(b), adding additional requirements for adequate sanitation, how often toys should be washed, to add a step to air dry, and to add a requirement to use chemical strips for any sanitizers used.

RESPONSE 54: NEW RULE LII(1)(b) contains instructions on how to clean toys in a bleach and water solution, then in the sanitizing cycle of a dish washer or rinsed with clean hot water, then air dried. The process is easy to follow. The addition of a chemical test strip is unnecessary if the process outlined in NEW RULE LII(1)(b) is followed.

COMMENT 55: A commenter stated supervision could be difficult if the diapering area is separate from play areas at registered child care facilities.

RESPONSE 55: NEW RULE LIII(1)(a) requires the diaper changing area be separate from food preparation and play areas. The department believes this is a minimally intrusive requirement that helps ensure there is not contamination between diapering and eating and playing areas.

COMMENT 56: A commenter suggested changing "wash basin" to "hand sink" in NEW RULE LIII(1)(b).

RESPONSE 56: The department will keep current proposed text. A diapering area may not contain a hand sink, so NEW RULE LIII(1)(b) would allow a child care provider to use a wash basin for diapering needs. This allows for flexibility in meeting the health and safety requirements while protecting sanitation standards.

COMMENT 57: A commenter suggested revised language in NEW RULE LIII(1)(h) to specify sanitizer concentration and use of test strips.

RESPONSE 57: The department will keep current proposed rule text. NEW RULE LIII(1)(h) contains instructions on how to sanitize the diapering area with a bleach to water solution, then rinse with clean water, and finally to air dry. The process is easy to follow. The addition of a chemical test strip is unnecessary if the process outlined in NEW RULE LIII(1)(b) is followed.

COMMENT 58: A commenter suggested revised language in NEW RULE LIII(1)(k) to include mandatory handwashing, and to specify where the diapering station and hand sink should be located.

RESPONSE 58: The department will keep the current proposed text. NEW RULE XLVIII outlines that staff, volunteers, and children at licensed and registered child care facilities must learn and follow good handwashing practices. The proposed rule further requires soap and towels or hand-drying devices at all hand washing sinks. Since the location and layout of child care facilities vary, the department has only proposed requirements on what is required at a hand washing sink, not where hand sinks must be located. NEW RULE LIII(1)(k) requires the hands of a diapered child be washed after changing, but it does not require a hand sink be located in a specific place.

COMMENT 59: A commenter suggested revised language in NEW RULE LVIII(2) to change the water sampling from January and June to once between April-June and once between September-October.

RESPONSE 59: The department retained the same water source testing requirements in ARM 37.95.225(1)(b) for NEW RULE LV(2)(a). The department has been utilizing testing in January and June since 2006 and has found no issues with the timing of required testing.

COMMENT 60: A commenter suggested adding language in NEW RULE LV(2)(c) that a corrective action plan would be sent to the local public health authority.

RESPONSE 60: The department will keep current proposed text. The department will notify the local public health authority if there is a public health concern regarding a child care facility's water supply.

COMMENT 61: A commenter suggested adding a required food safety course to NEW RULE LVIII.

RESPONSE 61: NEW RULE LVIII outlines minimum food safety requirements to meet licensing and registration standards. The department believes that the proposed rule helps reduce the risk of foodborne illness, without overburdening providers, especially home-based providers, with unduly prescriptive regulations.

COMMENT 62: A commenter suggested adding language in NEW RULE LVIII(1)(e) to dictate the steps for proper handwashing.

RESPONSE 62: The department will keep current proposed text. NEW RULE XLVIII requires child care facilities, except RCEs, to learn and follow good handwashing practices. Additionally, the same rule requires these facilities to post handwashing signs in certain areas as reminders of good hygiene practice. The department believes these regulations are sufficient.

COMMENT 63: A commenter requested clarification on language in NEW RULE LVIII(2)(a) that a registered child care provider can serve home-canned food so long as the provider is not participating in the Child and Adult Care Food Program (CACFP).

RESPONSE 63: The rule change would prohibit a registered child care facility from serving home-canned food to children, regardless of the facility's participation in CACFP. The department has no way of ensuring home-canned foods were prepared or maintained safely.

COMMENT 64: A commenter suggested adding instructions in NEW RULE LVIII(2)(c) on how to cool down and reheat food.

RESPONSE 64: The department will keep current proposed rule text. NEW RULE LVIII specifies a desired outcome—that is, reducing the risk of foodborne illnesses in child care facilities. The department is setting the desired outcome and granting facilities needed flexibility when determining how to meet these regulatory guidelines.

COMMENT 65: A commenter suggested adding a requirement in NEW RULE LVIII on where to store and how to use chemicals, a requirement to fit all dirty dishes in a dishwasher at one time, a requirement that food should be protected from cross contamination, and clarification that household refrigerators may be used in child care centers.

RESPONSE 65: NEW RULE XXIX outlines where and how cleaning products can be stored. The department is setting the desired outcome for each step, and allowing child care facilities and their staff to determine how the requirement will be met. It is the department's position that other proposed rules being adopted in this adoption notice adequately address this commenter's concerns without being duplicative, unduly prescriptive, or overly burdensome. For example, NEW RULE LVIII(4) specifies that a domestic style dishwasher must use the heat option to dry dishes, and NEW RULE LVIII(5)(a) outlines how dishes must be hand washed. The rules address good dishwashing practices.

NEW RULE LVIII(2)(b) requires food served family-style to be disposed of after a meal service, and NEW RULE LVIII(2)(c)(ii) does not allow new and old food to be mixed. The department proposes to meet health and safety standards for food stored in a refrigerator in NEW RULE LVIII(2)(c). The department's position is that these proposed rules are adequate to help ensure healthy facilities.

The proposed rules do not prohibit the use of household, or non-commercial, refrigerators in child care centers. Again, the department intends the food preparation and handling regulations to provide minimum standards necessary to reduce the risk of foodborne illnesses. Individual providers have the flexibility and autonomy to decide how these standards are met based on their individual facilities.

COMMENT 66: A commenter requested clarification on language in NEW RULE LX on who will determine compliance with Child and Adult Care Food Program (CACFP) food guidelines.

RESPONSE 66: Child care providers participating or interested in participating in CACFP should refer questions to their sponsor organization.

COMMENT 67: A commenter suggested if a child is in a choking incident the parent or guardian should be notified in NEW RULE XXIX.

RESPONSE 67: NEW RULE XXI(1)(e) requires a child care provider to have written policies on calling parents or guardians when a child is injured. The department believes this proposed new rule addresses notification requirements in the event of a choking event.

COMMENT 68: A commenter suggested adding language to NEW RULE XXIX(2) to include any material labeled keep out of reach of children.

RESPONSE 68: The department appreciates the comment. The items enumerated in NEW RULE XXIX(2) are in addition to NEW RULE XXIX(1), which states providers are responsible for keeping hazardous materials and objects inaccessible to children in care. The department believes that these safety provisions are adequate to encompass materials that need to be kept out of reach of children. Providers are also expected to use common sense when identifying potentially hazardous materials and not rely solely on labeling.

COMMENT 69: A commenter requested clarification on who would test lead paint in NEW RULE XXIX(4)(f).

RESPONSE 69: To provide appropriate flexibility, the department has chosen to identify the requirement, but declines to prescribe the person(s) or organization(s) that can conduct these tests for providers.

COMMENT 70: A commenter disagreed with NEW RULE XXIX(5) not prohibiting guns from being stored on a child care facility's premise.

RESPONSE 70: Child care facilities can be located in both commercial and residential property. The department's role is to adopt and enforce health and safety standards for children in care, so as to ensure their health, safety, and well-being, not to restrict gun ownership on the part of child care providers. NEW RULE XXIX(5) helps ensure children in child care do not have access to guns or ammunition, while not impermissibly limiting legal access to guns.

COMMENT 71: A commenter suggested adding language to NEW RULE XXIX(8)(a) to increase the diameter of toys and objects from one inch to 1.25 inches.

RESPONSE 71: The department has retained the same standards for diameter of objects in ARM 37.95.121(8) for NEW RULE XXIX(8)(a). These standards have been in place since 2018, and it is the department's position that this regulation best protects children from the hazard of choking.

COMMENT 72: Commenters supported the option to hire a 16-year-old as outlined in NEW RULE LXXII(3)(b) and NEW RULE LXXV(1)(b).

RESPONSE 72: The department thanks commenters for their support.

COMMENT 73: A commenter stated home-based family and group child care providers should be licensed, not registered.

RESPONSE 73: Section 52-2-703(12), MCA, provides that family day-care homes and group day-care homes shall be registered. The department's rules must be in compliance with this statutory provision.

COMMENT 74: A commenter supported child care staff being called Early Childhood Teachers.

RESPONSE 74: The department thanks the commenter for their support.

5. In the event that the Children, Families, Health, and Human Services Interim Committee withdraws its written objection pursuant to 2-4-406(2), MCA, the effective date is April 13, 2024. In the event that the Children, Families, Health, and Human Services Interim Committee does not withdraw its written objection pursuant to 2-4-406(2), MCA, the effective date is the day after final adjournment of the regular session of the 69th Legislature. The department will publish a notice confirming the effective date.

/s/ Heidi Sanders
Heidi Sanders
Rule Reviewer

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

Certified to the Secretary of State April 2, 2024