

## **Exhibit Number: 8**

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**This exhibit is a petition, which contains several pages of Montanans' addresses and signatures. The petition exceeds the maximum number of pages for scanning. Four pages have been scanned for your research. The original exhibit is on file at the Montana Historical Society and may be viewed there.**

DEPARTMENT OF  
PUBLIC HEALTH AND HUMAN SERVICES  
DIVISION OF QUALITY ASSURANCE

EXHIBIT 8  
DATE 3-10-05  
HB 704



BRIAN SCHWEITZER  
GOVERNOR

DR. ROBERT WYNIA  
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STATE OF MONTANA

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Testimony of the Department of Public Health and Human Services  
Before the House Appropriations Committee  
March 10, 2005

RE: HB 704 A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING TIMEFRAMES FOR THE DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES FOR DECISIONS ON SURVEYS AND INFORMAL DISPUTE RESOLUTION FOR LONG-TERM CARE FACILITIES; AMENDING SECTION 53-6-109, MCA; AND PROVIDING AN EFFECTIVE DATE."

The Quality Assurance Division of the Department of Public Health and Human Services has responsibility for both the Informal Dispute Resolution (or IDR) and the Medicare/Medicaid survey and certification process that are addressed in HB 704. We conceptually support the timeframes that are outlined in this bill. We would be unable to meet these time frames, however, without additional resources. We have prepared a fiscal note for this bill that requests 4.00 FTE. Two FTE are needed to perform the IDR functions required on **page 2, lines 2-4** of the bill. Two additional FTE are required to perform the survey form quality assurance function outlined on **page 2, lines 12-14** of the bill. The general fund cost for these FTE is \$29,643 in SFY 2006 and \$28,155 in SFY 2007. Survey related activities are funded at a 12.5% general fund and 87.5% federal fund matching rate.

I wanted you to have a clearer idea about the areas addressed in HB 704, so I have prepared two handouts. The white handout is a copy of an Informal Dispute Resolution hearing decision. An Informal Dispute Resolution hearing can be requested by a nursing facility if they disagree with survey and certification findings made by the Department. A hearing officer who is independent of the survey process conducts the hearing. These hearings can be quite complex and often involve multiple issues that must be decided. Each issue may require research into federal and state regulations, nursing home industry standards, and medical standards of practice.

The second handout, on colored paper, is the actual survey form, which is called a 2567. This contains the information about any deficient practices that were found when the Department performed an on-site inspection of the nursing facility. This form must be posted at the nursing facility and be available for public review. The federal government also publishes results of the survey on a nationally available web page. Thus, accuracy is critical to both providers and the Department.

I will be available and would be happy to answer any questions that you might have about the IDR or survey process.

Respectfully submitted,

Handwritten signature of Mary E. Dalton in cursive.

Mary E. Dalton, Administrator  
Quality Assurance Division

1 Mary Rose A. Heller, Presiding Official  
Department of Public Health and Human Services  
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6  
7 **BEFORE THE DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES**

8 \* \* \* \* \*

9 In the matter of the Certification ) IDR No. 04-03-275XXX  
Survey of LTC Facility, AnyTown. )  
10 ) **OPINION AND RECOMMENDATION**  
11 )  
12 )

13 An in-person Informal Dispute Resolution Conference was held on the above-  
entitled matter on August 5, 2004, in Helena Montana. From a review of the  
14 file, the Presiding Official provides the following:

15 **I. PROCEDURAL BACKGROUND**

16 On May 20, 2004, the Department of Public Health and Human Services acting as  
17 the State Survey Agency (hereinafter Department) completed a Health Re-  
certification Survey of Long Term Care Facility (hereinafter Facility). On  
18 June 1, 2004, the Department sent a letter to Facility informing the Facility  
19 that the enclosed Statement of Deficiencies (hereinafter SOD) recorded on the  
20 federal form CMS-2567, contained deficiencies that required a Plan of  
21 Correction (POC). Facility was also given notice of its right to request an  
22 IDR pursuant to 42 CFR § 488.331 and ARM §37.5.601 et seq. to contest the  
23 deficiencies cited. On June 9, 2004, Facility requested an in-person IDR  
24 conference in order to refute the survey findings and citation of deficiency  
25 TAGs F225, F253 and F324. Subsequently an IDR conference was scheduled and  
held. Those who appeared in person for Facility were: Regional Executive

1 Director of Facility; Regional Operations Manager of Facility; and Executive  
2 Director of Facility. One person appeared for the Department: Surveyor  
3 Supervisor of the Certification Bureau of the Department of Public Health and  
4 Human Services' Quality Assurance Division. The Presiding Official was from  
5 the Department's Office of Fair Hearings.

6 At the Conference Facility withdrew its request to dispute TAG F225.  
7 From the presentations made and documents and supporting regulations  
8 referenced, the Presiding Official provides the following:

## 9 **II. OVERVIEW OF THE REGULATION OF LONG-TERM CARE FACILITIES**

### 10 **A. Medicare Certification**

11 The Social Security Act (hereinafter Act) provides that skilled nursing  
12 facilities participating in Medicare must meet certain specified  
13 requirements.<sup>i</sup> The provisions of part 483 of Title 42 of the Code of Federal  
14 Regulations contain the requirements. They serve as the basis for survey  
15 activities for the purpose of determining whether a facility meets the  
16 requirements for participation.<sup>ii</sup> Certification is a recommendation made by  
17 the survey agencies to CMS based upon the compliance of the skilled nursing  
18 facilities with the requirements for coverage.<sup>iii</sup>

### 19 **B. Medicare Survey Process**

20 Section 1864(a) of the Act directs the Secretary of the U.S. Department of  
21 Health and Humans Services<sup>iv</sup> to use the help of state health agencies  
22 (hereinafter SSA standing for State Survey Agency) when determining if health  
23 care entities meet federal standards. The Montana Department of Public  
24 Health and Human Services is the SSA for Montana. To assist SSAs the Center  
25 for Medicare and Medicaid Services (hereinafter CMS) issued a State  
Operations Manual (Publication 100-07) (hereinafter SOM) explaining the

1 federal standards. The most recent version was released in May of 2004.

2 "Chapter 7 implements the nursing home survey, certification, and enforcement  
3 regulations 42 CFR Part 488."<sup>v</sup> Survey procedural guidelines are found at 42  
4 CFR § 488.110. This survey protocol provides guidance to surveyors  
5 conducting surveys. SSAs are directed to follow the protocol that consists  
6 of survey procedures, worksheets and interpretive guidelines.<sup>vi</sup> The seven  
7 survey tasks are described in detail in Appendix P<sup>vii</sup> of the SOM. "A standard  
8 survey is composed of Tasks 1 - 7, and is a resident-centered, outcome-  
9 oriented inspection which relies on a case-mix stratified sample of residents  
10 to gather information about the facility's compliance with participation  
11 requirements. Outcomes include both actual and potential negative outcomes,  
12 as well as failure of a facility to help residents achieve their highest  
13 practicable level of well-being."<sup>viii</sup>

14 If after gathering the information the SSA determines that a deficiency  
15 exists (defined as a facility's failure to meet a participation requirement  
16 specified in the Social Security Act or in Part 483 Subpart B) the SSA  
17 assesses the effect on resident outcome (severity level) and determines the  
18 number of residents potentially or actually affected (scope level). There  
19 are four severity levels and three scope levels. The SSA issues a Statement  
20 of Deficiencies (hereinafter SOD) using the CMS Form 2567. These statements  
21 indicate the data prefix TAG<sup>ix</sup> and regulatory citation followed by a summary  
22 of the evidence and supporting observations using resident identifiers.\* All  
23 of the TAGs and the full regulatory identifying information are found in  
24 Appendix PP of the SOM.

25 A facility may request an informal dispute resolution to refute a deficiency  
citation made by the SSA.<sup>xi</sup>

1 III. DEFICIENCIES CITED IN DISPUTE

2 After completion of the 2004 re-certification survey the Department  
3 determined Facility did not meet some certification requirements. Facility  
4 disputes the deficiency citations of the following TAGs.

5 A. TAG F253

6 TAG F253 is cited if a facility fails to meet the standards set in 42 CFR §  
7 483.15(h)(2) which provides: "The facility must provide - housekeeping and  
8 maintenance services necessary to maintain a sanitary, orderly, and  
9 comfortable interior."

10 The Department cited Facility for this deficiency based on the following  
11 conditions observed by the surveyors: odor throughout the facility; grass,  
12 paper, string, dust, debris and cigarette butts on carpeted floors; stained  
13 and damaged carpet; chairs in a varying states of disrepair; cracked and  
14 missing floor tile in a tub room; traction strips in a tub in poor condition  
15 and covered with fuzz and lint; mold and mildew growing in the shower grout  
16 in a shower room; damaged floor tiles; numerous unclean floors; opened window  
17 missing screen; patio concrete surface cracked; unused furniture stored  
18 against outside wall of building; and dirty entrance threshold and  
19 baseboards. The Department found this practice to be widespread with no  
20 actual harm resulting but with the potential for more than minimal harm that  
21 is not immediate jeopardy and determined the scope and severity of this  
22 deficiency was an F.

23 Facility disputed this finding. Facility argued that the Department needed  
24 to use specific descriptors in the examples such as dirt, mud, or coffee  
25 instead of "brown chunks of matter" or "unidentified brown liquid" or "black  
matter". Facility argued the descriptions were inflammatory and that readers

1 of the 2567 could make assumptions about the items described, i.e. brown  
2 matter could be fecal material and black matter could be dried blood. The  
3 Department responded that such descriptions are standard. In example #2 the  
4 Facility disputed the cited condition of the carpet and asserted it did not  
5 contain holes as evidenced by the pictures it provided. Facility argued the  
6 conditions of the floors and carpets were a result of rain and a landscaping  
7 project. It also asserted that a member of the survey team contributed to  
8 the condition of the floors by tracking mud throughout the building.

9 **1. Federal Standards**

10 **a. Survey Protocol**

11 Survey Task 3 is Initial Tour. A general objective of the Initial Tour is to  
12 obtain an initial evaluation of the environment of the facility.<sup>xii</sup> Surveyors  
13 are instructed to focus on the "(i)mpact of the facility environment and  
14 safety issues: ... 3. Presentation and maintenance of a homelike and clean  
15 environment; ..."<sup>xiii</sup> Survey Task 5 is Information Gathering. A subtask of 5  
16 is a general observation of the facility. The general objective of this sub-  
17 task (5A) is to observe physical features in the facility that affect  
18 resident's quality of life, health and safety.<sup>xiv</sup> The surveyors are instructed  
19 to review the condition of the environment and pay attentions to such things  
20 as cleanliness, sanitation, accident hazards and the proper and safe storage  
21 of drugs, biologicals, and housekeeping compounds.<sup>xv</sup>

22 **b. Interpretation**

23 A facility is the residents' place of abode. The purpose of the regulations  
24 is to assure that facilities are maintained in a way that not only makes them  
25 habitable but also pleasant and attractive.<sup>xvi</sup> Housekeeping must be done  
regardless of ongoing renovations whether they are interior construction or

1 exterior landscaping.<sup>xvii</sup> A facility is not cited for a spill, speck of dust  
2 or scrap of clutter that occurs occasionally during constant use or  
3 activities. Instead a facility is cited if the conditions described are the  
4 kind from inadequate cleaning and repair that occur overtime.<sup>xviii</sup>

5 Based on the foregoing regulatory requirements, the factual findings cited on  
6 the SOD, and Facility's responses the Presiding Official is of the following:

7 **2. Opinion**

8 **a. Issues**

9 Were the conditions described in the surveyors' findings indicative of  
10 inadequate cleaning and repair overtime or were they just the occasional  
11 conditions that occur during constant use and daily activities? Is the  
12 particular wording used in the findings inflammatory or are the surveyors  
13 required to use more specific terms that identify the "matter" they observe  
14 during inspections? Was there substantial evidence to support the  
15 Department's findings of holes in the carpet in the entrance area?

16 **b. Discussion**

17 The conditions described in the surveyors' findings indicate a long term  
18 neglect of building and furnishing maintenance, repairs and general  
19 housekeeping. The result was neither a pleasant nor an attractive abode for  
20 the residents. I am not convinced the landscaping project contributed  
21 significantly to the state of the facility that was described in the  
22 surveyors' findings. Any transient conditions created by a landscaping  
23 project have little to do with damaged and stained furniture, missing and  
24 broken bathroom tiles and mildew, food scraps and stains and an overall odor  
25 permeating the facility.