

EXHIBIT NO. EX #5DATE: 1-7-05
BILL NO. SB 46

Senate Bill 46- Senate Public Health, Welfare and Safety
Testimony submitted by Bonnie Adee, Mental Health Ombudsman
 Friday, January 7, 2004

In April 1999 the 56th Montana Legislature created a Mental Health Ombudsman, giving the office the duty to "represent the interests of individuals with regard to the need for public mental health services". In August 1999 Governor Marc Racicot appointed me to a four-year term as the first Mental Health Ombudsman.

Two years later, the 57th Montana Legislature clarified legislative intent regarding the Mental Health Ombudsman's office, adding the requirement of an annual report with recommendations regarding the mental health system, and the instruction not to provide legal advocacy.

Last session the 58th Montana Legislature considered a bill to change the law to make the office of the Mental Health Ombudsman discretionary, allowing the Governor the option of not appointing an ombudsman. This bill died in committee. Governor Martz reappointed me to another four-year term in August 2003.

Senate Bill 46, before you now, is a bill requested by the Children, Families and Health Human Services Interim Committee. It's intent is to further clarify the duties of the Mental Health Ombudsman, as well as to indicate legislative intent regarding access to confidential and protected health information.

The need for a bill arose because in April 2003, when portions of the federal privacy act (HIPAA) took effect, the Department of Public Health and Human Services (DPHHS) determined the Mental Health Ombudsman was not a health oversight agency, a term used in the act. Federal law gives a health oversight agency access to protected health information without written authorization of the individual under certain circumstances. Members of the interim committee believe the Mental Health Ombudsman is a health oversight agency, and the committee requested a legal opinion on that question from legislative legal services. Attorney Greg Petesch wrote that "it appears the mental health ombudsman falls within the federal definitions of a health oversight entity", and "under those definitions does not need written authorization to receive protected health care information". The members of the interim committee decided to request a bill to recognize the Mental Health Ombudsman as a health oversight entity in state law.

In addition to recognizing the Mental Health Ombudsman as a health oversight entity, SB 46 add language to state law allowing a health care provider to disclose protected health care information without the patient's authorization to the mental health ombudsman when necessary to perform the ombudsman duties. The bill makes it clear the ombudsman may not make unlawful or authorized disclosures of confidential information without penalty.

The interim committee agreed that Legislative intent would be clearer if the bill also enumerated some of the duties of the Mental Health Ombudsman. Lines 24 through 30 on

page 1 list those duties defining when the Mental Health Ombudsman is acting as a health oversight entity.

The part of this bill that seems to be controversial is the language that states the duties of the mental health ombudsman are directly connected to the administration of the Medicaid program. This language was added to the bill with the hope that it would assist the ombudsman to access eligibility information, when requested by someone in need of mental health services, in the Medicaid database. However, CMS has determined that the ombudsman cannot have access to the Medicaid database, with or without this language. Currently, DPHHS and the Mental Health Ombudsman's office have worked out an acceptable arrangement for me to request Medicaid eligibility information with an individual's verbal authorization, with written authorization to follow. Most of the time the department's response has been timely.

One other issue may relate making the Mental Health Ombudsman part of the Medicaid administration. Up until last month, the Office of the Mental Health Ombudsman received Medicaid administrative matching funds from the federal government. That payment has been disallowed, and may be subject to repayment by DPHHS. Since the purpose and functioning of the Mental Health Ombudsman has not changed, it appears the federal interpretation of what qualifies as Medicaid administration has changed. The current language in the bill might be construed as the intention to seek Medicaid administrative matching funds again. In my opinion, the language making the Mental Health Ombudsman part of the administration of the Medicaid program is not critical to the intent of the bill.