



Children, Families, Health, and Human Services Interim Committee

68th Montana Legislature

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March 12, 2024

Director Charles Brereton
Department of Public Health and Human Services
PO Box 4210
Helena, Montana 59604-4210

Dear Director Brereton:

Pursuant to 5-5-225, MCA, the Children, Families, Health, and Human Services Interim Committee (Committee) reviewed MAR Notice No. 37-1044, pertaining to Licensure of Day Care Facilities. The Committee objected to the rule pursuant to 2-4-305(9), MCA, at its November 16, 2023 and January 18, 2024 meetings.

This letter constitutes notice to the Department that the Committee now objects pursuant to 2-4-406, MCA, to the rules proposed in MAR Notice No. 37-1044.

Under 2-4-406, MCA, the Committee may object to the proposed rulemaking if the Committee considers the proposed rulemaking to not have been proposed in substantial compliance with 2-4-302, 2-4-303, and 2-4-305, MCA. The Committee objects to MAR Notice No. 37-1044 for the following reasons:

1. The proposed rules are not in substantial compliance with 2-4-305(6)(a), MCA, because definitions in proposed new Rule I and used throughout the proposed rulemaking are not consistent and are in conflict with the statutory definitions found in 52-2-703, MCA.

The proposed new rule creates and defines its own categories of day-care facilities that do not align with the categories of day-care facilities defined in 52-2-703, MCA. For example, proposed new Rule I states:

“Child care center” has the same meaning as “day-care center” as defined in 52-2-703, MCA, and means an out-of-home place in which child care is provided to 16 or more children on a regular basis. The term does not include a place where child care is provided if a parent of a child for whom child care is provided remains on the premises, unless the parent is a director/owner, staff member, support staff, or volunteer of the child care center, *or unless the child care center is on the premises or campus of an employer who employs the parent.*

However, the 52-2-703(3) states:

- (a) “Day-care center” means an out-of-home place in which day care is provided to 16 or more children on a regular *or irregular* basis.
- (b) The term does not include a place where day care is provided if a parent of a child for whom day care is provided remains on the premises.

The italics have been added to both definitions to highlight conflicting language. The Committee believes the definitions conflict, in part, because the Department's definition excludes irregular care and impermissibly expands the definition of child care center to include day care provided on the premises or campus of a parent's employer, which is excepted from the definition of day-care center in statute.

The proposed rules then provide exceptions and requirements for the newly defined categories that are not consistent and are in conflict with the statutory requirements. For example, the proposed definition of "School-age care" to mean "regularly scheduled care exclusively for school-age children during out-of-school-time hours, licensed by the department" could fall within the statutory definition of "day-care center" if care is provided for 16 or more children. Yet proposed new Rule II(3)(a)(i) provides that school-age care facilities "have the option of being licensed" despite the requirement in 52-2-721(1)(a), MCA, for all day-care centers that provide care on a regular basis to be licensed.

The Committee's objections to the definitions are not limited to the few specific examples provided here, but to all the definitions that are not consistent and are in conflict with the statutory definitions found in 52-2-703, MCA, or for which the proposed rules provide exceptions or requirements that conflict with Title 52, chapter 2, part 7, MCA.

2. The proposed rules are not in substantial compliance with 2-4-305(6)(b), MCA, because the rules are not reasonably necessary to effectuate the stated purpose of the statute under 52-2-702(2)(d)(ii), MCA, to promote "the availability and diversity of quality child-care services for all children and families that need such services".

The day care statutes in Title 52, chapter 2, part 7, MCA, seek to support a diversity of child-care options, in part, by providing for a dual system of **licensure** for day-care centers and **registration** for family day-care homes or group day-care homes under 52-2-721, MCA. The proposed rules largely treat licensure and registration the same, placing overly onerous requirements on registration. The Committee believes this one-size fits all approach does not effectuate the purpose of the statutes to promote a diversity of options.

3. The proposed rules are not in substantial compliance with 2-4-305(6)(a), MCA, because the immunization requirements in the proposed rules misapply state law for exemptions and are also not in substantial compliance with 2-4-305(5), MCA, because the immunization requirements exceed the statutory rulemaking authority of the Department.

The Committee believes the proposed new Rule LXV misapplies state law for exemptions from vaccinations for registered day care providers by allowing certain providers to choose whether to accept exemptions and is therefore not in substantial compliance with 2-4-305(6)(a), MCA.

Additionally, the Committee believes the proposed new rules providing immunization requirements for day-care facilities other than day-care centers exceed the statutory rulemaking authority of the Department and is thus not in substantial compliance with 2-4-305(5), MCA. Section 52-2-735, MCA, provides authorization for the Department to adopt rules to protect children in day-care centers from communicable diseases, which must include requiring children under 5 years of age to be immunized against Haemophilus influenza type "b" unless an exemption is claimed as provided in 20-5-405, MCA. This statute does not authorize the Department to require immunization for day-care facilities other than day-care centers, such as family day-care homes or group day-care homes. Section 52-2-731, MCA, the other substantive statute cited by the Department, does not provide the foothold needed for the proposed immunization requirements for day-care facilities that are not day-care centers. That statute requires the Department to develop standards for "child-care programs and practices necessary to ensure the health, safety, safety in transportation, development, and well-being of children." However, this section applies

to all licensed and registered day-care facilities, including day-care centers. If the Legislature intended this section to provide sufficient authority for immunization requirements, 52-2-735, MCA, would be superfluous.

In summary, the Committee believes that for the adoption of the rules proposed in MAR No. 37-1044 to be valid as proposed, the Legislature would first need to amend the statutes governing day care under Title 52, chapter 2, part 7, MCA. For an agency to adopt rules implementing its desired policy changes that are not consistent and conflict with the current statutes is a violation of the separation of powers and usurps the role of the Legislature.

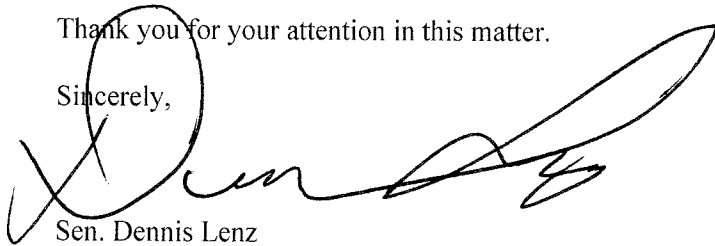
If a rule is objected to under 2-4-406, MCA, before the rule is adopted, as is the case here, the rule is not effective until the day after final adjournment of the regular session of the Legislature that begins after the notice proposing the rule was published by the Secretary of State unless the Committee withdraws its objection pursuant to 2-4-306(3)(c), MCA.

Please note that the Department is required to respond in writing to the Committee's objection within 14 days of the mailing of this objection pursuant to 2-4-406(2), MCA. After receipt of the response, the Committee may withdraw or modify its objection.

If the Committee fails to withdraw or substantially modify its objection, it may vote to send the objection to the Secretary of State for publication in the MAR and ARM. Under 2-4-406(4), MCA, if the objection is published, the Department would bear the burden, in any action challenging the legality of the rule objected to by the Committee, of proving that the rule objected to was adopted in substantial compliance with 2-4-302, 2-4-303, and 2-4-305, MCA.

Thank you for your attention in this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Dennis Lenz", written over a circular stamp or seal.

Sen. Dennis Lenz
Presiding Officer