



Children, Families, Health, and Human Services Interim Committee

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59th Montana Legislature

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TO: Children, Families, Health, and Human Services Interim Committee

FROM: David S. Niss, Staff Attorney

RE: DPHHS Compliance With 2-4-302

DATE: August 28, 2006

In 1997, the Legislature amended the Montana Administrative Procedure Act by inserting a requirement that when an Executive Branch agency adopts initial rules implementing new law, it send a notice to the legislative sponsor of the implemented language. That provision amended section 2-4-302, MCA, by inserting subsection (2)(d), which reads as follows:

(d) The agency shall also, at the time that its personnel begin to work on the substantive content and the wording of the initial rule proposal to implement one or more statutes, notify the sponsor of the legislative bill that enacted the section. [Chapter 340, L. 1997.]

This requirement applied to all rulemaking proposals within the language of the statute proposed after the effective date of Ch. 340, L. 1997 (October 1, 1997).

In the 59th legislative session, Senator Bob Keenan introduced Senate Bill No. 127 (Ch. 353, L. 2005), which amended sections 53-6-401 and 53-6-402, MCA, to give broad authority to the Department of Public Health and Human Services (DPHHS) to apply for necessary waivers to operate various home and community waiver programs. The method of amendment of those statutes is shown in the attached copy of Chapter 353.

In its writing of the newly proposed rules to create a home and community waiver program for persons with severe mental illness (MAR Notice No. 37-390), forwarded to Committee members by e-mail on Tuesday, August 22, 2006, the DPHHS did not contact the sponsor of Ch. 353 (SB 127), Senator Bob Keenan, when it began writing the rules implementing the new language in the sections amended by that chapter (53-6-401 and 53-6-402, MCA). The reason that the DPHHS did not contact Senator Keenan is traceable to the language of section 2-4-302(2)(d). That language, as shown above, indicates that it only applies to a "bill that enacted the section". Read most favorable for the DPHHS, this language seems to indicate that the notice requirement applies only to the first rules implementing an entirely new section of law. However,

read technically, it could apply to any new language, even an amendment, implemented by the first rules for a DPHHS program.

The issues raised by the proposed rules and the lack of timely notice to Senator Keenan are therefore as follows:

1. Does the notice requirement apply to rules implementing amendatory language within a section?
2. Does the notice requirement apply to rules on a program-by-program basis?
3. Does the Committee believe legislation is necessary to clarify the statute?

These three issues will be discussed with Committee members during the time normally allotted at Committee meetings for discussion of rulemaking issues.

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