



Children, Families, Health, and Human Services Interim Committee

PO BOX 201706
Helena, MT 59620-1706
(406) 444-3064
FAX (406) 444-3036

61th Montana Legislature

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CHRISTINE KAUFMANN
RICK LAIBLE
TRUDI SCHMIDT

HOUSE MEMBERS

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FONG HOM, Secretary

TO: Committee members
FROM: Lisa Mecklenberg Jackson, Staff Attorney
RE: DPHHS Administrative Rule Activity
DATE: November 13, 2009

The Department of Public Health and Human Services has filed the following rule notices with the Secretary of State's Office for publication in the Montana Administrative Register (MAR):
(Notices in their entirety are available online at: <http://www.dphhs.mt.gov/legalresources/>)

Notices of Proposed Rules:

I.

MAR 2009 Issue No. 20 (October 29, 2009), MAR Notice 37-491, NOTICE OF PUBLIC HEARING ON PROPOSED ADOPTION -- the department has filed a NOTICE OF PUBLIC HEARING in the matter of the proposed adoption of six new rules pertaining to state matching fund grants to counties for crisis intervention, jail diversion, involuntary precommitment, short-term inpatient treatment costs, and contracts for crisis beds and emergency and court-ordered detention beds for persons with mental illness. A hearing will be held November 23, 2009 in the DPHHS Auditorium, 111 N. Sanders, Helena, Montana. The comment period runs until November 27, 2009. These rules are necessary to implement HB 130, 2009, which provides for state matching fund grants to counties for local crisis intervention, jail diversion, involuntary precommitment, and short-term inpatient treatment costs for individuals with mental illnesses. The department is also proposing the adoption of new rule VI pertaining to state contracts with eligible providers for crisis beds and emergency or court-ordered detention beds for the mentally ill which was the result of HB 131, 2009.

RULE I - Grants to Counties, Goals and Outcomes: Contains the goals and outcomes counties should consider when developing applications for state matching fund grants. Modeled after the preamble from HB 130, this rule includes goals such as the reduction of reliance on the MSH, supporting the treatment of mental illness closer to home, increasing the number of intervention options, etc.

RULE II - Grants to Counties, Participants: A county or group of counties are the only entities that may participate in the state matching funds grants program. The proposed rule allows for designation of an individual to act on behalf of the Board of County Commissioners if desired.

RULE III - Grants to Counties, Determining Grant Amounts: The department will match county and other local entity funds or in-kind contributions using a sliding scale for state grants. The department is proposing the sliding scale be determined by calculating the previous year's

admissions as reported by MSH per 1,000 county residents. The department may grant up to 70% of the local investment to counties below the statewide average admission rate, and may match local investment of cash or in-kind contribution to any county whose MSH admissions are at or above the statewide average admission rate on a sliding scale of 50% to 65% in equal 5% increments. The department's match rate will not be less than 50% of the local investment.

RULE IV - Grants to Counties, Pro Rata Distribution: If the amount requested for matching fund grants exceeds the funding available in legislative appropriation, the department may allocate funding on a pro rata basis according to the estimate of county population adopted in Rule III. This rule is proposed to address overwhelming county interest in the grants. Total funding divided by the total population of all counties submitting proposals equals approximately \$1.50 per person. Grants to each county would be available for up to \$1.50 times the county population.

RULE V - Grants to Counties, Strategic Plan Requirements: Letters of intent to participate in state fund matching grants will be accepted until two weeks after publication of the final adopted version of this rule and grant applications will be accepted until March 1, 2010 for fiscal year 2010. Grants will be awarded no later than 60 days after receipt of a completed grant application and contract for services. A grant application will include at least the following: a strategic plan; a detailed proposal for how the county or counties and other local entities will collaborate; a detailed budget; an agreement to report key data elements to the department; and counties that include tribal lands must demonstrate coordination efforts with tribal representatives both on and off the reservation. Each county must submit an annual report to the department within 30 days of the end of each funding year.

RULE VI - Jail Diversion and Crisis Intervention, Contracts for Psychiatric Treatment Beds: The department may contract with a mental health facility for psychiatric treatment beds. Contracts will be developed in each service area and eligible providers include licensed mental health centers which operate a secured crisis stabilization facility and hospitals, including critical access hospitals. Reimbursement to a mental health facility is for vacant contracted psychiatric treatment beds. A contractor must prioritize placement in contracted beds.

At the time of publication of the rule proposal notice, the department had received letters of intent from 37 counties to participate in the matching fund grant program for SFY 2010. The amount of state funds appropriated in HB 2, 2009, for SFY 2010 is \$1,240,866 and for SFY 2011 is \$1,239,454, including \$1,091,495 to implement HB 130 in SFY 2010. The amount allocated to implementation of HB 131 is \$149,371 for SFY 2010. The department intends to apply the final rules retroactively to August 1, 2009.

TECHNICAL NOTE: The proposed rules were reviewed by committee staff and some issues were noted and a memo sent to DPHHS legal counsel. 53-21-1203(2), MCA, requires the department to develop a sliding scale for state grants based upon the historical county use of the Montana State Hospital with a high-use county receiving a lower percentage of matching funds. The department's rule proposal complies with this statutory requirement as a high use county will

receive a lower percentage of the funds. However, 53-21-1203(2), MCA, requires that the sliding scale be based upon two components:

1. the number of commitments by county compared to total commitments; and
2. upon the population of each county compared to the state population.

In its rule proposal, the department proposes to calculate the sliding scale matching rate by using a single component, the previous year's admissions as reported by the Montana State Hospital per 1,000 county residents. This calculation method is troublesome as some Montana counties (Petroleum, Treasure, and Wibaux for example) do not have 1,000 county residents and therefore a sliding scale built on this premise cannot be truly accurate according to the specifications required by the Legislature. Based on the statutory language of 53-21-1203, MCA, the department should base its sliding scale for matching grant awards to counties on a ratio factor reflecting each counties' population compared to the state population, not a base of 1,000 county residents.

Also, 53-21-1203 (2), MCA, requires the sliding scale to be based on the number of **commitments** to the state hospital, rather than the number of **admissions** which is what the department is using for its sliding scale calculation in Rule III. "Commitments" refers to involuntary commitments while "admissions" encompasses involuntary commitments, voluntary commitments, emergency, and court-ordered detentions. Accordingly, the admissions number the department used for its sliding scale calculation is going to throw off the grant amount which should be awarded to each county. For example, using the correct figure of "commitments" Flathead County had 31 commitments to the state hospital out of a state total of 186 commitments (.166 or 16.6%). The population of Flathead is 86,844 compared to a state population of 967,440 (.089 or 8.9%). So, Flathead County had 16.6% of the total commitments to the state hospital, but only 8.9% of the population making it a high use county which should receive the lower grant amount of 50%, according to 53-21-1203(2), MCA. Because the department used the admissions rate for its sliding scale calculation (a higher number than the commitment rate), it proposed to award Flathead County a 70% match rate, rather than the 50% it should have.

It should also be pointed out that within the language of 53-21-1203 (2), MCA, itself there is a disconnect between the stated desired outcomes for use of the grant amounts (reduce admissions to the state hospital for emergency and court-ordered detentions) versus the basis for awarding the money via sliding scale (commitments by county). Emergency and court-ordered detentions where an individual can only be detained and treated for a short time are different than commitments where an individual can be held for 90 days. The committee may wish to authorize a committee bill to address this incongruity. Of interest: the language regarding sliding scales and commitments didn't appear in HB 130 until it was amended in Senate Finance, in the 4th version of the bill.

Further, proposed Rule IV proposes a pro rata distribution of matching grant funds if the amounts requested via the procedure outlined in Rule III exceed legislative appropriation. This has already happened as letters of interest received from 37 counties indicate an intent to

implement plans that would cost a projected total of \$3,249,894 in SFY 2010. Only \$1,091,495 from HB 2 is available in SFY 2010. In this situation, via Rule IV, the department may allocate funding on a pro rata basis according to the population of the county. Under proposed Rule IV a county or counties receive a grant based on the number of persons in the county and the county is then required to provide either a cash or in-kind match based on hospital usage. This is problematic as such an award scheme is in direct contradiction of the legislature's direction to base matching grant awards on both population and state hospital usage, not one then the other as the department is proposing here.

II.

MAR 2009 Issue No. 20 (October 29, 2009), MAR Notice 37-490, NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT -- the department has filed a NOTICE OF PUBLIC HEARING in the matter of the proposed amendment of two rules pertaining to the Temporary Assistance for Needy Families (TANF). A hearing will be held November 18, 2009 in the DPHHS Auditorium, 111 N. Sanders, Helena, Montana. The comment period runs until November 27, 2009. The proposed amendments to ARM 37.78.102 are necessary to incorporate into the Administrative Rules of Montana the revised versions of the federal TANF policy manual.

TANF 103-2 - Referral to WoRC: Allows WoRC office the option to schedule appointments within three working days of the date the TANF applicant is to begin the work activities, rather than three days from the referral to the WoRC office.

TANF 103-5 - Start Date of Benefits: Allows WoRC office the option to schedule appointments within three working days of the date the TANF applicant is to begin the work activities, rather than three days from the referral to the WoRC office.

TANF 701-3 - Participation Components: Forms needed to establish a medical or mental health condition justifying WoRC accommodation based on classifications of "incapacitated" must be fully completed by a medical professional and delivered directly from that office.

TANF 704-1 - Supportive Services: Updated to set forth the required verification and documentation for requests for supportive services.

TANF 1512-1 - Case Transfer: The revised process set forth in the update is designed to clarify and streamline the case transfer process to increase the likelihood of participants' full compliance with work requirements.

ARM 37.78.420 has been updated to reflect the increase in the TANF payment standards from 33 of the 2007 Federal Poverty Guidelines to 33% of the 2009 Federal Poverty Guidelines. The increase was approved in the 2009 Legislative session under HB 2. The department estimates this change could positively affect a monthly average of 3,302 TANF households. This rule is also being updated to reflect the increase in the TANF eligibility standards from 30% of the 2002 Federal Poverty Guidelines to 30% of the 2009 Federal Poverty Guidelines. This increase was

authorized under HB 645, 2009. The department estimates this change could result in a monthly average of 70 additional households being eligible for TANF cash assistance. The department intends the proposed rule changes to be applied effective January 1, 2010.

TECHNICAL NOTE: The proposed rules were reviewed by committee staff and no technical problems were noted.

III.

MAR 2009 Issue No. 19 (October 15, 2009), MAR Notice 37-489, NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT -- the department has filed a NOTICE OF PUBLIC HEARING in the matter of the proposed amendment of one rule pertaining to basic Medicaid services for able-bodied adults. A hearing was held November 5, 2009 in the DPHHS Auditorium, 111 N. Sanders, Helena, Montana. The comment period runs until November 13, 2009. The amendments are necessary to provide basic Medicaid services to one additional population, referred to as "MHSP waiver." "MHSP waiver" individuals are otherwise uninsured individuals qualified for the state-only Mental Health Services Plan (MHSP) program, who have schizophrenia or bipolar disorder, who are at least 18 years of age, and who are residents of Montana with incomes at or below 150% of FPL. Montana has been operating a basic Medicaid waiver program since 1996. Recently Montana submitted, and CMS anticipates approval of, a basic Medicaid extension amendment that would allow continued coverage for 7,704 able-bodied adults, with incomes at or below 33% of FPL as described in the current basic Medicaid waiver, without change. One additional population, the "MHSP waiver" population, could be covered with the extension (an additional 400 individuals in 2010 and up to 800 additional individuals in 2011 and beyond if Medicaid spending remains neutral). Currently the MHSP includes very limited mental health and mental health pharmacy benefits. Individuals currently receive no physical health benefits through the plan. With the waiver expansion, the "MHSP waiver" population would receive the same basic Medicaid benefits, would be subject to the same restrictions, and would pay the same cost share as currently eligible able-bodied adults. The department expects to use accumulated federal savings from the existing basic Medicaid waiver to provide federal funding for the addition of the "MHSP waiver" expanded population to the basic Medicaid waiver. State funding would come from the state only MHSP Program. Total state and federal costs for a three-year extension, February 2009 through January 2012, for continuing the able-bodied adults population and adding one new expansion population of 400 individuals, is estimated at \$101,006,485. The department intends the proposed rules changes to be effective January 1, 2010.

TECHNICAL NOTE: The proposed rules were reviewed by committee staff and no technical problems were noted.

IV.

MAR 2009 Issue No. 19 (October 15, 2009), MAR Notice 37-488, NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT -- the department has filed a NOTICE OF PUBLIC HEARING in the matter of the proposed amendment of four rules pertaining to the Pharmacy Access Prescription Drug Benefit Program (Big Sky Rx Program). A hearing was held

November 5, 2009 in the DPHHS Auditorium, 111 N. Sanders, Helena, Montana. The comment period runs until November 13, 2009. The department is proposing amendments to the rules pertaining to the Pharmacy Access Prescription Drug Benefit Program (Big Sky Rx Program) to coincide with changes in the federal program Social Security Extra Help and are being updated to match the federal monthly benefit benchmark. In-kind support as counted income shall be removed to coincide with the federal program requirements. The proposed amendments will assist the Big Sky Rx Program in evaluating income level to determine if applicants should apply for the federal program Social Security Extra Help. The monthly maximum benefit will increase from \$33.19 to \$37.55 to match the new federal monthly benefit benchmark. This will help Big Sky Rx enrollees pay their monthly Medicare Part D premiums which in turn allows them more money to pay their other monthly expenses. Currently Big Sky Rx has 328 applications that have listed in-kind as income. The increase in premiums will affect approximately 3,600 Big Sky Rx enrollees who will have premiums fall above the new benchmark. The department intends the proposed amendments to be effective January 1, 2010.

TECHNICAL NOTE: The proposed rules were reviewed by committee staff and no technical problems were noted.

V.

MAR 2009 Issue No. 18 (September 24, 2009), MAR Notice 37-486, NOTICE OF PUBLIC HEARING ON PROPOSED ADOPTION AND AMENDMENT -- the department has filed a NOTICE OF PUBLIC HEARING in the matter of the proposed adoption of three new rules and the amendment of 16 rules pertaining to home and community based services (HCBS) for youth with serious emotional disturbance (SED). A hearing was held October 15, 2009 in the DPHHS Auditorium, 111 N. Sanders, Helena, Montana. The comment period ran until October 22, 2009. The proposed new rules and amendments, pertaining to Medicaid childrens' mental health waiver services authorized under section 1915(c) of the Social Security Act: add Missoula and Ravalli Counties as areas where home and community based services (HCBS) for youth with serious emotional disturbance (SED) are available as of August 1, 2009 (funding comes from a federal grant); increase the maximum age for participation in the program to 18; add family support specialist services, wraparound facilitation, and caregiver peer-to-peer support specialist services to the spectrum of HCBS for youth with SED; increase the spending limit for customized goods and services (from \$200 to \$1,000 annually); and reference fees stated in the national program's waiver policy manual. Since October 1, 2007 the department has operated a program, authorized by CMS, of Medicaid funded HCBS for youth who have SED. The three new services mentioned above, family support specialist services, wraparound facilitation, and caregiver peer-to-peer support specialist services, are recognized services provided to youth and families in other states with the same waiver and would allow for Medicaid coverage not available through the existing set of mental health services funded with Medicaid monies. The department is proposing to amend ARM 37.87.1323 to make a wraparound facilitator responsible for management of an individual's plan of care. This function is currently being performed by the plan manager who is an employee of the department. The department expects no increase or decrease in the cost of benefits for recipients of HCBS waiver services and no overall change in reimbursement levels for providers. There are at least three mental health centers plus numerous mental health

providers in Missoula and Ravalli Counties eligible to provide HCBS mental health waiver services and approximately 35 to 50 youth may be eligible for those services. The department intends the rule amendments to be applied retroactively to August 1, 2009.

TECHNICAL NOTE: The proposed rules were reviewed by committee staff and no technical problems were noted.

Notices of Adopted Rules:

VI.

MAR 2009 Issue No. 21 (November 12, 2009), MAR Notice 37-487, NOTICE OF ADOPTION AND AMENDMENT -- no public hearing was held with regard to the proposed adoption of one rule and proposed amendment of one rule pertaining to Medicaid reimbursement for swing-bed hospital services. No comments or testimony were received. The new rule and amendment implement funding to allow wage increases for swing-bed hospital and direct care and ancillary services workers. HB 645, 2009, provided for an appropriation for a one-time direct care and ancillary services worker wage increase for employees of swing-bed hospitals. The new rule requires that all swing-bed hospitals enrolled as Medicaid providers report to the department actual hourly wage and benefit rates paid for all direct care and ancillary services workers for the period January 1, 2010 through December 31, 2010. The form identifies which workers will receive these funds and if the funds will be distributed in the form of a stipend, a bonus, or a wage increase. The department will use the data to calculate lump sum payments to Medicaid certified swing-bed hospitals based on the total annual number of Medicaid bed days prorated to each participating swing-bed facility. Such payments would be in addition to the reimbursement rate and may be used only for wage and benefit increases or lump sum payments for direct care or ancillary services workers in swing-bed hospitals. There are 45 swing-bed hospitals eligible for Medicaid reimbursement in Montana. The amendments will be effective January 1, 2010.

VII.

MAR 2009 Issue No. 20 (October 20, 2009), MAR Notice 37-484, NOTICE OF AMENDMENT -- a public hearing was held October 2, 2009 with regard to the proposed amendment of 11 rules pertaining to the Montana PharmAssist Program and Medicaid reimbursement rates for some services with rates not set under resource based relative value scale (RBRVS). One comment was received stating that the average base price for inpatient services was calculated incorrectly and should be \$4,209 not \$4,129 as proposed, based on the 2% increase from HB 2, 2009. The amendments remove the requirement that pharmacists annually complete two hours of continuing education to participate in the PharmAssist Program (a program providing free in-depth consultation with licensed and credentialed participating pharmacists, which is open to all Montana citizens, regardless of age or income). The requirement is not needed because a pharmacist must complete 15 hours of continuing education to maintain his/her state license through the state board of pharmacy. The changes to the remaining rules are necessary to change the Medicaid reimbursement rates for some providers who rates are not set based on the RBRVS rate system and to increase provider rates by 2% based on the appropriation in HB 2, 2009. These include services for hearing aids, fees for filling prescriptions, home infusion therapy, eyeglasses, Early and Periodic Screening, Diagnostic and Treatment (EPSDT) for individuals

under 21 nutrition and private duty nursing services, therapeutic youth group home services, transportation and per diem reimbursement, ambulance services, and capital expenses base prices for center for excellence hospitals. The department intends to apply the rule amendments retroactively to July 1, 2009.

VIII.

MAR 2009 Issue No. 20 (October 29, 2009), MAR Notice 37-483, NOTICE OF AMENDMENT -- no public hearing was held with regard to the proposed amendment of one rule pertaining to fee reduction for medical marijuana patients. No comments or testimony were received. The amendment decreases the original application fee for registration as a medical marijuana patient or caregiver from \$50 to \$25 and the renewal fee from \$50 to \$10. The revenue received by the program is no longer cost-neutral due to the continued increase in qualified patients and caregivers. Using the current trend of an average of approximately 200 new applications per month and the likelihood that approximately 3,000 patients would renew, the department determined that by reducing the application fee to \$25 and the renewal fee to \$10 the program would generate revenue sufficient to operate the program while offsetting program costs. The rule amendment will be applied retroactively to October 1, 2009.

IX.

MAR 2009 Issue No. 19 (October 15, 2009), MAR Notice 37-482, NOTICE OF AMENDMENT -- a public hearing was held September 3, 2009 with regard to the proposed amendment of three rules pertaining to Medicaid covered organ and tissue transplantation. No comments or testimony were received. The amendments extend coverage of medically necessary organ and tissue transplantations to include all Medicare covered organ and tissue transplants to all Medicaid recipients. Prior to these amendments, medically necessary transplants were covered services for Medicaid-eligible children through age 20 and were limited to bone marrow, kidney, cornea, and lymphocyte immune globulin for adults. The department also adopted a methodology, based on standards promulgated by the U.S. Dept. of Health and Human Services, for determining whether a transplant procedure or drug is experimental or investigational and therefore not covered by Medicaid. The total projected budget increase for the transplantation services in FY 2010 is \$5,369,536 (state share=\$1,722,101, federal share=\$3,647,526) and for FY 2011 the total increase is projected at \$5,691,708 (state share=\$1,837,853, federal share=\$3,853,855).

X.

MAR 2009 Issue No. 18 (September 24, 2009), MAR Notice 37-479, NOTICE OF AMENDMENT -- a public hearing was held August 19, 2009 with regard to the proposed amendment of five rules pertaining to the Montana Telecommunications Access Program (MTAP). No comments or testimony were received. The Montana Telecommunications Access Program (MTAP) provides specialized telecommunications equipment to low income persons who need such equipment to communicate effectively using a telecommunications system. These rule changes are the result of legislation enacted in 2007 making changes to MTAP's governing statute, 53-19-311, MCA. The most significant change is the amendment of 53-19-311, MCA, to provide that ten cents per month must be assessed by the service provider (rather than the local

exchange company) against each end user connection (rather than against each telephone access line). Further changes to 53-19-311, MCA, clarify that the assessment applies to prepaid wireless services as well as to wireless services that are billed monthly. These rule proposals reflect the statutory changes to 53-19-311, MCA.

XI.

MAR 2009 Issue No. 18 (September 24, 2009), MAR Notice 37-478, NOTICE OF AMENDMENT -- a public hearing was held July 16, 2009 with regard to the proposed amendment of one new rule pertaining to grandparents and relative caretakers access to birth records. Two written comments in support were received. The amendments to ARM 37.8.126 allow relative caretakers, including grandparents, to have access to the birth certificate of that child provided certain identification requirements are met. Currently, relative caregivers can consent to a child's medical treatment under 40-6-501 and 502, MCA, and enrollment in school pursuant to 20-50-503, MCA, without having legal custody or the parents' permission. The caregivers may need copies of the child's birth certificate to further assist in getting medical treatment, education, public assistance, immigration, and for other matters during the time they care for the child.

XII.

MAR 2009 Issue No. 19 (October 15, 2009), MAR Notice 37-473, NOTICE OF ADOPTION -- a public hearing was held June 19, 2009 with regard to the proposed adoption of 27 new rules pertaining to behavioral health inpatient facilities (BHIFs). Ten comments were received. These rules set forth the minimum licensing standards for behavioral health inpatient facilities (BHIFs) as required by SB 45, L. 2007. Section 53-21-194, MCA, enables the department to license BHIFs to provide inpatient psychiatric care to persons involuntarily committed or detained under Title 53, MCA, or to persons seeking treatment voluntarily. A BHIF can provide treatment for up to 16 persons, over 18 years old, and will be licensed as a health care facility. BHIFs do not require EMTALA compliance, but if a BHIF resides in a hospital EMTALA would apply due to the nature of hospital regulations. In addition to being required by statute, the rules inform potential providers and recipients of BHIF services of the expectations necessary for licensure and address for patients various aspects of their treatment program and setting in which treatment will be received. The rules address basic BHIF requirements for the application process, staffing requirements, policies and procedures, records, security, physical setting, and environmental considerations. The rules also address specific requirements more directly relating to the patient including assessments, treatment planning, restraints and seclusion, patient rights, quality assessment, discharge, and transfer to the state hospital. Based on comments received, the department is requiring that a BHIF provide directly or contract for ancillary services such as laboratory or radiological services, and that there be coordinated transfer protocols of a patient being moved to another facility.

XIII.

MAR 2009 Issue No. 18 (September 24, 2009), MAR Notice 37-472, NOTICE OF ADOPTION, AMENDMENT AND REPEAL -- a public hearing was held June 17, 2009 with regard to the proposed adoption of one new rule, the amendment of 15 rules, and the repeal of two rules

pertaining to home infusion therapy (HIT). Two comments were received. The changes reflect evolving changes in the home infusion therapy industry. Home infusion therapy services means the preparation, administration, or furnishing of parenteral (drugs injected through the skin) medications, or parenteral or enteral (drug administered by way of the intestine) nutritional services to an individual in the individual's residence. The agency must enter into a written contract with each party receiving services and the rule changes clarify that process. Amendments to ARM 37.106.2405 state the requirements for all home infusion therapy agency personnel. Other amendments enable the incorporation of policies and procedures for pharmacy and nursing, in addition to other services the agency may provide. In addition, amendments to ARM 37.106.2415 provide that those administering medication within a home infusion therapy agency be licensed in Montana and ARM 37.106.2416 is amended to require participating pharmacies to hold a Montana pharmacy license.

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