



Children, Families, Health, and Human Services Interim Committee

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65th Montana Legislature

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May __, 2018

Director Sheila Hogan
Department of Public Health and Human Services
111 North Sanders, Suite 301
Helena, MT 59601

draft

Dear Director Hogan:

Pursuant to the Children, Families, Health, and Human Services Interim Committee's (Committee) statutory authority as the appropriate administrative rule review committee under 5-5-225, MCA, and the provisions of Title 2, chapter 4, parts 3 and 4, this letter constitutes notice to the Department of Public Health and Human Services (DPHHS) that a majority of the members of the Committee objects under 2-4-406, MCA, to the rulemaking adopted by MAR Notice No. 37-820, which relates to the Montana Medical Marijuana Program (Program).

Under 2-4-406, MCA, an administrative rule review committee may object to a proposed or adopted rule if the committee considers the rule to not have been proposed or adopted in substantial compliance with 2-4-302, 2-4-303, and 2-4-305, MCA. The Committee objects to MAR Notice No. 37-820 for the following reasons:

(1) *The canopy allowed for providers and marijuana-infused products providers is not within the standards prescribed by 50-46-301 and 50-46-344, MCA, as required under 2-4-305(5), MCA.* A rule is invalid unless it is "within the scope of authority conferred and in accordance with standards prescribed by other provisions of law". §2-4-305(5), MCA. ARM 37.107.118(6) allows licensees to have 50 square feet of canopy space per registered cardholder served. This allowance is contrary to the Program's purpose to allow for the limited cultivation of marijuana, §50-46-301, MCA, and is contrary to the guidelines set forth in 50-46-344, MCA, which require DPHHS to establish a canopy that will take into consideration safety and security issues and that will undercut illegal market prices.

The Committee received testimony that the canopy size provides for more than is allowed in recreational states, produces more marijuana than is needed by registered cardholders, and encourages diversion to the black market.

(2) *The adoption notice did not include an adequate statement of reasons for overruling the various considerations that were urged against the adoption of the rules, as required under 2-4-305(1)(b)(i), MCA. Section 2-4-305(1)(b)(i) requires:*

(b)(i) [upon] adoption of a rule, an agency shall issue a concise statement of the principal reasons for and against its adoption, incorporating in the statement the reasons for overruling the considerations urged against its adoption. If substantial differences exist between the rule as proposed and as adopted and the differences have not been described or set forth in the adopted rule as that rule is published in the register, the differences must be described in the statement of reasons for and against agency action.

There are several instances in the adoption notice, published February 9, 2018, in which DPHHS has provided almost no detail regarding the content of the comments received and has dismissed the comments or responded without adequately setting forth the reasons for overruling the considerations urged by the public. One example is Comment #2:

COMMENT #2: The department received many comments concerning requirements for cardholder, provider, and testing laboratory applicant's proof of Montana residency.

RESPONSE #2: The department does not agree.

Here, DPHHS provided no reasons for overruling any of the comments received.

Another example is Comment #3:

*COMMENT #3: The department received many comments about licensee requirements including use of cannabis on a registered premises by cardholder, allowing minors on registered premises, requiring a badge and dress code, health and safety, signage, reporting registered premises changes, reporting operations plans, visitors logs, and **canopy limits**.*

*RESPONSE #3: The department agrees with the comments regarding use of cannabis on a registered premises by cardholders, minors on registered premises, and requiring a badge and dress code. The department has revised New Rule V to allow for cannabis use on registered premises by active cardholders. The department has also revised New Rule V to allow minors on registered premises when accompanied by an adult. The department further recognizes that many providers work from their residence and has removed the prohibition of on-site consumption of intoxicants. Badge and dress code comments are addressed in response #1. **The department does not agree with the comments regarding safety requirements, excess signage, reporting registered premises changes, reporting***

operations plans, visitors logs, and canopy limits. These rules ensure the health and safety of providers, employees, cardholders, and visitors and allows the department to effectively regulate the program. (Emphasis added.)

In this example, DPHHS dismissed concerns regarding the canopy, summarily concluding the rules ensure health and safety and allow for effective regulation despite comments indicating otherwise. Section 2-4-305(1)(b)(i), MCA, requires more: reasons must be set forth for overruling considerations urged by the public.

Comment #13 is also problematic:

COMMENT #13: The department received comments about transitional time frames.

RESPONSE #13: The department agrees that requiring cardholders and providers to be in compliance on April 30, 2018 may cause problems. The department will now require cardholders and providers to license at their annual registration renewal or by December 31, 2018, whichever is sooner.

Here, DPHHS fails to explain its principal reasons for delaying implementation of provider licensure for up to 8 more months and for staggering licensure. Because staggered and delayed implementation was not a topic included in the original proposal notice, the only rationale provided by DPHHS for this new requirement is that April 30, 2018, may cause problems. Given that the provider licensure requirement has been in effect since November of 2016 when I-182 passed, the Committee questions how further delaying licensure or treating licensees disparately is reasonably necessary to implement the Program.

Please note that DPHHS is required to respond in writing to the Committee's objection within 14 days of the mailing of this objection. §2-4-406, MCA. If the Committee does not withdraw or modify its objection after receiving the response, the Committee may vote to send the objection to the Secretary of State for publication, and, if DPHHS elects, the response may also be published. The Committee is responsible for the costs of publication. §2-4-406(3), MCA. Publication of the objection has the following effect:

(4) If an objection to all or a portion of a rule has been published pursuant to subsection (3), the agency bears the burden, in any action challenging the legality of the rule or portion of a rule objected to by the committee, of proving that the rule or portion of the rule objected to was adopted in substantial compliance with 2-4-302, 2-4-303, and 2-4-305. If a rule is invalidated by court judgment because the agency failed to meet its burden of proof imposed by this subsection and the court finds that the rule was adopted in arbitrary and capricious disregard for the purposes of the authorizing statute, the court may award costs

and reasonable attorney fees against the agency. §2-4-406(4), MCA.

Thank you for your consideration of this matter.

Sincerely,

Mary Caferro

Presiding Officer, Children, Families, Health, and Human Services Interim Committee

cc: Flint Murfitt, Rule Reviewer, DPHHS Office of Legal Affairs
Sue O'Connell, Research Analyst
Children, Families, Health, and Human Services Interim Committee

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