

BEFORE THE DEPARTMENT OF PUBLIC
HEALTH AND HUMAN SERVICES
OF THE STATE OF MONTANA

In the matter of the amendment of) NOTICE OF AMENDMENT
ARM 37.51.306 pertaining to foster)
care immunization requirements)

TO: All Concerned Persons

1. On August 5, 2022, the Department of Public Health and Human Services published MAR Notice No. 37-1005 pertaining to the public hearing on the proposed amendment of the above-stated rule at page 1531 of the 2022 Montana Administrative Register, Issue Number 15.

2. The department has amended the above-stated rule as proposed.

3. The department has thoroughly considered the comments and testimony received. A summary of the comments received and the department's responses are as follows:

COMMENT #1: Several commenters offered support for the proposed changes, stating the rule changes would increase the number of potential foster parents, specifically those from faith communities.

RESPONSE #1: The department acknowledges that the proposed changes may provide opportunities to increase the number of available resource families who are connected to faith communities. The department appreciates the support.

COMMENT #2: Several commenters expressed general support for the amendments as they will reduce barriers for people wanting to be licensed as foster parents, and make it easier for otherwise qualified Montanans to be licensed as foster care parents.

RESPONSE #2: The department appreciates the support.

COMMENT #3: Two commenters suggested that currently licensed foster families should be able to use a religious exemption; the language seems to limit utilization by currently licensed foster parents who evolve in their religious beliefs and become opposed to vaccinations after licensing.

RESPONSE #3: The department appreciates the opportunity to clarify that the proposed changes would apply during initial licensure and any subsequent re-licensure.

COMMENT #4: Two commenters indicated that they are unable to be considered as possible adoptive parents because of the current vaccination rules.

RESPONSE #4: The department clarifies that the current and proposed vaccination rules apply only to foster care licensing and are not a requirement for families seeking to be approved only for adoptive placements. Eligibility regulations regarding state child adoption services may be found in ARM 37.52.101 through 37.52.125.

COMMENT #5: One commenter expressed concern that foster parents would be allowed to make immunization decisions for children placed in their care under these proposed changes.

RESPONSE #5: The department clarifies that the proposed changes allow foster parents to claim a religious exemption for their own children. Birth parents and the department will continue to make health care decisions, as appropriate, for children in foster care. Foster parents are required to respect the religious beliefs or practices of the foster children placed in their home. (See ARM 37.51.806.)

COMMENT #6: Several commenters stated that the proposed changes should not occur because foster children are often under-vaccinated, have other medical issues, and are at greater risk of contracting life-threatening diseases.

RESPONSE #6: The department appreciates these comments. The department seeks to ensure that foster care vaccination requirements (and foster care religious exemptions) are consistent with Montana's newly enacted Religious Freedom Restoration Act (MT RFRA). MT RFRA provides that State action may not substantially burden a person's right to the exercise of religion unless the action is essential to further a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest. Under case law interpreting the federal RFRA – which would likely be applied in interpreting MT RFRA – only those governmental interests of the highest order can outweigh free exercise claims, and such interests must be evaluated not in broad generalities, but as applied to the particular person who would claim an exemption.

The rules regarding the physical care of children in foster care require these children's medical needs to be met. Each child must receive a medical screening within 30 days of placement in foster care and, if medically necessary and in accordance with the child's or birth parent's religious practice, receive necessary vaccinations. (See ARM 37.51.806 and 37.51.825.) Foster parents are also required to keep the placing agency apprised of any illnesses for which a foster child required medical attention, and the results of any examinations, tests, and treatment recommendations. (See ARM 37.51.825(6)).

The department believes that the proposed rule changes, coupled with existing regulations, appropriately balance the requirements of the MT RFRA and the department's obligation to protect the wellbeing of children in foster care. The illness reporting regulation helps ensure the department is monitoring and responsive to the medical needs of children receiving foster care.

COMMENT #7: One commenter stated that rules should not change because the current immunization requirements do not pose an undue burden on foster care families as required by the Religious Freedom Restoration Act.

RESPONSE #7: The department relies on its above response to Comment #6.

COMMENT #8: Two commenters indicated that the state was not in compliance with the National Model Foster Family Licensing Standards and could potentially lose funding with this change.

RESPONSE #8: The department is aware of the Model Licensing Standards. The standards are not a requirement for states but a suggested standard to be considered. The department has previously notified the Children's Bureau that they were not in compliance with other items in the Model Standards; the notification did not result in a loss of funding. The department anticipates the same as the result of these rule changes. The department further notes that any federal requirements are subject to the federal Religious Freedom Restoration Act of 1983. 45 U.S.C. 2000bb *et seq.*

COMMENT #9: One commenter indicated that individuals who generally oppose vaccination will use religious exemptions as there is no department review of the veracity of claimed religious tenets.

RESPONSE #9: The department will require a notarized affidavit from any individual requesting a religious exemption, attesting that receipt of a vaccine or vaccines is contrary to an individual's religious belief, observance, or practice. Making false statements in the licensing process can result in negative licensing action, including denial of licensure. Additionally, under Montana law, it is a misdemeanor to falsely attest pursuant to 45-7-202, MCA, and is punishable by a fine not to exceed \$500, imprisoned in the county jail for a term not to exceed six months, or both.

/s/ HEIDI SANDERS

Heidi Sanders
Rule Reviewer

/s/ CHARLES T. BRERETON

Charles T. Brereton, Director
Department of Public Health and Human
Services

Certified to the Secretary of State September 13, 2022.